LEGAL SERVICES BOARD

# Enhancing consumer protection, reducing regulatory restrictions

## A discussion document about how the LSB will assess the boundaries of legal services regulation and connected regulatory decisions

Views on our approach are welcomed by Friday 4 November 2011

## This discussion paper may be of particular interest to:

Approved legal regulators

Regulators of non-reserved legal services and associated services

Providers of legal services (including in-house lawyers)

Providers of non-reserved legal services and associated services

Legal representative bodies

Organisations that provide will-writing, probate or estate administration services and bodies representing such providers

Foreign bar associations

Other professional and trade Bodies

Legal advisory organisations

Third sector organisations (representing the interests of consumers or providers of legal services)

Other consumer groups

Law schools/universities

Legal and regulatory academics

Members of the legal professions

Accountancy Bodies

Potential new entrants to the ABS market

Think tanks

Government departments

NDPB's

Members of Parliament

Political parties

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## Foreword by the Chairman

The Legal Services Act 2007 determines that the Legal Services Board makes recommendations about, and in some cases decides upon, the reach and nature of regulation in legal services. The issues of competition, redress and independence have occupied the Board's first three years of operation and we are now turning to this wholly new role for a statutory body and one that demands proper debate.

Historically, the scope of regulation was a matter for Parliament. It operated as an on/off switch: for example, should a particular legal service be reserved to solicitors and barristers? Arguably, the debate has now shifted to the negative impacts on innovation and competition that come from such a restrictive approach. Parliament has built alternative "one-off" regulatory approaches for conveyancing, immigration and claims management. With the Legal Services Act in force and embedded, it is possible to move beyond this patchwork quilt to develop a more rational, strategic approach.

The key point is that this does not imply more regulation. The LSB is governed by the regulatory objectives in the Legal Services Act which provide the reference point for deciding upon the scope and nature of regulation in legal services. These regulatory objectives, (see the LSB's ***'The Regulatory Objectives'*** published in July 2010)**,** need to be applied directly to each individual regulatory issue. We must apply best regulatory practice as set out in the better regulation principles. For example, we are considering the arguments to regulate all will writing services by looking at competition and access to justice, the consumer and public interest, and the strength and diversity of the legal profession.

The legal services market is increasingly dynamic. The reach and nature of regulation must be flexible in order to respond to emerging risks and new issues. Any review must consider case by case the types of regulatory interventions most appropriate to the specific risks. But we must also have a strategic approach that underpins each particular decision and collectively delivers the regulatory objectives. To develop that strategic approach is the purpose of this discussion document.

The following three themes are at the core of our vision for the legal services market.

- **Consumer protection and redress should be appropriate for the particular market.** That might be through a mixture of before the event authorisation requirements and after the event redress, depending upon the nature of the detriment. This could combine education and quality assurance entry hurdles; insurance and compensation requirements and ombudsman schemes.

- **Regulatory obligations should be at the minimum level to deliver regulatory objectives.** There is no simple hierarchy of regulatory restrictions but we favour reliance upon general consumer and competition law wherever possible; with restriction to particular and narrowly defined categories of individuals only deployed where it is absolutely required to ensure the regulatory objectives are secured. There is a wide menu of regulatory interventions between these two extremes.

- **Regulation should live up to the better regulation principles in practice.** Setting out the scope and nature of regulation must be linked to developing regulatory standards and performance among approved regulators.

We expect the overall direction to be one of liberalisation. That is already happening with regard to ownership, external investment and control. That liberalisation needs to be underpinned by the right consumer protections and oversight. The Legal Ombudsman and the shift to risk based or outcomes focused regulation provide examples. Whichever direction we take in any circumstance, the objective is simple: the legal services market must work for the consumer and the public, for it is they to whom we all, regulators and professionals alike, are accountable.

**David Edmonds**

## Executive Summary

1. This discussion paper sets out the how the Legal Services Board ("the LSB") will approach assessing the boundaries of legal services regulation and connected regulatory decisions in line with our obligations under the Legal Services Act 2007 ("the Act").

### The starting point

2. The Act carried across the structure and the scope of the reserved activities that preceded it. There are two main types of legal service regulation. Some lawyers are regulated in respect of all their legal work by virtue of their professional membership and accompanying title – the best known of which are solicitors and barristers. Others are authorised by a legal services regulator to undertake one or more of the six specific "reserved legal activities" [1], which brings them within the scope of legal services regulation.

3. One consequence of this is that there is no specific legal services regulation of people who neither have a protected title nor offer any of the reserved activities. Will-writing is perhaps the best known of the services frequently undertaken by unregulated providers, but there are many others including many forms of general legal advice. In such cases, consumer protection arises only from general consumer law and voluntary schemes of regulation, rather than any other statutory requirements: importantly, consumers have no automatic right of redress from the Legal Ombudsman[2].

4. The LSB considers that the current pattern of reserved and unreserved work is unsatisfactory. There are a number of reasons for this.

5. First, it is clear from research undertaken by Professor Stephen Mayson and Olivia Marley of the College of Law[3], that there is no clear rationale for what activities are reserved and what lies outside of reservation. We have simply inherited a hotch-potch of individual historical decisions which have never been tested against either the needs of consumers in the current marketplace, or any form of broader public interest test or legal principle.

6. Second, reservation as currently understood is a very blunt instrument. It does add some consumer protection over and above that available through general law. However, it does so only through the establishment of professional monopolies, the existence of which might well have greater disbenefit through negative effects on access to justice, competition and other aspects of the

[1] Exercise of rights of audience; conduct of litigation; reserved instrument activities; probate activities; notarial activities and the administration of oaths.
[2] The Legal Ombudsman is the single organisation for all consumer legal complaints not resolved by an authorised provider at the first-tier and has been established by the Office for Legal Complaints (OLC) under the Legal Services Act 2007.
[3] See Legal Services Institute, The Regulation of Legal Services: Reserved Legal Activities: History and Rationale, August 2010 and The Regulation of Legal Services: What is the case for reservation, Interim Discussion Paper, February 2011 (updated and reissued July 2011)

regulatory objectives[4] set out in the Act. The economic research prepared for the LSB by the Regulatory Policy Institute and published in March 2011 explored the risks in some detail[5]. There are also many benefits of a strong professional ethos in driving standards which we want to encourage while ensuring that regulation operates properly in the wider public interest.

7. Third, the current sharpness of the boundary between reserved and unreserved activities has the effect of leaving some consumers unprotected, particularly when it comes to easy accessibility of redress. Perhaps even more importantly, there is the potential for some of those consumers to make purchases in the mistaken belief that such redress would be available. Although such confusion has always been possible within the legal services market, the Legal Ombudsman has rightly highlighted this as an issue likely to grow in importance as the market becomes more diverse.

## The effect of the Act

8. It might be argued that an issue of this complexity needs to be resolved by Parliament undertaking a root and branch overhaul of the current system. The LSB does see merit in that approach and will begin some exploratory work and discussions to better understand what a revised statutory framework would ideally look like in the longer-term. However, the LSB also recognises that the Act gives it both specific responsibilities and opportunities to improve the present framework, which would potentially enable some significant progress to be made.

9. Section 24 of the Act gives the LSB the duty to consider whether new legal activities should become reserved and section 26 gives an analogous duty to remove reservation where it is found to be unnecessary. The detailed process for both is specified in Schedule 6 to the Act. This document is designed to set out our proposed approach for assessing whether changes are needed to the scope of regulation, it also indicates our immediate action plan to take the work forward and sets out our overall approach to regulatory decision making.

[4] LSA 2007, Part 1, Regulatory Objectives:
- protecting and promoting the public interest
- supporting the constitutional principle of the rule of law
- improving access to justice
- protecting and promoting the interests of consumers
- promoting competition in the provision of services
- encouraging an independent, strong, diverse and effective legal profession
- increasing public understanding of the citizen's legal rights and duties
- promoting and maintaining adherence to the professional principles.

[5] Dr Christopher Decker and Professor George Yarrow, Regulatory Policy institute “Understanding the economic rationale for legal services regulation”, March 2011

## A clear vision

10. Against the legal and policy background presented above, the LSB intends to set a clear vision for its approach to regulation:

    - Consumer protection and redress should be appropriate for the particular market
    - Regulatory obligations should be at the minimum level to deliver regulatory objectives
    - Regulation should live up to the better regulation principles in practice

11. The discussion document sets out both our short-term priorities and medium-term approach to secure this.

## The review process

12. Our starting point will be to seek to ensure that regulation delivers the public interest and that the interests of consumers are placed at the heart of the system.

13. We want to ensure that consumers are better and more consistently protected, especially through access to redress. Delivering this consumer protection must be balanced against the desire to avoid reservation becoming a means of removing normal competitive pressures. Any obligations introduced will be tightly focused and strictly proportionate to the risks involved. The test for extending regulation will be high. There must be a compelling case underpinned by appropriate evidence – this is a core governing principle for any review of regulation.

14. The public interest is not easily defined: it often means different things to different people. We believe that all the regulatory objectives together define the public interest. In practice regulating in the public interest means finding the right balance between the objectives in a given circumstance and aligning the objectives with the better regulation principles. The public interest will not be static and will need to be assessed for each regulatory decision. The public interest will always be based upon "deserved public confidence in the legal system"[6]. Legal services are part of a broader social-political-moral landscape that underpins the fabric of our society built on the rule of law. The importance of public confidence in the provision of legal services and the effective administration of justice holds greater significance than might be attributed to other professional services.

15. In line with the processes set out in Schedule 6 to the Act and taking into account the Government's principles of regulation and guide to reviewing

[6] LSB, The Regulatory Objectives, July 2010
http://www.legalservicesboard.org.uk/news_publications/publications/pdf/regulatory_objectives.pdf

regulation[7], we will approach reviewing the scope of regulation in individual areas in the following way:

- Identification of the area of legal services for review: This may emerge from a request by the Lord Chancellor, the Office of Fair Trading ("the OFT"), the Legal Services Consumer Panel ("the Panel") or the Lord Chief Justice, bodies explicitly given this right by Schedule 6, or any other body. It may also emerge from our own assessment of risk in the market or significant public interest concerns derived from research, analysis and a wide ranging intelligence base. This may include approved regulators, the Office for Legal Complaints ("the OLC"), bodies responsible for different aspects of the administration of justice, practitioners or any other party.

- Identification of issues: From a review of the initial evidence base, we will begin to identify the actual problems that are causing concern, the possible causes and the potential detriments. We will begin to define the specific activities which may need regulation. We will begin to identify the areas of the regulatory objectives which may be materially threatened by the absence of explicit regulation. We will consider the sophistication of customers within the area covered to assess the extent to which they need additional protection or have the ability to effectively assess their own interests. Consideration will be given to the public interest and whether this is wider in its implications than the consumer interest alone in relation to the specific issue. Competition and access to justice concerns are also likely to be prevalent.

- Compilation and analysis of further evidence: Where the initial analysis indicates the need to continue the investigation we will build a more complete evidence base and assess the prevalence and impact of any consumer detriment or public interest concern in practice. This may involve undertaking empirical assessment, a call for evidence and wide ranging consultation. The importance of appropriate and targeted consultation is particularly important in the context of difficult to define public interest concerns, about which we will seek views. It is also relevant to reaching vulnerable groups, whose needs may be different to other parts of society.

- Analysing existing mechanisms and non-statutory interventions: We will assess the extent to which the existing broader legal framework (e.g. consumer law) and infrastructure (e.g. small claims machinery) does or could address the apparent detriment. Analysis of the effectiveness or potential effectiveness of non-statutory safeguards such as voluntary schemes operated by trade bodies and increased consumer education will also be considered where relevant.

[7] http://www.bis.gov.uk/policies/better-regulation

- Option appraisal: In the absence of effective alternatives to statutory regulation, we will consider what forms of regulatory arrangements might be triggered if the activity was reserved to address the issue in the most proportionate way. Cost-benefit analysis techniques and considerations of practicability will underpin this assessment.[8]

- Identifying impacts: We will identify and assess the impact of proposals to introduce changes to what is regulated and how it is regulated on the broader regulatory framework (e.g. concerning professional privilege and the responsibilities of existing approved regulators) in the legal services sector and beyond. We will consider likely impacts on the courts and the wider administration of justice. We will seek the views of practitioners. We will need to be alive to any unintended consequences for the overall quality of services provided to the consumer, the simplicity of the regulatory environment to aid consumer understanding, the culture and norms of the professions as well as confidence in regulated services for consumes (including for "UK plc" as a whole).

- Recommend reservation: We will publish and invite comment on a provisional report setting out where we are minded to make a recommendation to the Lord Chancellor that the list of reserved activities is extended (or reduced) under the Act if this is the most proportionate response. We will also set out our high level analysis of what regulatory arrangements should flow from that decision. Dependent on any changes in our analysis as a result of feedback received, we will then make the appropriate recommendation.

- Optimum standards: Where reservation is recommended we will consider issuing guidance under Section 162 of the Act on the high level regulatory arrangements that are most likely to proportionally address the problems and protect against the detriments that have been identified.

- Application from potential approved regulators: Where there is reservation, we will receive applications from bodies wishing to be designated to regulate the new reserved activity. This will include applications from existing approved regulators whose members currently provide the legal activity that is being reserved.

16. This approach will ensure that final recommendations are evidence-based and that opportunities are provided for the full range of interested parties to have their say. The analysis will give full weight to the regulatory objectives, the professional principles and the better regulation principles. The approach, applies the Treasury's Green Book cost –benefit techniques to the regulation

[8] We will undertake the best assessment of costs and benefits given the level of evidence that is available in the particular circumstance. This will vary between markets and the types of issues under consideration. Given the broad nature of the regulatory objectives, costs and benefits in the context of legal services extend beyond hard financial considerations.

of legal services. The process will ensure that in future it will be clear to all stakeholders how a particular decision was made and conclusions arrived at. So, while each assessment will be on individual merits, it will be done within a consistent and transferable framework.

## The potential remedies

17. The Act provides a set of tools that allow for the operation of reservation to be rebalanced for the modern world. Reservation has for too long operated by excluding work from people other than members of the legal profession. The Act makes clear that this narrow interpretation is not justified. The Act allows for greater consistency in regulation. In the Act, reservation means that the activity can only be carried out by a person, subject to appropriate regulatory arrangements and authorised by an approved regulator to do so. It does not follow as a matter of course that authorisation has to attach to only named individuals – it also attaches to entities. Nor does it follow that reservation can only be applicable to lawyers. In fact the Act talks only of "authorised persons".

18. The LSB does not view a decision that an activity should be brought within the scope of reservation as necessarily triggering the full range of regulatory requirements imposed on the current reserved activities or those individuals who are currently regulated in all the legal work that they do by virtue of their professional membership. The precise obligations triggered will depend on the nature of the risks presented.

**19. The reservation of an activity may therefore result in a different mix of approved regulators, authorised persons and regulatory arrangements than we have now.**

20. The LSB considers it probable that any decision to reserve will require each approved regulator designated to regulate the activity to have regulatory arrangements that as a minimum ensure[9]:

- Consumers have proper access to redress at the first tier and to the Legal Ombudsman
- Any entity offering the reserved activity is compelled to adhere to the relevant professional principles relating to that activity
- Any entity offering the reserved activity has the right level of systems and controls (for example in relation to client money and indemnification where this is appropriate) to ensure that the work is properly handled and consumers are appropriately protected

[9] Each applicant will have to demonstrate that their proposed arrangements make appropriate provisions with regards each component of regulatory arrangements specified at Section 21 of the Act but this does not mean that all components must be adopted in full.

21. Other potential remedies are discussed at paragraphs 113 to137 and would be used where necessary. Through its rules[10], the LSB has articulated a set of tests in relation to designating new approved regulators and approving regulatory arrangements under the terms of Schedule 4 to the Act and considers that these remain relevant in the context of any new reserved activity. This provides that we only approve new regulatory arrangements or changes to existing regulatory arrangements that are compatible with the regulatory objectives and also the widely accepted better regulation principles of being transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed. The starting point is that arrangements must be demonstrably targeted at the problems and risks that have been identified in relation to that particular activity and propose the least restrictive way of addressing them.

22. In determining appropriate arrangements there will be considerable crossover with wider work to review and modernise regulatory arrangements and standards. For example, the three largest regulators – the Solicitors Regulation Authority (the "SRA"), the Bar Standards Board (the "BSB") and ILEX Professional Standards are currently undertaking a review of education and training. This aims to look afresh at the skills and knowledge required of modern legal practitioners and how best on-going competence can be achieved.

23. The reservation of any activity does not automatically mean that the LSB will recommend to the Lord Chancellor that any of the existing approved regulators or trade bodies whose members are working in that area should be designated as an approved regulator for that activity.

24. The consequences of a decision to reserve could therefore include an expansion or reduction in the role or remit of existing approved regulators, which may need to impose new obligations on their existing membership or broaden the range of activities they regulate. In extremis, the LSB has power to act as "regulator of last resort".[11]

## A future programme

25. The LSB is seeking views on areas which might be reviewed in the period 2012-15 to inform our strategic planning. We have already committed to action in some areas within our existing business plan such as reviewing the transitional protections for special bodies and reviewing the regulation of the conveyancing and immigration markets. Other areas listed below represent initial thinking and are only set out to encourage discussion about possible priorities for regulatory investigation and frame our proposed approach. Our planning is not just around reviewing whether and where reservation is needed but wider regulatory decisions about the type of regulation needed in different circumstances. The issues and tests are systemic and the

[10] Rules for applications for Approved Regulator and Qualifying Regulator designation, Rules for Rule Change Applications and Rules for applications to be designated as a Licensing Authority
[11] See sections 62 and 73 of the Act

methodology provides as solid a basis for decisions about changing or reducing existing regulation as it does for decisions about introducing regulation in new areas.

26. The LSB's current thinking is that the following areas may be worthy of at least preliminary study:

### *Services delivered typically by special bodies and trade unions*

27. Parliament considered that special bodies (not for profit advice providers, community interest companies and trade unions) warranted special treatment under the Act. A mixture of special provisions and transitional measures give them some protection from the requirements of the Act, especially as regards the Alternative Business Structures ("ABS") regime. This means that they are able to carry out reserved activities without a licence. However, the Act left open the issue for the LSB to review in the medium-term. In particular the LSB must decide when to switch off transitional elements of the Act.

28. We will look at the types of services typically delivered by special bodies and, through that, explore the nature of regulation that is required to protect consumers and promote the regulatory objectives, in line with better regulation principles. That approach will lead on to the narrower questions of transitional sections of the Act and will also consider wider arguments about public policy towards not for profit organisations and trade unions.

### *Residential conveyancing*

29. As the recession has impacted heavily upon the property market, there has been substantial discussion about effective regulation. Lenders, in the shape of banks and building societies, insurance companies that provide professional indemnity insurance and the professional bodies have traded anecdote and accusation about unfair practices and poor quality decisions. It is difficult to find the evidence that shows either clear consumer detriment or a threat to the regulatory objectives but it is important that confidence is restored and consumers, as the quietest voices, are not drowned out by more powerful interests.

30. Currently only reserved instrument activity is a reserved legal activity under the Act, which is narrower in scope than conveyancing as a whole. However, conveyancing is more loosely defined as an activity in the Administration of Justice Act with reference to the authorisation of Licensed Conveyancers. This raises questions of consistency. The LSB has started to gather evidence of the issues in parallel with this discussion document so that it can better understand if this area should be prioritised for a deeper investigation to see whether change is needed in either the regulatory scope or the way regulation is applied in this area. We have commenced initial fact-finding with the approved regulators most directly concerned and will be broadening that activity to include other stakeholders shortly.

### *General legal advice*

31. This is perhaps the most difficult area to consider. At present, no specific legal services consumer protection requirements exist in relation to legal advice, over and above those which derive from the general responsibilities of individuals regulated in all that they do by virtue of their professional membership. However, advice is increasingly being given directly by specialists without formal legal qualifications – human resources specialists on employment law, accountants in relation to tax, and welfare advisers in relation to benefit entitlement. It is difficult to construct even a retrospective case for why consumers of certain legal services should only get access to an Ombudsman scheme, among other regulatory protections, if they chose a provider covered by statutory legal services regulation. There is therefore a case for considering widely what consumer protection exists for legal services consumers outside of statutory regulation and the extent to which it is adequate.

### *Corporate law (including banking and finance)*

32. We are often told that lawyer clients (e.g. the general counsels of corporate clients) and corporate law firms around the world value regulation. Robust and credible regulation may contribute to confidence and thereby to the commercial strength of this part of the sector (and so to the regulatory objective on a strong profession). However, disproportionate or misapplied regulation may prove positively harmful, in both commercial and policy terms.

33. When considering the economic case for regulation, we are struck by the greater symmetry of information and power between the client and the legal services provider in these transactions than in many other legal transactions. There is evidence of sophisticated decision making by purchasers and of competitive forces at work. There is therefore a question about the relative balance of regulatory focus. Is the current balance of regulation right or are there areas where deregulation may be appropriate?

### *Immigration – a special case*

34. The LSB has taken on responsibility from the Immigration Services Commissioner for overseeing the work of those approved regulators whose members offer immigration advice. The Commissioner retains her jurisdiction in relation to those advisors not authorised by a relevant approved legal services regulator. Given that additional and specific duty for the LSB in immigration services, it is important to ensure that we properly understand the market, the risks to consumers and the effectiveness of the different regulatory protections properly. For example, it is noted that there is disparity between qualification requirements for immigration advisers undertaking private client work, legal aid services and those regulated by the Commissioner. We will want to approach our evidence gathering in partnership with the Commissioner and the relevant approved regulators. This does not mean that the LSB is prejudging whether there is a case to change the current landscape, but we do want to assure ourselves that the current regulatory structures secure the regulatory objectives.

## Early priorities – will-writing

35. In 2010, will writing bodies requested that the LSB recommend to the Lord Chancellor that will-writing be reserved under the terms of Section 24 of the Act. We rejected that request on the basis that the evidence was not available to underpin a robust decision and there were no proper criteria or a developed approach to undertaking a review. We did however commission formal advice from the Panel about the provision and regulation of will-writing services. In partnership with the OFT and the SRA, we also commissioned a research agency to undertake original research including a "shadow shopping" exercise which shadowed 101 real consumers getting wills from different types of provider with a panel of experts assessing the quality of the wills.

36. The Panel's report highlighted many problems faced by consumers when buying a will. This included evidence of poor-quality wills, questionable sales practices and lost wills where companies disappear without trace. The qualitative shadow shopping research demonstrated that too many wills, written by both solicitors and unregulated will-writers, failed to reflect what the client intended and made other basic errors. The Panel also highlighted that some inherent features of will-writing services place consumers at risk of detriment. The Panel's primary recommendation was that will-writing be added to the list of reserved activities.

37. We consider that the Panel's report along with the underpinning evidence demonstrate that there is a strong prima facie case to be answered for making will-writing a reserved activity. We consider also that the evidence of consumer detriment that has been reported justifies consideration of whether estate administration should be brought within the scope of reservation, or in the case of probate, if the current reach of reservation is appropriate.

38. The LSB has therefore decided to hold the formal Section 24 and Section 26[12] investigations necessary to reach a final recommendation on the issue in these three markets. Our intention is to use the process defined in this paper to undertake this work. This is not intended to prejudge the outcome of this discussion but will act as a live case study to help test the effectiveness of the methodology. We will publish more details of the process and timetable later in the summer.

[12] We will run Section 24 and 26 investigations together as we cannot prejudge that the reach of reserved probate activities, as currently defined, will prove to be appropriate.

## Introduction

39. This discussion paper outlines our approach to assessing the boundaries of legal services regulation and connected regulatory decisions.

40. The LSB was established by the Act to oversee legal services regulation in England and Wales. Our underpinning mandate is to ensure that regulation delivers the public interest and that the interests of consumers are placed at the heart of the system. We have the responsibility in our oversight role to ensure that legal services regulation through the approved front-line legal regulators delivers the regulatory objectives[13] and the statutory better regulation principles of being transparent, accountable, proportionate, consistent and targeted only at cases where action is needed.

41. The LSB sees the following three themes as the core of our vision for the legal services market:

- **Consumer protection and redress should be appropriate for the particular market.** That might be through a mixture of before the event authorisation requirements and after the event redress, depending upon the nature of the detriment. This could for example combine education and quality assurance entry hurdles; insurance and compensation requirements and ombudsman schemes.

- **Regulatory obligations should be at the minimum level to deliver the regulatory objectives**. There is no simple hierarchy of regulatory restrictions but we favour reliance upon general consumer and competition law wherever possible; with restriction to particular and narrowly defined individuals only deployed where it is absolutely required to ensure the regulatory objectives are secured. There is a wide menu of regulatory interventions between these two extremes.

- **Regulation should live up to the better regulation principles in practice**. Setting out the scope and nature of regulation must be linked to developing regulatory standards and performance among approved regulators.

42. We envisage a landscape where statutory regulation guarantees that appropriate protections and redress are in place and above this there are real competitive and cultural pressures for legal services to deliver the highest possible standards with a range of options for consumers at different prices.

[13] LSA 2007, Part 1, Regulatory Objectives:
- protecting and promoting the public interest
- supporting the constitutional principle of the rule of law
- improving access to justice
- protecting and promoting the interests of consumers
- promoting competition in the provision of services
- encouraging an independent, strong, diverse and effective legal profession
- increasing public understanding of the citizen's legal rights and duties
- promoting and maintaining adherence to the professional principles.

Competition and provider culture should drive quality as well as price and regulation should help to provide the right incentives to make this happen. Approved regulators have a responsibility to ensure that the expected standards are being met, identify where they are not and take appropriate action to raise standards. In this context it is of concern that the recent research into quality in the will-writing market indicates that too many wills written by solicitors, as well as by unregulated will-writers, failed to reflect what the client intended and included basic errors.

43. The Act provides the LSB with a mandate to review and monitor the legal services market and make recommendations to the Lord Chancellor about which services should be required by statute to be subject to legal services regulation (Sections 24 and 26). The Act provides the LSB with further connected responsibilities to make recommendations and decisions that will shape the nature of the regulation that will apply to reserved activities. Schedules 4 and 10 to the Act require that we consider applications from any organisation wishing to be designated as an approved regulator or licensing authority to authorise individuals and entities to perform one or more reserved activity - again with a view to making a recommendation to the Lord Chancellor. Schedule 4 also provides that we must approve any successful applicant's initial set of regulatory arrangements - the rules and regulations that make up the conditions of authorisation - as part of that process. Subsequent changes to the regulatory arrangements may only be made with the LSB's approval.

44. Our work to improve the scope and structure of legal services regulation impacts on all of the regulatory objectives. We believe that, taken together, the regulatory objectives, define regulation in the public interest. Protecting and promoting the public interest, protecting and promoting the interests of consumers, promoting competition in the provision of services and improving access to justice are considered to be particularly central to this work. It should be noted here that the regulatory objective of promoting competition explicitly refers to all legal services and not just currently reserved activities

45. In our current business plan, we have said that "during 2011/12 we will undertake an examination of regulation and reservation in order to develop a rational and intellectually coherent approach to assessing whether and where regulation is required". This work is particularly salient given that we have recently received a recommendation from the Panel that will-writing should be brought within the scope of legal services regulation. Our approach to reviewing individual areas of legal services as outlined in this discussion document has been developed alongside the will-writing review as a live case study.

46. We found no existing rationale to guide us in developing our approach. So, as a starting point, we have taken a step back to consider the underlying purpose of legal services regulation. To help develop our thinking, we commissioned two pieces of original research. Along with two reports about the reserved legal activities written by Professor Stephen Mayson and Olivia Marley of the

Legal Services Institute at the College of Law[14]– the research underpins the thinking set out in this paper.

47. We commissioned the Regulatory Policy Institute to produce a report summarising what economics in particular can teach us. The report "Understanding the economic rationale for legal services regulation" can be found on our web-site alongside a series of essays which provide responses from different perspectives.[15] A summary of the key concerns identified by Dr Christopher Decker and Professor George Yarrow, along with our initial analysis of potential harm towards the regulatory objectives is found at Annex 5.

48. We also commissioned Opinion Leader Research to undertake a piece of research that covers an important gap in our knowledge: what it is that consumers want from regulation of the legal service market and what do they expect from their interaction with legal services. The report "Developing measures of consumer outcomes for legal services" is also available on our web-site.[16]

49. There are significant challenges facing the regulators of legal services through the combination of moves towards Outcome Focused Regulation and Alternative Business Structures and economic and technological changes. In this changing world, there is a major task for regulators to ensure that the regulatory framework they administer is proportionate, targeted, and fit for purpose.

50. Rationalising the scope of regulation within the framework of the Act is no easy task. We appreciate the importance of engaging with and learning from different expertise, experience and viewpoints – from those that are regulating, those that are regulated, consumers of legal services and all other interested parties. This discussion paper is designed to air the key issues and difficulties and solicit input from a broad range of stakeholders.

[14] Legal Services Institute, The Regulation of Legal Services: Reserved Legal Activities: History and Rationale, August 2010 and The Regulation of Legal Services: What is the case for reservation, Interim Discussion Paper, February 2011 (updated and reissued July 2011)
[15] http://www.legalservicesboard.org.uk/what_we_do/Research/Publications/publications.htm
[16] http://www.legalservicesboard.org.uk/news_publications/latest_news/pdf/consumer_outcomes_final_research_report.pdf

***Question 1***: What are your views on the three themes that we have put at the core of our vision for the legal services market? If different, what themes do you believe should be at the core of our vision?

***Question 2***: What is your opinion of our view that the purpose of regulation is to ensure appropriate protections and redress are in place and above this there are real competitive and cultural pressures for legal services to deliver the highest possible standards with a range of options for consumers at different prices? If different, what do you consider that the role of regulation should be?

## Legal and Policy Background

### The regulatory landscape

51. There are two main types of legal service regulation under the Act. Some lawyers are regulated in respect of all their legal work, reserved activities or not, by virtue of their professional membership and accompanying title – the best known of which are solicitors and barristers. Others are authorised by a legal services regulator to undertake one or more of the six specific "reserved legal activities", which brings them within the scope of legal services regulation.

52. Reserved legal activities are the foundation of the regulatory framework under the Act. These are the activities that Parliament has at various stages in the past determined may only be undertaken by individuals and organisations that that have been authorised to do so by an approved legal services regulator or is an exempt person by virtue of Schedule 3 to the Act because, for example, authority has been granted to them through other legislation. Schedule 3 also provides that individuals who are not authorised persons can perform reserved legal activities under supervision in certain circumstances. For example, an individual without rights of audience may advocate in certain types of court under supervision if they have been assisting in the conduct of litigation.

53. Under the Act it is the approved regulators, overseen by the LSB, which determine what the regulation of those providing reserved legal activities looks like. Approved regulators may be designated to regulate one or more of the reserved activities. The Act does not prescribe the conditions of authorisation to be attached to the reserved activities. In reality "reserved" means little more than must be undertaken by an authorised person subject to appropriate regulation. Each approved regulator is responsible for setting its own regulatory arrangements. Regulatory arrangements set out the types of individual and/or entity that may be authorised to perform reserved activities, the qualification and entry requirements that they must meet and the regulations that will be applied to them as the conditions of authorisation. There are currently 10 approved regulators[17] with overlapping responsibilities for different reserved activities and with different approaches to regulation and different regulatory arrangements.

[17] The list of approved regulators and the reserved legal activities that they are authorised is at Schedule 4 of the Legal Services Act. In addition two bodies (Institute of Chartered Accountants in Scotland, Association of Chartered Certified Accountants) come from outside the traditional legal services sector and were designated formally as approved regulators specifically for probate activities in January 2010 but as yet have not authorised any member to carry out these activities. In April 2011 the Institute of Legal Executives' reach was extended to include rights of litigation (used explicitly for the authorisation of Crown Prosecution Service Associate Prosecutors).

54. Reservation therefore provides an important basis for regulation but it does not determine the full range of activities that are regulated. Regulation extends beyond the reserved activities when undertaken by certain titles of lawyer – such as solicitors and barristers. The rules of their professional membership, administered by their approved regulators, attach regulation to their title. They are therefore regulated in all of the different legal activities that they perform - reserved activity or not.

55. Many lawyers may still choose to enter the regulated community even if they do not undertake or wish to undertake any of the reserved activities. There may be different reasons for this. For example, it may be for commercial reasons – to access a brand which is well known by consumers and attracts a monetary premium. Many people are committed to joining the legal profession because of the societal benefits that they believe having a strong legal profession bring. The value of such a strong professional ethos is clear and it is important that regulation does nothing to undermine this. But not all forms of professionalism are equally positive in effect. Some may seek to join a profession because of an attraction to the status, culture and incidental benefits that go with professional membership. And the fact that a monopoly may be operated by members of a profession does not of itself remove the deleterious impact on competition of such a monopoly. The model of self-regulation, combined with oversight regulation from the LSB, set out in the Act is therefore designed to create the right balance between encouraging a powerful professional ethos and ensuring that it operates properly in the wider public interest.

56. Adding a further level of complexity, governments have introduced separate regulatory schemes in some markets such as immigration and for claims management companies offering services in categories of law such as employment, housing disrepair and personal injury.

57. Beyond this some providers, predominantly from non-legal professions, may be covered by their own sector's regulator – for example the Financial Services Authority regulates their members when delivering some services that may be defined as legal activities. Furthermore, some state purchasers, notably the Legal Services Commission (which administer the legal aid scheme) and the Crown Prosecution Service, have their own quality requirements that apply only to the providers with whom they contract. There has been a rapid evolution in general consumer protection legislation impacting on all businesses including providers of legal services. Also, there are several trade bodies operating voluntary licensing schemes, of which the Association of Personal Injury Lawyers ("APIL") is perhaps the longest established.

58. In introducing the Act, Parliament determined not to change what is and is not regulated - the existing landscape was carried across as was. The result is a landscape that Sir David Clementi, in his 2004 independent review[18] ,

[18] Clementi, Review of the Regulatory Framework for Legal Services in England and Wales, March 2004.

describes as being “punctuated with gaps, overlaps and anomalies”. He highlighted problems with the “asymmetry of regulation”[19], meaning that the level of regulatory consumer protections (and associated regulatory burdens for providers) provided when accessing the same legal service may vary significantly depending on the type of provider delivering the service.

59. One consequence of this is that there is no specific legal services regulation of people who do not have a protected title and are not offering one of the reserved activities. Will-writing is perhaps the best known of the services frequently undertaken by unregulated providers, but there are many others including many forms of general legal advice. In such cases, consumer protection arises only from general consumer law and voluntary schemes of regulation, rather than any other statutory requirements: importantly, consumers have no automatic right of redress from the Legal Ombudsman

60. There is a list of only six reserved legal activities that are restricted to being undertaken by authorised persons subject to legal services regulation. This is found at Section 12 of and Schedule 2 to the Act and comprise of:

    - The exercise of rights of audience (e.g. appearing as an advocate before a court)
    - The conduct of litigation (e.g. certain aspects of managing a case through its court processes)
    - Reserved instrument activities (e.g. dealing with the transfer of land or property under specific legal provisions)
    - Probate activities (e.g. applying for or opposing the grant of probate or a grant of letters of administration)
    - Notarial activities (e.g. work set out by the Public Notaries Act 1801)
    - The administration of oaths (e.g. taking oaths and swearing affidavits)

61. The list does not cover the majority of legal services including many of those that are required by vulnerable consumers. For example, writing wills, advice in relation to mental health, welfare benefits, housing and most other general legal advice. At the other end of the scale, transactional corporate advice is not reserved. This means that in practice most legal activities can be performed by anybody who wishes to enter the market irrespective of qualifications, expertise or experience. In doing so the general competition and consumer protection framework applies but not the additional protections for consumers and obligations for providers that go with legal services regulation. In some cases the definition of the reserved activity is narrow even within the area of law covered. For example, probate activities are reserved activities but are defined narrowly as ‘preparing any probate papers for the purposes of the law of England and Wales or in relation to any proceedings in England and Wales’. ‘Probate papers’ are defined as ‘papers on which to found or oppose grant of probate, or a grant of letters of administration’.

[19] Clementi, Chapter E – Regulatory Gaps, Consultation Paper on the Review of the Regulatory Framework for Legal Services in England and Wales, March 2004.

62. Importantly, whether a consumer goes to a regulated or an unregulated provider impacts on their ability to obtain redress in the event that they are dissatisfied with the service provided. The OLC was created as a key component of the Act to facilitate an easily understood and accessible system of redress for all individuals and small business consumers with a service grievance. However, the jurisdiction of the Ombudsman is defined by services provided by "authorised persons". Under the definitions of the Act, this means persons authorised by an approved regulator to undertake one or more of the reserved activities. Therefore, whether a consumer has access to the Ombudsman depends on the type of provider that is chosen.

63. A further consideration in the context of this debate is the ability to provide consumers with the benefit of professional privilege when seeking legal advice as privilege currently attaches to the titles solicitors and barristers and under Section 190 of the Act authorised persons when undertaking certain of the reserved activities (advocacy, litigation, probate, conveyancing). This protection provides consumer benefits and also competitive benefits for the privileged authorised person. We note the Supreme Court case due to conclude in 2012 and will be mindful of the findings as we assess impact on privilege of future regulatory decisions on a case-by-case basis.

64. The LSB considers that the current pattern of reserved and unreserved work is unsatisfactory. There are a number of reasons for this which are explored further below.

## Why regulatory scrutiny is needed?

### *Historical development of regulation and the reserved activities*

65. It is clear from research undertaken by Professor Stephen Mayson and Olivia Marley of the College of Law[20], that there is no clear rationale for what activities are reserved and what lies outside of reservation. We have simply inherited a hotch-potch of individual historical decisions which have never been tested against either the needs of consumers in the current marketplace, or any form of broader public interest test or legal principle.

66. As is common with regulation of professional services in other sectors, the regulation of legal services in England and Wales has developed on an ad hoc basis over hundreds of years. Professions have grown as lawyers that deliver similar types of legal services have joined together to form self-regulating organisations and collectively set the conditions for membership. This involves controlling entry – the starting point often being a general legal qualification. The standards of behaviour to be maintained and rules and regulations saying what members can and cannot do is established and set out in various codes of practice. Systems then apply to provide for members

[20] See Legal Services Institute, The Regulation of Legal Services: Reserved Legal Activities: History and Rationale, August 2010 and The Regulation of Legal Services: What is the case for reservation, Interim Discussion Paper, February 2011 (updated and reissued July 2011)

not meeting the prescribed standards or breaching the rules to be disciplined and potentially expelled. The totality of these arrangements make up the regulatory arrangements as defined under the Act. Through membership, distinct values, behaviours and culture are embedded - defining what it means to be part of the profession.

67. Titles such as solicitor and barrister are given to members of the different professions so that consumers can distinguish them from non-members – either other professions or providers with no attachment to any professional body. Regulation is then attached to the title – meaning that requirements apply no matter what combinations of legal work the practitioner undertakes and irrespective of any difference in expertise and skill required for different combinations of activity.

68. Over time the number of professions has increased and through legislation, Parliament has incrementally granted exclusive rights of practice over certain legal activities – the reserved activities– to different professions– making the professional bodies the statutory regulators of practitioners carrying out those activities. The statutory regulators are known as "approved regulators" under the Act. Successive legislation has given different regulatory arrangements for different professions a statutory basis.[21]

69. The Act maintained the existing list of reserved activities, the existing approved regulators and the activities that they regulate. Most of the different legislation that formed the framework for their regulation was preserved or incorporated into the Act.[22] This carried over differences in the scope of the schemes and some quirks of regulation. For example, notarial activities are one of the reserved activities in the Act. This is defined not in terms of specific activities, but rather as "any activities which, immediately before the appointed day, were customarily carried on by virtue of enrolment as a notary in accordance with Section 1 of the Public Notaries Act 1801 (c. 79)". ILEX carried over rules that limited the legal executive regime so, unlike solicitors, the authority to perform, for example, advocacy is broken down by category of law and also the type of court in which the case is heard e.g. only matters arising in the county court. [23]

70. Professor Stephen Mayson and Olivia Marley have argued persuasively in their two recent reports[24] that the choices about which activities to reserve and to whom have been made on an ad hoc basis rather than following any codified public interest or other relevant test. Decisions have often been made pragmatically for example as a way to confirm in legislation practices that were developing. Some as a result of political deals - such as the granting of

[21] See Legal Services Institute, The Regulation of Legal Services: Reserved Legal Activities: History and Rationale, August 2010, Appendix for a summary of the statutory origins of reserved activities
[22] For example - the Solicitors Act 1974, the Administration of Justice Act 1985 and the Courts and Legal Services Act 1990.
[23] See the Institute of Legal Executive's web-site: http://www.ilex.org.uk/about_legal_executives/what_legal_executives_do.aspx
[24] Legal Services Institute, the Regulation of Legal Services: Reserved Legal Activities: History and Rationale, August 2010. See Legal Services Institute, The Regulation of Legal Services: What is the case for reservation, Interim Discussion Paper, February 2011 (updated and reissued July 2011)

conveyancing being reserved for lawyers in 1804 to appease the profession in light of plans to increase taxes on articles of clerkship and practising fees. And some to address specific concerns such as the solicitor monopoly in conveyancing that saw the establishment of the Council for Licensed Conveyancers in 1985.

71. There is no common theme or unifying feature explaining what is subject to regulation. There has been no forward look at what is wanted and needed to protect consumers and deliver the regulatory objectives introduced by the Act. History does not present us with a strong basis for regulation of legal services in the modern world or rationale for making future decisions about where the boundaries of regulation should lie.

### *Consumer protection and professional monopolies*

72. Reservation as currently understood is a very blunt instrument. It does add some consumer protection over and above that available through general law. However, it does so only through the establishment of professional monopolies, the existence of which might well have deleterious effects on access to justice, competition and other aspects of the regulatory objectives set out in the Act. The economic research prepared for the LSB by the Regulatory Policy Institute and published in March 2011 explored the risks in some detail.

73. Legal services have traditionally been offered predominantly by individuals following the traditional routes to qualification – solicitors and barristers whose professional membership rules extended consumer protection (beyond consumer and competition law) to unreserved activities. Rules have attempted to provide a level of uniformity in the standards that must be met and the way in which services are delivered to ensure this. Other rules prevent the construction of connected businesses providing unreserved activities outside of regulation.

74. The inward facing nature of professional self-regulation has many benefits. As set out in the paper "Developing Regulatory Standards"[25], it is through professional adoption of regulatory standards that client confidence in goods and services has been built. That has helped the legal services market grow substantially over a sustained period and it remains for many a profitable business with many satisfied consumers.

75. But professional self regulation is recognised as being likely to work to maximise the benefits for its members rather than for consumers and the wider market – although this is often not through strategic intention. Dr Decker and Professor Yarrow have emphasised the propensity for regulation that has developed with a strong supply side influence to go further than is necessary for the wider good, reducing competition so as to achieve "private benefits"[26] –

[25] http://www.legalservicesboard.org.uk/news_publications/latest_news/pdf/21110420_developing_reg_std_finalrb_proof_3.pdf

[26] Decker and Yarrow, Understanding the economic rationale for legal services regulation", March 2011, chapter 5, see envelope theorem.

potentially leading to higher costs, poorer service and reduced delivery options for the consumer, many of which are the common criticisms of legal services provision.

76. Competition between providers within any of the regulated professions has been possible e.g. between solicitors and barristers in the provision of advocacy services. However, the legal services market has not been exposed, within the reserved activities, to the types of competition of ideas and business models common in a truly competitive market. This in turn is likely to have been, at least in part, responsible for the relatively homogenous provision of legal services, compared to other sectors.

77. The emergence of the unregulated sector, providing legal services outside of the reserved areas, increasingly presents a competitive challenge to the legal professions. These firms have entered the market in areas traditionally monopolised by solicitors (and other relevant types of lawyer regulated in all that they do) and where there is no statutory requirement for other providers to be regulated when delivering the service. These firms have competed directly with traditional legal firms offering products at competitive prices and in new ways. Regulated providers, fearing potential customers leaving for unregulated firms have been faced with two options, either innovate to survive within the regulated sector or provide unregulated services themselves.

78. In this context, regulations have acted as a barrier to innovation. This has frustrated legal services providers trying to meet the needs of their clients, grow their business and compete with non-regulated businesses. Conversely such regulation provides a comfort blanket for firms that wish to maintain traditional models without innovating in the consumer interest[27]. The ability for providers to move outside of regulation while maintaining professional status has also been restricted through rules such as the separate business rule. This has led to a choice either to exit professional regulation and the provision of reserved activities in their entirety or to look at ways to stretch the boundary between reserved and unreserved activities and the restrictions that regulation has placed between them.

79. The market for legal services is changing and regulation will have to change with it to provide simple and accessible regulation that helps providers deliver imaginative and consumer focused services while giving consumers confidence that regulation helps them without burdening them with costs or preventing them from accessing services in the way that suits them best.

### *The changing market*

*80.* The sharpness of the boundary between reserved and unreserved activities has always had the effect of leaving some consumers unprotected, particularly when it comes to easy accessibility of redress. Perhaps even more importantly, there is the potential for some of those consumers to make purchases in the mistaken belief that such redress would be available.

[27] For example, Dr Decker and Professor Yarrow and accompanying essays and Clementi Report .

Although such confusion has always been possible within the legal services market, the Legal Ombudsman has rightly highlighted this as an issue likely to grow in importance as the market becomes more diverse. The Ombudsman has reported an increasing number of cases where this has happened as the market has developed and produced new delivery models. We intend to issue a Section 120 request for a report from the OLC setting out details of complaints that the Ombudsman has received where the complainant has thought that they are purchasing a legal service from a provider covered by the Ombudsman scheme when in fact they are buying a service from an unregulated provider and therefore no such redress is available. A Section 120 request will set the parameters for obtaining relevant intelligence from the Ombudsman which will prove invaluable in helping us to understand developing issues around the scope of regulation and access to the Ombudsman and help us make decisions on areas to prioritise for review going forward. We regard the experience of the Ombudsman as having a unique status in the inputs to our decision-making.

81. Historically, for most people wanting to access legal services, there were few options in the market place other than visiting a solicitor's firm. As solicitors are regulated by title this meant that it was largely irrelevant to the consumer, in regulatory terms, whether the service that they were receiving was a reserved activity or not.

82. However, in recent years the position has been changing with a proliferation of non-regulated options providing non-reserved legal services and with lawyers responding to changing consumer needs and economic pressures by looking for cheaper alternatives to undertaking most legal work themselves. For example, many law firms are increasing their use of outsourcing and off-shoring as well as using non-qualified employees, under the supervision of a qualified solicitor, where required, to deliver legal activities. Other providers are emerging completely outside of legal services regulation, offering only non-reserved services.

83. The BSB reports that there are a "large and growing" number of barristers without practising certificates that provide unreserved legal services to individuals and small businesses[28]. The SRA reports that their members face a "big incentive" to set up separate businesses to undertake non-reserved works as "it will reduce costs, and avoid the possibility of regulatory scrutiny"[29].

84. The innovation and challenges from outside the profession are resulting in significant rises in services being delivered away from the traditional models of visiting a solicitor, barrister, legal executive etc. The changing market does not fit neatly within the traditional regulatory approaches of authorising individual lawyers and focusing regulation on them.

85. For example:

[28] Report of BSB December 2010 board meeting at lgalfutures.co.uk, 20 December 2010
[29] The Architecture of Change: the new SRA Handbook" – May 2010 consultation paper

- There are on-line options for receiving tailored legal advice where a lawyer's expertise is deployed in developing the systems rather than delivering the advice. On-line divorce services are one of the most visible.

- There are many unregulated organisations that specialise in delivering unreserved legal activities. Will-writing is the highest profile, but far from the only example of this.

- Many banks, building societies and affiliate organisations that are not subject to legal services specific regulation provide services that most would understand to be legal services to their customers and / or members. This may be done in partnership with lawyers, by using technological solutions or by steering clear of the reserved activities altogether.

86. This trend is likely to continue as individuals looking for legal services become more active consumers, driven by experiences in other markets where changes in technology have encouraged shopping around for the best deal. The introduction of ABS will further facilitate non-lawyer ownership and allow external investment for the first time. This will likely lead to even greater innovation in the way in which legal services are delivered. Consumers are likely to be presented with even greater choice in the market. In future, more brands, currently not commonly associated with legal services, will be competing directly with legal services firms in the provision of legal advice.

***Question 3***: In light of the changing market do you think that specific action may be needed to ensure that more legal services activity can unequivocally be included within the remit of the Legal Ombudsman and, if so, how can this best be achieved?

### *Consumer choice*

87. Consumers increasingly have greater choices to buy legal services from regulated or unregulated providers based on price, accessibility and delivery methods. However, to make this choice effectively consumers must understand the distinction between regulated and unregulated activities and the service, and course for redress, they can expect and receive. Their ability to understand and make choices will vary considerably between different types of consumers. Research indicates that most individuals and small business consumers are not able to assess the quality of providers and do not understand the difference between regulated and unregulated providers.

88. The contribution of Steve Brooker, the Legal Services Consumer Panel Manager, to the collection of essays discussing the Dr Decker and Professor Yarrow report highlighted the challenge consumers face:

- "Surveys show that 60% of the public cannot name a single law firm and 77% of consumers who used lawyers in the last five years did not shop around. Moreover, 80% of people say that would not know how to tell a good lawyer from a bad one, while the same proportions who are dissatisfied with their lawyer do not complain. Research for the Legal Services Consumer Panel's referral fees investigation showed that consumers view legal services as standard products where quality and price do not vary much between suppliers. And the Panel's report on quality assurance found that consumers assume all lawyers are technically competent and tightly regulated. Furthermore, the way in which legal services are provided makes it difficult for consumers to exercise choice. Legal services ranked third bottom for the ability of consumers to compare goods and services in an EU-wide survey comparing consumer outcomes in 50 markets"[30].

89. Dr Decker and Professor Yarrow set out some of the common consequences that opaque, ill-fitting regulation can create in terms of consumer behaviour and impacts on the market. To illustrate this, we can hypothesise some of the potential issues for consumers choosing will-writing services:

- Consumers may go to an unregulated provider without understanding the trade-offs that they are making, which leaves them exposed to potential harm and without effective redress. The Panel has received a large number of case studies to this effect in response to their call for evidence on will-writing

- Consumers, in particular those lacking confidence, may retreat to an established "brand" (e.g. solicitor, barrister) without considering alternatives that could be cheaper or more flexible delivery options that might better suit their needs. Although the IFF research indicates that consumers shop around more in this market than many others, especially on price and flexibility, the proportion of consumers that currently use these unregulated services is relatively small – it is estimated that at least two thirds wills are still written by solicitors[31]

- Consumers may not access a service at all. There is still only a relatively low proportion of the non-elderly population that have a will.[32] There are likely to be diverse reasons for the relative inertia, both social and market related, related to price and accessibility in the

[30] Steve Brooker, Legal Services Consumer Panel Manager, The consumer‟s role, Legal Services Board, Understanding the economic rationale for legal services regulation -A collection of essays, March 2011

[31] Law Society 2010 survey results as submitted to Legal Services Consumer Panel Call for evidence indicate that 67% of wills are written by solicitors. An Office of Fair Trading survey of 2000 adults from February 2010 provided a figure of 88%.

[32] The proportion of people with a will increases steadily with age; 6% of those aged 16 to 24 compared with 82% of those aged 75 or over. See Alan Humphrey, Lisa Mills and Gareth Morell, National Centre for Social Research, and Gillian Douglas and Hilary Woodward, Cardiff University, Inheritance and the family: attitudes to will-making and intestacy, August 2010 and Consumer Panel advice to LSB, July 2011.

broadest sense, for example the lack of recognised brands to signal a trusted provider of services

90. The developments in the market are increasing the pressure on the ability of the current regulation to deliver consistent and effective consumer protection. There is a clear case for consistency. The Legal Ombudsman has expressed concern that this fragmentation and uncertainties about the edge of legal services specific regulation may confuse consumers about the boundaries of his responsibilities and so impact on the effectiveness of complaints handling at the second-tier.

### *Provider concerns*

91. Some unregulated specialist providers of non-reserved activities are questioning the existing professional monopolies. For example, a number of will-writers who are members of trade bodies with voluntary licensing regimes providing some extra protections for consumers are calling for an extension of reservation. Importantly they want the opportunity to achieve statutory regulated status themselves. They argue that this would ensure that all providers in the market are committed to delivering minimum protections for consumers. Will-writers have argued that it is difficult for practitioners that sign up to voluntary schemes to easily distinguish themselves from competitors that do not. Non solicitor will-writers often argue that, as they spend the majority of their time focused on this activity, they are likely to be at least as knowledgeable and skilled in will preparation as solicitors in general practice. Shadow shopping research results indicate that in that sample solicitors were as likely to write poor wills as non-solicitor will writers.

92. Furthermore, many lawyers regulated by title complain that the developing market is resulting in an unlevel playing field, with non-regulated organisations facing lower regulatory burdens to deliver the same services. Moreover, the different regulatory arrangements applied by different approved regulators inherently mean that in some cases there will also be variations in the level of regulatory burden between different types of regulated provider.

93. Creating a truly level playing field where the burden falls evenly on those providing a service under the current system could be achieved by either reserving all legal work and imposing the most onerous rule book on all providers or, alternatively, by removing all statutory regulation all together. Clearly neither is an option that is likely to deliver the regulatory objectives and be compatible with the accepted standards of better regulation.

94. The approach that is more likely to deliver the regulatory objectives is to rationalise regulation, so that there remains maximum flexibility for providers while ensuring the right level of protection for consumers and the wider public interest. This hinges, therefore, not just on what is and is not reserved but equally the shape of the regulatory arrangements adopted by the approved regulators.

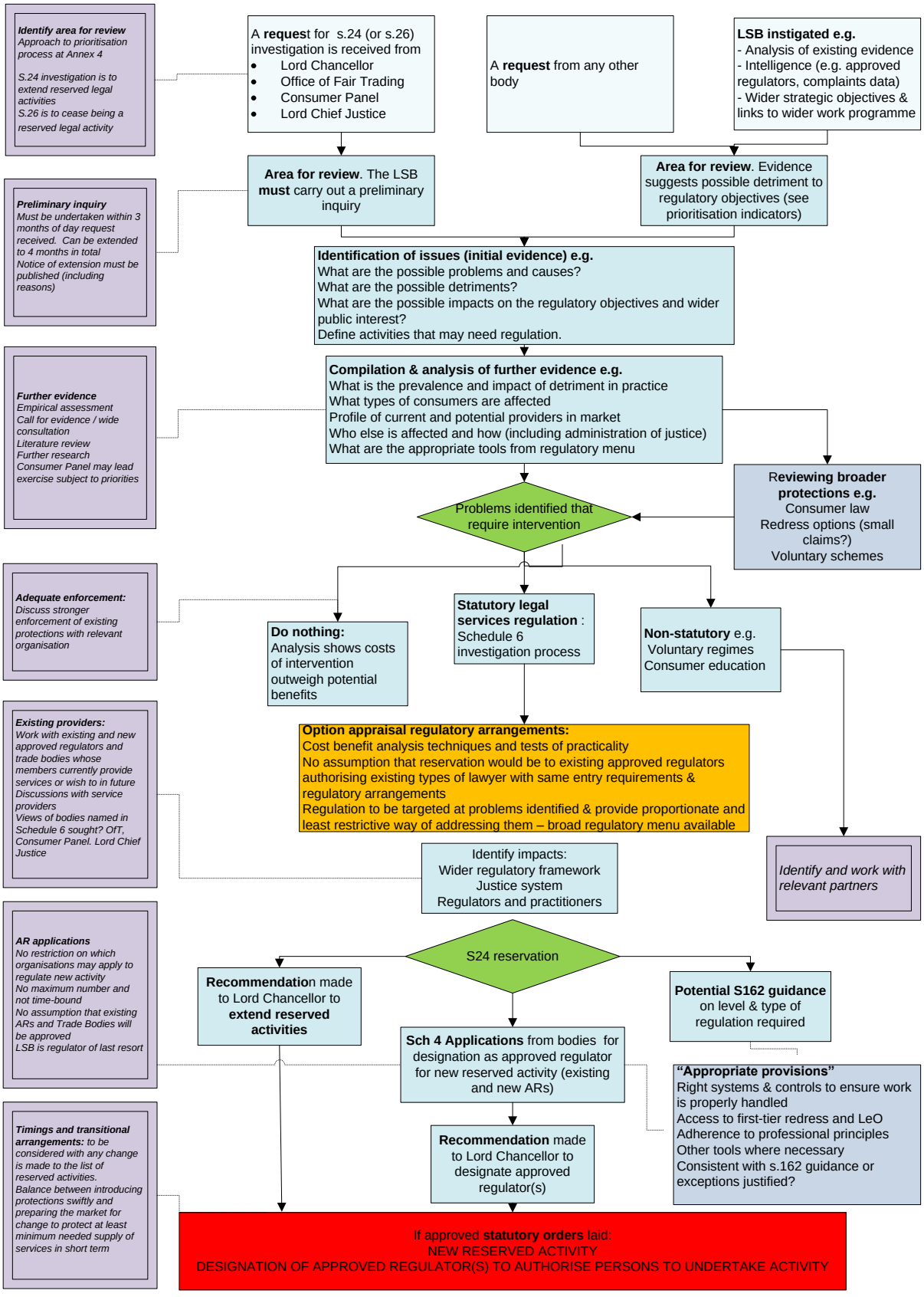
95. This will likely require continued movement towards activity based regulation that is organised around clearly identified risks. The extent to which this would make regulation via professional title obsolete is arguable, however. There is asymmetry of information between many consumers and providers of legal services and title does provide a useful, if not perfect, signal to consumers about regulation and thus consumer protection. As the regulatory approach to any activity is reviewed, it will be important to consider the extent to which titles do already provide a vital market function by acting as shorthand for consumers to use. But it is unlikely that a regulatory solution could be solely – or even largely - based around title-based monopolies because of the significant barriers to entry it presents. Approved regulators will want to consider how regulatory arrangements could be used more flexibly to, in turn, provide flexibility to providers to organise their business to maximise their competitiveness.

***Question 4**:* What are your views of our diagnosis of the weakness of the existing system and the problems within it?

***Question 5***: What do you see as the benefits and downsides of regulating through protected title such as solicitor and barrister?

***Question 6***: What are you views on whether there should be a consistent approach to the allocation of title to authorised persons? What are your views on whether the title should be linked directly to the activities that a person is authorised to undertake or linked to the principal approved regulator that authorises them?

# LSB approach to reviewing the scope of regulation – an overview



## The Effect of the Act

### Overview

96. It might be argued that an issue of this complexity needs to be resolved by Parliament undertaking a root and branch overhaul of the current system. The LSB does see merit in that approach and will begin some exploratory work and discussions to better understand what a revised statutory framework would ideally look like in the longer-term. However, we also recognise that the Act gives it both specific responsibilities and opportunities to improve the present framework, which would potentially enable significant progress to be made.

97. The Act provides a framework that allows flexibility to review the regulation of different services on an on-going basis and "be able to both bring in new services and to deregulate where necessary"[33]. The Department of Constitutional Affairs ("the DCA") White Paper "The Future of Legal Services, Putting Consumers First" that preceded the Act said "the Legal Services Board will monitor the legal services market to ensure that regulatory gaps are anticipated and tackled before consumers are put at risk"[34]. The Act defines the breadth of legal activities, beyond reserved legal activities, so as to set the boundaries for LSB reviews. The definition is broad: any activity which consists one or both of the following a) the provision of legal advice or assistance in connection with the application of the law or with any form of resolution of legal disputes; b) the provision of representation in connection with any matter concerning the application of the law or any form of resolution of legal disputes[35] .

98. Sections 24 and 26 of the Act allow for the widening and narrowing the scope of what is subject to legal services regulation. Section 24 provides that the Lord Chancellor may, by order, amend Section 12 of and Schedule 2 to the Act so as to add activities to the list of reserved legal activities. It is only through this mechanism that an activity can be brought within the scope of legal services specific regulation irrespective of who delivers the service. Otherwise only providers who are regulated in all that they do by virtue of their title would be caught within the net when delivering that service. Section 26 of the Act allows for activities to be removed from the list of reserved activities in a similar way.[36] In both instances the Lord Chancellor can act only on the recommendation of the LSB.

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[33] Clementi, Review of the Regulatory Framework for Legal Services in England and Wales, March 2004
[34] DCA White Paper, The Future of Legal Services, Putting the Consumer First, October 2005
[35] Legal Services Act s12(3)(b)
[36] Unlike a s24 recommendation, there is no procedure under the Act to implement as.26 recommendation and it would be for the Lord Chancellor to pursue this by other means (for example, further primary legislation or, possibly, a regulatory reform order).

99. The process that we must follow to investigate changing the list of reserved activities is set out in Schedule 6 to the Act. We can make investigations of our volition or if requests are received from one or more of - the Lord Chancellor, the OFT, the Panel or the Lord Chief Justice[37] or from any other body. The process will be consistent in its general methodology, although there will be some marginal variation depending on the origins of the investigation.

100. Recommending that an activity is added or removed from the list of reserved activities is just the start. If a reserved activity is added, any organisation wishing to regulate a newly reserved activity will have to apply to the LSB under the Schedule 4 approval process. This obligation extends both to the existing approved regulators whose members at present undertake the currently non-reserved activity and wish to be able to authorise them to continue doing so and any new or existing trade bodies who represent those delivering the currently non-reserved activity on an unregulated basis.

101. There is no assumption that any of these bodies will automatically be approved. Each applicant must demonstrate that their regulatory arrangements must make "appropriate provisions". This is explored further in paragraphs 116 to 127.

102. The Act allows for more than one regulator to regulate any of the reserved legal activities. In practice, no regulator has a monopoly of any of the current reserved activities, with the exception of the Master of Faculties' role in relation to notarial activities. We do not see any difficulty in principle with there being multiple routes by which the public can be assured that proper standards are being maintained. That is what Parliament intended and the LSB will oversee. This does not mean regulators competing against their "peers" for "market share" of any potential regulated community by making regulatory "offers". Only tough and capable regulators meeting the strict tests of the Schedule 4 process and with appropriate regulatory arrangements will be recognised.

## A clear vision

103. Against the legal and policy background presented above, the LSB intends to set a clear vision for its approach to regulation:

- Consumer protection and redress should be appropriate for the particular market.
- Regulatory obligations should be at the minimum level to deliver the regulatory objectives
- Regulation should live up to the better regulation principles in practice

[37] The four bodies given a specified role in Schedule 6 to the Act

## The review process

104. Our starting point will be to seek to ensure that regulation is delivers in the public interest and that the interests of consumers are placed at the heart of the system. We want to ensure that consumers are better and more consistently protected, especially through access to redress. This means balancing this consumer protection against the desire to avoid reservation becoming a means of removing normal competitive pressures. Any obligations introduced will be tightly focused and strictly proportionate to the risks involved. The test for extending regulation will be high. There must be a compelling case underpinned by appropriate evidence– this is a core principle for reviewing regulation, adopted by governments of all political persuasions in many jurisdictions.

105. The public interest is not easily defined: it often means different things to different people. We believe that all the regulatory objectives together define the public interest. In practice regulating in the public interest means finding the right balance between the objectives in a given circumstance and aligning the objectives with the better regulation principles. The public interest will not be static and will need to be assessed for each regulatory decision. The public interest will always be based upon "deserved public confidence in the legal system". Legal services are part of a broader social-political-moral landscape that underpins the fabric of our society built on the rule of law. The importance of public confidence in the provision of legal services and the effective administration of justice holds greater significance than might be attributed to other professional services.

106. We will review the need for regulation on a case-by-case basis with each review considering the types of regulatory interventions most appropriate to specific risks and issues within each area reviewed. This allows flexibility to review the scope and nature of regulation within a changing legal services market and as new risks and issues emerge.

107. In line with the processes set out in Schedule 6 to the Act and taking into account our obligations under Section 3 of the Act, the Government's principles of regulation and guide to reviewing regulation[38] , we will approach reviewing the scope of regulation in individual areas in the following way

- Identification of the area of legal services for review. This may emerge from a request by the Lord Chancellor, the OFT, the Panel or the Lord Chief Justice - bodies explicitly given this right by Schedule 6, or any other body. it may emerge from our own assessment of risk in the market or significant public interest concerns derived from research, analysis and a wide ranging intelligence base. This may come from approved regulators, the OLC, bodies responsible for different aspects of the administration of justice, practitioners or any other party. Our

[38] http://www.bis.gov.uk/policies/better-regulation

approach for making decisions about whether an area will be prioritised for review is set out Annex 4.

- Identification of issues. From a review of the initial evidence base we will begin to identify the actual problems that are causing concern, the possible causes and the potential detriments. We will begin to define the specific activities which may need regulation. We will begin to identify the areas of the regulatory objectives which may be materially threatened by the absence of explicit regulation. We will consider the sophistication of customers within the area covered to assess the extent to which they need additional protection or have the ability to effectively assess their own interests. Consideration will be given to the public interest and whether this is wider in its implications than the consumer interest alone in relation to the specific issue. Competition and access to justice concerns are also likely to be prevalent.

- Compilation and analysis of further evidence: Where the initial analysis indicates the need to continue the investigation we will build a more complete evidence base and assess the prevalence and impact of any consumer detriment or public interest concern in practice. This may involve undertaking empirical assessment, a call for evidence and wide ranging consultation. The importance of appropriate and targeted consultation is particularly important in the context of difficult to define public interest concerns, on which we will seek views. It is also relevant in relation to reaching vulnerable groups, whose needs may be different to other parts of society..

- Analysing existing mechanisms and non-statutory interventions: We will assess the extent to which the existing broader legal framework (e.g. consumer law) and infrastructure (e.g. small claims machinery) does or could address the apparent detriment. Analysis of the effectiveness or potential effectiveness of non-statutory safeguards such as voluntary schemes operated by trade bodies and increased consumer education will also be considered where relevant. Please see Annex 2 for more detail of possible non-statutory solutions.

- Option appraisal: In the absence of effective alternatives to statutory regulation, we will consider what forms of regulatory arrangements might be triggered if the activity was reserved to address the issue in the most proportionate way. Cost-benefit analysis techniques and considerations of practicability would underpin this assessment.[39]

- Identifying impacts: We will identify and assess the impact of proposals to introduce changes to what is regulated and how it is regulated on the broader regulatory framework (e.g. concerning professional privilege

[39] We will undertake the best assessment of costs and benefits given the level of evidence that is available in the particular circumstance. This will vary between markets and the types of issues under consideration. Given the broad nature of the regulatory objectives, costs and benefits in the context of legal services extend beyond hard financial considerations.

and the responsibilities of existing approved regulators) in the legal services sector and beyond. We will assess likely impacts on the courts and the wider administration of justice. We will seek the views of practitioners. We will need to be alive to any unintended consequences for the overall quality of services provided to the consumer, the simplicity of the regulatory environment to aid consumer understanding, the culture and norms of the professions as well as confidence in regulated services for consumes (including for "UK plc" as a whole).

- Recommend reservation: We will publish and invite comment on a provisional report setting out where we are minded to make a recommendation to the Lord Chancellor that the list of reserved activities is extended (or reduced) under the Act if this is the most proportionate response. We will also set out our analysis of what regulatory arrangements should flow from that decision. Dependent on any changes in our analysis as a result of feedback received we will then make the appropriate recommendation.

- Optimum standards: Where reservation is recommended we will consider issuing guidance under Section 162 of the Act on the high level regulatory arrangements that are most likely to proportionally address the problems and protect against the detriments that have been identified.

- Application from potential approved regulators: Where there is reservation we will receive applications from bodies wishing to be designated to regulate the new reserved activity. This will include applications from existing approved regulators whose members currently provide the legal activity that is being reserved.

108. When making a recommendation to the Lord Chancellor to add an activity to (or remove an activity from) the list of reserved activities, timings and the need for any transitional provisions will need to be considered. There will be a balance to be found between introducing protections or removing restrictions swiftly when it has been identified as necessary and preparing the market for change. A priority will be to ensure that there is no unintended detriment caused to the regulatory objectives and in particular to access to justice for consumers.

109. We have highlighted in paragraph 63 that at present the benefits of professional privilege when seeking legal advice currently attached to the titles of solicitor and barristers and also other authorised persons when undertaking certain of the reserved activities. When and to whom privilege applies can be complex and the issue is hotly debated, especially in relation to intra profession competition. Although we do not consider that the maintenance or extension of existing rights of privilege should determine questions of regulation, we must be mindful of the consequential impact on the issue when considering changes to regulatory boundaries and connected regulatory decisions.

110. The review process set out above will ensure that final recommendations are evidence-based and that opportunities are provided for the full range of interested parties to have their say. The analysis will give full weight to the regulatory objectives, the professional principles (and the LSB's analysis of them in its paper published in July 2010[40]) and the better regulation principles. The approach is rooted in the Decker and Yarrow research and applies the Treasury's Green Book cost-benefit techniques to the regulation of legal services. The transparency provided by the process will ensure that in future it will be clear to all stakeholders how a particular decision was made and conclusions arrived at. So, while each assessment will be on individual merits, it will be done within a consistent and transferable framework rooted in the regulatory objectives and consumer focus.

111. The assessment process will evolve in line with our understanding of the meaning of the regulatory objectives, the professional principles and the ongoing development of better regulation principles but the underpinning rationale will remain.

112. In identifying future areas for review, we will consider the extent to which there is a case to review any of the current reserved activities.

***Question 7***: What are your views on our proposal that areas should be examined "case- by- case", using will-writing as a live case study, rather than through a general recasting of the boundaries of regulation? If you disagree, what form should a more general approach take?

***Question 8***: What are you views on our proposed stages for assessing if regulation is needed, and if it is, what regulatory interventions are required?

***Question 9:*** What are your views on the implications of our approach for professional privilege?

***Question 10***: Do you believe that any of the current reserved legal activities are in need of review? If so, which activities do you think should be reviewed and why?

[40] http://www.legalservicesboard.org.uk/news_publications/publications/pdf/regulatory_objectives.pdf

## The potential remedies

113. The Act provides a set of tools that allow for the operation of reservation to be rebalanced for the modern world. Reservation has traditionally worked by granting exclusive rights to certain professions. It has been seen as a means of excluding work from people other than members of the legal profession. The Act makes clear that this narrow interpretation is not justified. The Act allows for greater consistency in regulation. In the Act, reservation means that the activity can only be carried out by a person, subject to appropriate regulatory arrangements and authorised by an approved regulator to do so. It does not follow as a matter of course that authorisation has to attach only to named individuals – it also attaches to entities. Nor does it follow that reservation can only be applicable to lawyers. In fact the Act talks only of "authorised persons".

114. The LSB does not view a decision that an activity should be brought within the scope of reservation as necessarily triggering the full range of regulatory requirements imposed on the current reserved activities or those individuals who are currently regulated in all the legal work that they do by virtue of their professional membership. The precise obligations triggered will depend on the nature of the risks presented.

115. The reservation of an activity therefore may result in a different mix of approved regulators, authorised persons and regulatory arrangements than we have now.

- **Approved regulators**

116. As explained in paragraphs 101 and 102 above, if a new legal activity is added to the list of reserved legal activities, any organisation wishing to be able to authorise persons to perform that activity will have to apply to the LSB under the Schedule 4 approval process. Among other things the Schedule 4 approval criteria requires that any successful applicant's regulatory arrangements must make "appropriate provisions" in relation to the activity in question

117. There is therefore no intention that existing approved regulators whose members currently undertake the activity will be designated, without scrutiny, as an approved regulator for that activity once the activity is reserved. Existing approved regulators will have to apply for designation. There is no assumption that existing regulatory arrangements will be considered appropriate for the new reserved activity. Existing regulators will have to review their existing rule books and qualification requirements to ensure that they are appropriate and meet the Schedule 4 approval criteria. The starting point for any regulator in developing and reviewing their regulatory arrangements should be the Act's regulatory objectives and the principles of better regulation - not that the status quo is necessarily the best option and any change from that would likely cause detriment..

118. Applications may also be received from existing approved regulators whose current membership does not currently undertake the activity being reserved. Further, applications may be received from organisations that are not currently approved regulators under the Act. This would most likely be existing professional or trade bodies who represent practitioners delivering the relevant activity outside of statutory legal services specific regulation. Again there will be no assumption that the LSB will automatically grant an application from any of or all such bodies.

119. One consequence of a decision to reserve could therefore be an expansion (or reduction if their members currently undertake the activity) in the role or coverage of existing approved regulators, which may need to impose new obligations on their existing membership or broaden the range of their offer. In extremis, the LSB has power to act as "regulator of last resort", although, in the absence of a competent or potentially competent approved regulator, there will need to be an overwhelming public interest case for regulation to be extended before the Board would take on a direct regulatory role in a wholly new area.[41]

120. When any change is made to the list of reserved activities timings and the need for transitional arrangements will need to be carefully considered. There must be a balance between fast implementation to protect consumers and deliver the regulatory objectives against the detriments identified and allowing the market time to adapt. The need to protect against any short-term reduction in the level and types of service required to deliver access to justice will be a key consideration.

- **Authorised persons**

121. There are several routes to becoming an authorised person. The traditional route is an existing approved regulator authorising by professional title after an individual completes a general legal qualification and joins the regulator's practising register. This entitles the individual to undertake the full range of work and provide any services that the regulator oversees. The individual is then regulated in all the legal work that they undertake.

122. Alternatively an approved regulator may have qualification requirements and other regulatory arrangements that are more tailored for authorising a person for separate activities where this can be shown to be beneficial. An approved regulator could focus on a single legal service or an approved regulator that authorises by professional title could also authorise differently qualified or competency assured individuals to undertaken certain activities without an award of that title. For example, although not straightforward, in theory it would be possible in time for an approved regulator such as the SRA to authorise solicitors and also other types of practitioner that do not lay claim to the solicitor title – such as an authorised advocate or an authorised administrator of oaths.

[41] See sections 62 and 73 of the Act

123. Furthermore, historically, legal services regulation has focused on individual lawyers. The Act provides that authorisation is attached to a regulated *entity*[42] and not just the individual. Section 15 of the Act provides that an individual who is authorised to provide a reserved legal activity to the public cannot act as an employee or a manager of a business unless the employing entity has also been authorised to provide the relevant legal activity. In light of this and the move towards outcomes based regulation in the regulatory schemes of some approved regulators- careful consideration will have to be given to how authorisation and regulatory arrangements are split between the individual and the entity.

124. In his report, Clementi said "the change in regulatory emphasis proposed in this review is a shift in emphasis towards regulation of the economic unit and away from regulation of individual lawyers"[43].We agree that future regulation is likely to have a greater focus on the entity and less on the individual.

125. Regulators will therefore face the challenge of deciding when to restrict the activities to individual practitioners. In many circumstances it is likely that authorisation and regulation should be focused on proper systems and controls taking effect at the entity level. The entity would then be free to determine the most appropriate person to undertake different types of work based on the knowledge, skills, competence and experience needed to achieve the right outcome. For certain activities where the approved regulator has established that greater specific before-the-event quality assurance is needed, appropriately qualified individuals within the entity would have to be authorised to undertake certain work. There will be further considerations of how best to ensure that appropriate behaviours and ethics in line with the professional principles are adhered to throughout the workforce. When can this be delivered through the conditions of employment and the culture set by the entity and its owners, partners, senior managers, compliance officers and other colleagues? And when is further individual authorisation and accountability required?

- **Regulatory Arrangements**

126. The LSB considers it probable that any decision to reserve will require each approved regulator designated to regulate the activity to have regulatory arrangements that as a minimum ensure:

- Consumers have proper access to redress at the first tier and to the Legal Ombudsman

- Any entity offering the reserved activity is compelled to adhere to the relevant professional principles

[42] Section 18(1)(a) of the Act provides that an "authorised person" includes, inter alia, a person who is authorised to carry on the relevant activity by a relevant approved regulator. "Person" is defined in LSA s207 and "includes a body of persons (corporate or unincorporated)"

[43] Clementi, Review of the Regulatory Framework for Legal Services in England and Wales, March 2004

- Any entity offering the reserved activity has the right level of systems and controls (for example in relation to client money and indemnification where this is appropriate) to ensure that the work is properly handled and consumers are appropriately protected

127. Other potential remedies are discussed at paragraphs 128 to 137 and would be used where necessary. Through its rules[44], the LSB has articulated a set of tests in relation to designating new approved regulators and approving regulatory arrangements under the terms of Schedule 4 to the Act and considers that these remain relevant in the context of any new reserved activities. Schedule 4 approval criteria provide that we only approve new regulatory arrangements or changes to existing regulatory arrangements that are compatible with the regulatory objectives and the widely accepted better regulation principles. The starting point is that arrangements must be demonstrably targeted at the problems and risks that have been identified in relation to that particular activity and propose the least restrictive way of addressing them. Each applicant will have to demonstrate that their proposed arrangements make appropriate provisions with regards each component of regulatory arrangements specified at Section 21 of the Act. This does not mean that all components must be adopted in full where that is not appropriate for that particular activity and the risks attached to it.

## Regulatory menu

128. Statutory regulation is only one option for protecting consumers and influencing the way in which a provider delivers a service and the standard of that service. We are clear that we favour effective non-statutory options, such as properly enforced general consumer and competition laws and voluntary schemes, wherever possible. A key stage of our review process is analysing these options. Further detail on broader regulatory options is set out at Annex 2.

129. There is a broad menu of preventative and remedial tools that may make up regulatory arrangements in relation to a specific reserved activity. Section 21 of the Act defines the regulatory arrangements widely to include any arrangements that apply to regulated persons. The listed regulatory arrangements include provisions such as: qualification and entry requirements, practice rules, conduct rules, indemnification arrangements and compensation arrangements. The regulatory arrangements also provide the monitoring, supervision and disciplinary regimes of the approved regulators.

130. Preventative tools are designed to offer before the event assurance that the provider is competent and committed to maintaining specified standards. At its most extreme this means controlling entry and may also include, for example, setting conduct and practice codes and other on-going requirements as

[44] Rules for applications for Approved Regulator and Qualifying Regulator designation, Rules for Rule Change Applications and Rules for applications to be designated as a Licensing Authority

conditions of practice. Remedial tools such as compensation and complaints provisions, as well as disciplinary and enforcement regimes, are designed to provide comeback and remedy when things go wrong because of the shortcomings of the provider. Deciding the appropriate mix of preventative and remedial tools will be a matter for the particular circumstances - types of clients, risks of the activities and costs and impacts of any intervention. For example, circumstances where clients are vulnerable and the impact of a poor outcome irreversible (e.g. a prison sentence), then regulation would seek to favour preventative action. Equally, in circumstances where clients are well informed and impacts of poor outcomes reversible though, say, financial compensation, regulation may favour remedial measures.

131. There should be no presumption that regulatory arrangements must always fully adopt all parts of the menu. The menu can be used flexibly and appropriate combinations drawn that are based on cost benefit and other analysis of the particular activity and circumstances. It not simply a hierarchy of interventions or restrictions. The task is to find the right mix to address the particular risks and concerns.

132. There will be further regulatory choices to be made about the shape of the regulations. For example, practice and conduct codes may include outcomes, rules or both and there may be different approaches to monitoring, supervision and enforcement in different situations. We have argued that in most cases regulation would be better targeting outcomes rather than using rules that target inputs[45]. This allows the provider to structure the business more efficiently at lower cost minimising any propensity for gold-plating of inputs while ensuring the necessary identified protections are delivered. To some extent this is already happening with some approved regulators applying outcomes and risk based regulation.[46] There is, of course, nothing to stop the firms, with the assistance of their professional bodies, from going further to distinguish themselves in a crowded market.

133. The starting point for risk based regulation is to facilitate a regulator to allocate its finite resources for inspecting, monitoring and supervising practitioners, but Julia Black argues that it should equally be considered by legal services regulators “to help them analyse what the problems are that they are trying to resolve and how to calibrate regulation to address them”[47].

134. Although more challenging, a regulator can use the same rationale in establishing the authorisation and practising conditions for multi-category or activity providers. For example, it is open to regulators to have a more granulated qualification regime focused more on the provision of narrower specialist services and less on general legal practice. There could be

[45] See LBS discussion document, Developing Regulatory Standards, http://www.legalservicesboard.org.uk/news_publications/latest_news/pdf/21110420_developing_reg_std_finalrb_proof_3.pdf

[46] For example, new SRA and CLC codes

[47] Professor Julia Black, Law, London School of Economics and Political Science, Calibrating Regulation, Legal Services Board, Understanding the economic rationale for legal services regulation -A collection of essays, March 2011

variations of staff qualification, training and supervision requirements across individual aspects of the activity based on the regulator's assessment of knowledge, skills, competence etc needed for that type of work.

135. At Annex 6 we have categorised the menu of regulatory tools that we have identified into four groupings and provided analysis of some circumstances in which the different tools are used. The categories are:

- **Entry and licensing arrangements** including education and training
- **On-going requirements** including training, supervision and risk systems
- **Outcomes and rules** plus monitoring, supervision and compliance
- **After service protections and provisions** including complaints provisions and financial protections

136. In activities where regulation is introduced for the first time, it is simple to imagine how packages of regulatory tools might work. For example, a specialist provider without protected legal title that currently delivers a non-reserved legal activity outside the statutory legal services regulation could select and apply the most appropriate tools for that single activity. It is more complex to select and apply the appropriate tools to deliver both very targeted and proportionate regulation for a specific activity when members of a profession are regulated by title, with the rule book applying to all the work that they do. This is especially so if providers want to deliver multiple services in multiple areas of law for multiple types of consumer.

137. A key feature of our approach will be to work closely with existing and potential approved regulators as part of the review process: these are not challenges we can solve on our own. We do not propose that we have a one size fits all regulatory system with identical rules and regulations across the board. This is not the system of regulation that the Act prescribes. However, we do propose that there should be a shared understanding of what regulation should achieve for any particular activity, the tools that are available and how the tools can be used differently in different circumstances as we continue to move away from mainly title-based regulation of the individual. In our oversight role, the LSB must ensure that the approved regulators demonstrate that their regulations are fit for purpose in this context. We have been given a statutory responsibility to oversee the development of better regulation in the legal services market.

## Optimum standards

138. Our review of whether an activity should be reserved will provide indicators of the level and types of regulatory arrangements that are likely to be required as a minimum to address the problems and protect against the detriments that have been identified. This will inform our assessment of bodies applying to regulate the new activity, as well as the regulatory arrangements that the LSB would have to develop if we were to be called upon as a regulator of last

resort. It will be incumbent on approved regulator applicants to demonstrate that their regulatory arrangements first, meet the minimum requirements and second, show that they are not applying unnecessary restrictions. If appropriate, we may issue guidance under Section 162 of the Act based on our analysis. In this context it is worth noting that Section 4 of the Act provides that we must assist in the maintenance and development of standards of regulation by approved regulators of persons authorised by them to undertake reserved activities. The explanatory notes to the Act suggest that part of the LSB's role is to promote consistency and best practice across legal services regulation.

139. This is not about letting potential new entrants into the market on a "regulation-lite" basis: there are currently no direct restrictions on who provides non-reserved activities. Our aim is to find the appropriate level of regulation. This will mean both bringing up standards to the appropriate level and allowing competition to drive higher standards. Professional bodies will play an important role in helping to distinguish their members in the market place on the basis of quality and high standards.

***Question 11***: What are your views on our analysis of the regulatory menu and how it can be used?

# Going Forward

## A future programme

140. The LSB is seeking views on areas which might be reviewed in the period 2012-15 to inform our strategic planning. We have already committed to action in some areas within our existing business plan such as reviewing the transitional protections for special bodies and reviewing the regulation of the conveyancing and immigration markets. Other areas listed below represent initial thinking and are only set out to encourage discussion about possible priorities for regulatory investigation and frame our proposed approach. Our planning is not just around reviewing whether and where reservation is needed, but wider regulatory decisions about the type of regulation needed in different circumstances. The issues and tests are systemic and the methodology provides as solid a basis for decisions about changing or reducing existing regulation as it does for decisions about introducing regulation in new areas.

141. The LSB's current thinking is that the following areas may be worthy of at least preliminary study:

### *Services delivered typically by special bodies and trade unions*

142. Parliament considered that special bodies (not for profit advice providers, community interest companies and trade unions) may warrant special treatment under the Act. A mixture of special provisions and transitional measures give them some protection from the requirements of the Act, especially as regards the ABS regime. This means that they are able to carry out reserved activities without a licence. However, the Act does leave open the issue for the LSB to consider. In particular the LSB must decide when to switch off transitional elements of the Act.

143. The LSB could consider this simply as a policy issue for certain types of organisation: are there good regulatory reasons, for example deriving from differing levels of risk or potential detriment, for privileging certain types of organisation? However, the regulatory objectives and better regulation principles lead us to ask different questions related to potential consumer detriment and risks to the regulatory objectives.

144. Therefore the LSB will look at the types of services typically delivered by special bodies and, through that, explore the nature of regulation that is required to protect consumers and promote the regulatory objectives, in line with better regulation principles. That approach will lead on to the narrower questions of transitional sections of the Act and will also consider wider arguments about public policy towards not for profit organisations and trade unions.

145. The LSB considers that, as the issues raised are broadly similar, it would also be sensible to consider the appropriateness of the regulatory regime on services provided by trades unions to their members in the same activity.

### *Residential conveyancing*

146. As the recession has impacted heavily upon the property market, there has been substantial discussion about effective regulation. Lenders in the shape of banks and building societies, insurance companies that provide professional indemnity insurance and the professional bodies have traded anecdote and accusation about unfair practices and poor quality decisions. It is difficult to find the evidence that shows either clear consumer detriment or threat to the regulatory objectives but it is important that confidence is restored and consumers, as the quietest voice are not drowned out by more powerful interests. .

147. As with probate, the scope of reservation of conveyancing activity is less than is commonly believed. The scope of the “reserved instrument activities” which forms the current definition effectively relates to dealing with the transfer of land or property under specific legal provisions and does not necessarily capture all forms of risk to consumers, whether arising from fraud or more innocent incompetence.

148. The LSB has started to gather evidence of the issues in parallel with this discussion document so that it can better understand if this currently reserved area should be prioritised for a deeper investigation to see whether change is needed in either the regulatory scope or the way regulation is applied in this area. We have commenced initial fact-finding with the approved regulators most directly concerned and will be broadening that activity to include other stakeholders shortly.

### *General legal advice*

149. This is perhaps the most difficult area to consider. At present, no specific legal services consumer protection requirements exist in relation to legal advice, over and above those which derive from the general responsibilities of individuals regulated in all that they do by virtue of their professional membership. However, advice is increasingly being given directly by specialists without formal legal qualifications – HR specialists on employment law, accountants in relation to tax, and welfare advisers in relation to benefit entitlement.

150. It is difficult to construct even a retrospective case for why consumers of certain legal services should only get access to an Ombudsman scheme, among other regulatory protections, if they chose a provider covered by statutory legal services regulation. The regulatory landscape fails nowhere more so than for consumers trying to make a complaint and having to navigate a complex web of type of service and nature of provider before discovering where, if anywhere, their complaint can go. The Legal Ombudsman is already confirming anecdotally that this is an issue.

151. The requirement on the LSB to promote competition in non-reserved legal services gives a clear locus for this issue to be considered. In addition, the advent of ABS will make the distinction between providers (traditional law firm compared to commercial provider of non-reserved services) less clear.

152. There is therefore a case for considering widely what consumer protection exists for legal services consumers outside of statutory regulation and the extent to which it is adequate. That will need to be carefully balanced against the barriers and anti-competitive effects of additional regulation. Rather than speculate as to the right answer based upon starting positions, the LSB considers that an initial collection and assessment of evidence will shed light on this difficult area.

### *Corporate law (including banking and finance)*

153. The LSB is often told that lawyer clients (e.g. the general counsels of corporate clients) and corporate law firms value regulation. It is certainly a valuable and successful part of the legal services market that plays an important and very substantial role in the economy of England and Wales through supporting business and trade and directly exporting its own expertise around the world. Robust and credible regulation may contribute to confidence and thereby to the commercial strength of this part of the sector (and so to the regulatory objective of a strong profession). However, disproportionate or misapplied regulation may prove positively harmful, in both commercial and policy terms.

154. When considering the economic case for regulation we are struck by the greater symmetry of information and power between the client and the legal services provider in these transactions than in many other transactions. There is evidence of sophisticated decision making by purchasers and of competitive forces at work.

155. There is therefore a question remains about the relative balance of regulatory focus. Is the current balance of regulation right or are there areas where deregulation may be appropriate?

156. The LSB is considering whether to put work in hand to review to what extent regulation triggered by reservation remains relevant in this area in the light of the customer segmentation and what extent a less restrictive regime may offer benefits to corporate customers. In examining this area, the LSB will need to at least consider the importance and role of privilege in this market and the effects of any precedent or Government policy on the subject.

### *Immigration – a special case*

157. Parliament decided some years ago that additional regulation was required for immigration services over and above competition and consumer law. In so doing Parliament did not reserve the matter to lawyers in a manner similar to other reserved activities prior to the passing of the Act but created a distinct regime (through the Immigration Services Commissioner) for immigration services not directly covered by the Law Society, Bar Council and ILEX, with

some overlap regarding oversight of complaints. The Act addressed this in Section 19 with the oversight functions moving to the LSB. The LSB has taken on responsibility from the Immigration Services Commissioner for overseeing the work of those approved regulators whose members offer immigration advice. The Commissioner retains her jurisdiction in relation to those advisors not authorised by one of the relevant approved legal services regulators.

158. Given that additional and specific duty for the LSB in immigration services, it is important to ensure that we understand the market, the risks to consumers and the effectiveness of the different regulatory protections properly. For example, it is noted that there is disparity between qualification requirements for immigration advisers undertaking private client work, legal aid services and those regulated by the Commissioner[48].

159. We will want to approach our evidence gathering in partnership with the Commissioner and the relevant approved regulators. This does not mean that the LSB is prejudging whether there is a case to change the current landscape, but we do want to assure ourselves that the current regulatory structures secure the regulatory objectives.

> ***Question 12:*** Do you have any comments on our thoughts on other areas that might be reviewed in the period 2012-15, including proposed additions or deletions, and suggestions on relative priority?

## Early priorities – will-writing

160. In 2010, will writing bodies requested that the LSB recommend to the Lord Chancellor that will-writing be reserved under the terms of Section 24 of the Act. We rejected that request on the basis that the evidence was not available to underpin a robust decision and there were no proper criteria or a developed approach to undertaking a review. We did however commission formal advice from the Panel about the provision and regulation of will-writing services. In partnership with the OFT and the SRA, we also commissioned a research agency to undertake original research including a "shadow shopping" exercise which shadowed 101 real consumers getting wills from different providers with a panel of experts assessing the quality of the wills. We consider that the evidence demonstrate that there is a strong prima facie case to be answered for making will-writing a reserved activity.

[48] Compulsory assessments are attached to membership of the OISC register; Legal Services Commission contracts make compulsory membership of a different accreditation scheme, with different tests run by the Law Society; and the practitioners who do not come under the oversight of the LSB rather than OISC oversight are covered by the general qualification and authorisation requirements set by their approved regulator under the Act rather than any category specific regime.

161. The Panel's report highlighted many problems faced by consumers when buying a will. This included evidence of poor-quality wills, questionable sales practices and lost wills where companies disappear without trace. The qualitative shadow shopping research demonstrated that too many wills, written by both solicitors and unregulated will-writers, failed to reflect what the client intended and made other basic errors. The Panel also highlighted that inherent features of will-writing services place consumers at risk of detriment. The Panel's primary recommendation was that will-writing be added to the list of reserved activities.

162. We consider that the Panel's report along with the underpinning evidence demonstrate that there is a strong prima facie case to be answered for making will-writing a reserved activity. We consider also that the evidence of consumer detriment that has been reported justifies consideration of whether estate administration should be brought within the scope of reservation, or in the case of probate, if the current reach of reservation is appropriate.

163. The LSB has therefore decided to hold the formal Section 24 and Section 26 investigations necessary to reach a final recommendation on the issue in these three markets. Our intention is to use the process defined in this paper to undertake this work. This is not intended to prejudge the outcome of this discussion but will act as a live case study to help test the effectiveness of the methodology.

164. We plan to organise a seminar to be held in September to which a broad range of interested parties will be invited. The seminar will focus on:

- Defining the specific activities which may need regulation or deregulation
- Seeking information and guidance in relation to the new areas being brought into the investigation
- Discussing optimum regulatory arrangements should the review conclude with the Lord Chancellor making an order for one or more activities to be reserved

165. We aim to consult on proposed solutions in the last quarter of the 2011/12 planning year. A summary of the statutory Schedule 6 process, including any mandatory timescales and consultation requirements is provided at Annex 3.

***Question 13***: Do you have any comments on the approach that we have adopted for reviewing the regulation of will- writing, probate and estate administration?

**Will-writing: live case study**

- There has been **longstanding debate** about the potential need for greater regulatory protections in relation to the **non-reserved will writing activities** for decades. Parliament debated this at the time of the Legal Services Bill but agreed with Ministers that there was insufficient evidence to reach a robust conclusion at that time. The door was left open for the LSB to return to the issue at a later date. We determined to do so in light of the significant number of **case studies** describing severe **consumer detriment** put to us, continued media attention potentially impacting on consumer confidence and legislation in Scotland being introduced to make it **illegal** for wills to be written for a fee by **unregulated practitioners**.

- We **identified a set of potential problems** associated with will-writing for example:

    - The technical quality of wills – validity and whether the will delivers what the consumer wanted
    - Sales and pricing practices
    - Fraud
    - Barriers to consumers making wills

- We then asked the Consumer Panel to develop a broad evidence base of the **prevalence and impact of the different problems in practice**. Methods included:
    - Shadow shopping exercise to assess quality between types of provider
    - A wide call for evidence
    - Consumer and provider surveys
    - Complaints data from the Ombudsman and consumer focus
    - Data from the probate office

- The Panel was asked to **include** within their recommendations whether **further statutory regulation** is required **or** whether **alternative solutions** may be more appropriate e.g. better enforcement of existing protections or promoting voluntary schemes of regulation. Or that no further action is needed.

- The Panel were asked not to assume that the only or best regulatory option will be **reservation to existing authorised persons with existing regulatory arrangements.** The Panel has considered the options (including many of the different potential remedies explored in this paper) and has provided a narrative of the **different problems found and the type of regulatory tools that would most appropriately counter them.**

- In summary the Panel has recommended that **will-writing should be made a reserved legal activity** but that reservation **should not give a monopoly to solicitors.** The panel suggests that other regulators – including existing will-writer trade bodies – whose regulatory arrangements make appropriate

provisions should be designated to authorise their members to carry on delivering will-writing services.

- The Panel **has not been prescriptive** in suggesting what appropriate regulatory arrangements might look like, which is the responsibility of prospective approved regulators for the activity, they do argue that the nature of the detriment suggests that **preventative, rather than remedial measures**, are needed. Beyond this, the Panel has "identified some key ingredients of a scheme" – which would need to be developed following consultation. The ingredients are:

    - **Education** – given the evidence about the poor quality of wills, providers should have to pass formal exams or equivalent qualifications;
    - **Office holders** – given the risk of fraud, providers should be required to appoint a Head of Legal Practice and Head of Finance and Administration (defined roles under the alternative business structures regime);
    - **Conduct rules** – given the evidence of poor sales practices and the incentives for providers to withhold information from consumers, providers should be required to follow a set of rules;
    - **Ensuring ongoing competence** – given our concerns about quality and regular changes to laws and taxation, there should be annual CPD requirements and periodic reaccreditation;
    - **Monitoring compliance** – given consumers lack of expertise, a mystery shopping programme should form part of approved regulators' toolkits. This is an area where existing mechanisms need strengthening;
    - **Redress** – providers should be insured, make contributions to a compensation fund (if estate administration falls within scope) and fall within the jurisdiction of the Legal Ombudsman; and
    - **Discipline** – where providers are guilty of misconduct, they should be subject to a wide range of sanctions including expulsion.

- Given the recommendations of the Panel and the evidence that underpins them, the LSB has determined to initiate the **formal Section 24 and Section 26 investigations** necessary to determine whether or not to make a recommendation to the Lord Chancellor that the **list of reserved activities** should amended. We will also set out what **regulatory arrangements** we think should flow from that.

- As the Panel has highlighted the **close association between will-writing services, estate administration and probate activities** and that consumer detriment may extend across the three markets – all three will be included within the scope of our investigation.

## How to respond

166. Views on our proposed approach are welcome by 5pm on Friday 4 November 2011 – this provides over 12 weeks for interested parties to respond.

167. In framing this discussion paper we have posed specific questions to help inform our final decision. These questions can be found in the body of this consultation paper and also as a consolidated list at Annex 1. We would be grateful if you would reply to these questions, as well as commenting more generally on the issues raised (where relevant). Where possible please can you link your comments to specific questions or parts of the paper rather than making general statements.

168. We would prefer to receive responses electronically (in Microsoft Word or pdf format), but hard copy responses by post or fax are also welcome.

    Responses should be sent to:

    Email: consultations@legalservicesboard.org.uk

    Post: Michael Mackay,
    Legal Services Board
    7th Floor, Victoria House
    Southampton Row
    London WC1B 4AD

    Fax: 020 7271 0051

169. We intend to publish all responses to this consultation on our website unless a respondent explicitly requests that a specific part of the response, or its entirety, should be kept confidential. We will record the identity of the respondent and the fact that they have submitted a confidential response in our decision document.

170. We are also keen to engage in other ways and we would welcome contact with stakeholders during the consultation period.

171. Following the conclusion of this discussion exercise, we intend to publish our approach for making regulatory decisions in Q4 (11/12)

172. We will consult on our work programme for 2012-15 including our proposed priority areas for regulatory regulation within our draft 2012/13 business plan.

173. The next steps for our Section 24 and 26 investigations into the regulation of the will-writing, probate and estate administration markets are set out at paragraphs 163 to 165. We aim to consult on the results of the investigation in Q4 (11/12)

## Complaints

174. Complaints or queries about this process should be directed to Julie Myers, Consultation Co-ordinator, at the following address:

Julie Myers
Legal Services Board
7th Floor
Victoria House
Southampton Row
London WC1B 4AD

Or by e-mail to: julie.myers@legalservicesboard.org.uk

## Glossary of Terms:

| | |
|---|---|
| **ABS** | Alternative Business Structures- Legal firms will be able to offer legal services to their customers in a way that is integrated with their existing services. Or law firms will be able to develop their portfolios to compete across wider areas compared with their existing experience. |
| **AR** or **approved regulator** | A body which is designated as an approved regulator by Parts 1 or 2 of schedule 4, and whose regulatory arrangements are approved for the purposes of the LSA and which may authorise persons to carry on any activity which is a reserved legal activity in respect of which it is a relevant AR |
| **Authorised Person** | A person authorised to carry out a reserved legal activity |
| **BSB** | Bar Standards Board – the independent Regulatory Arm of the Bar Council |
| **CLC** | Council for Licensed Conveyancers – the regulator of Licensed Conveyancers |
| **Consultation** | The process of collecting feedback and opinion on a policy proposal |
| **Consumer Panel or the Panel** | The panel of persons established and maintained by the Board in accordance with Section 8 of the LSA (2007) to provide independent advice to the Legal Services Board about the interests of users of legal services |
| **FSA** | Financial Services Authority – the regulator of all providers of Financial Services in the UK |
| **ILEX Professional Standards Board** | Institute of Legal Executives Professional Standards Board – the independent regulatory arm of the Institute of Legal Executives |
| **Institute of Legal Executive** | Representative body for Legal Executives |
| **LA** or **Licensing Authority** | An AR which is designated as a licensing authority to license firms as ABS |
| **LSB** or **the Board** | Legal Services Board – the independent body responsible for overseeing the regulation of lawyers in England and Wales |
| **LeO or Ombudsman** | Legal Ombudsman - The single organisation for all consumer legal complaints |
| **LSA** or **the Act** | Legal Services Act 2007 |
| **OFT** | Office of Fair Trading. A non-ministerial government department of the United Kingdom, which enforces both consumer protection and competition law. |
| **OLC** | Office for Legal Complaints. NPDB established by the Legal Services Act to establish an independent Legal Ombudsman Service (see LeO) |
| **Principles of Better Regulation** | The five principles of better regulation, being proportional, accountable, consistent, transparent and targeted at cases in which action is needed |
| **Regulatory Objectives** | There are eight regulatory objectives for the LSB that are |

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| | set out in the Legal Services Act (2007):<br>• protecting and promoting the public interest<br>• supporting the constitutional principle of the rule of law improving access to justice<br>• protecting and promoting the interests of consumers promoting competition in the provision of services in the legal sector<br>• encouraging an independent, strong, diverse and effective legal profession<br>• increasing public understanding of citizens legal rights and duties<br>• promoting and maintaining adherence to the professional principles of independence and integrity; proper standards of work; observing the best interests of the client and the duty to the court; and maintaining client confidentiality. |
| **Regulatory arrangements** | Set out the regulatory arrangements that Approved Regulators must comply with in order to be designated as approved regulators for specific reserved activity. |
| **Reserved Legal Activity** | Legal services which may only be undertaken by persons authorised and regulated by a relevant Approved Regulator |
| **SRA** | Solicitors Regulation Authority - Independent regulatory body of the Law Society |
| **Statutory Instrument** | A form of legislation which allow the provisions of an Act of Parliament to be brought into force or altered without Parliament having to pass a new Act. |

## Annex 1: List of questions

***Question 1***: What are your views on the three themes that we have put at the core of our vision for the legal services market? If different, what themes do you believe should be at the core of our vision?

***Question 2***: What is your opinion of our view that the purpose of regulation is to ensure appropriate protections and redress are in place and above this there are real competitive and cultural pressures for legal services to deliver the highest possible standards with a range of options for consumers at different prices? If different, what do you consider that the role of regulation should be?

***Question 3***: In light of the changing market do you think that specific action may be needed to ensure that more legal services activity can unequivocally be included within the remit of the Legal Ombudsman and, if so, how can this best be achieved?

***Question 4***: What are your views of our diagnosis of the weakness of the existing system and the problems within it?

***Question 5***: What do you see as the benefits and downsides of regulating through protected title such as solicitor and barrister?

***Question 6***: What are you views on whether there should be a consistent approach to the allocation of title to authorised persons? What are your views on whether the title should be linked directly to the activities that a person is authorised to undertake or linked to the principal approved regulator that authorises them?

***Question 7***: What are your views on our proposal that areas should be examined "case- by- case", using will-writing as a live case study, rather than through a general recasting of the boundaries of regulation? If you disagree, what form should a more general approach take?

***Question 8***: What are you views on our proposed stages for assessing if regulation is needed, and if it is, what regulatory interventions are required?

***Question 9***: What are your views on the implications of our approach for professional privilege?

***Question 10***: Do you believe that any of the current reserved legal activities are in need of urgent review? If so, which activities do you think should reviewed and why?

***Question 11***: What are your views on our analysis of the regulatory menu and how it can be used?

***Question 12:*** Do you have any comments on our thoughts on other areas that might be reviewed in the period 2012-15, including proposed additions or deletions, and suggestions on relative priority?

***Question 13***: Do you have any comments on the approach that we have adopted for reviewing the regulation of will- writing, probate and estate administration?

## Annex 2: Broader Regulation

1. Regulation extends far beyond the reserved activities. All services now come with consumer protections of some sort. The question for legal services regulation therefore is what is needed above the protections already in place. We must be careful not to unnecessarily replicate what is already there. Before deciding to pursue a regulatory option we must first look across protections already in place outside of statutory legal services regulation – particularly existing consumer and competition law and any other service regulation from different sectors (e.g. Financial Services Authority) that might apply. If there are existing protections in place such as a consumer protection law that should provide protection but are found not to be working, one starting point may be to explore with the responsible body whether improvements to these protections can be made, either to definition, consumer education or enforcement or some combination. However, we should not assume that we should *never* duplicate existing protection, if we come to a conclusion that the risks and the inefficacy of apparently applicable controls are such as to justify a specific intervention.

2. In the context of will-writing it should be remembered that many professional will-writers deliver a high quality service and have signed up to one or more of several, trade body run, voluntary scheme of regulation. These schemes contain entry requirements of different kinds and their own code of standards. Some carry include compulsory indemnification insurance requirements for members and at least one of the trade bodies is proposing to introduce a compulsory bond scheme, an alternative to a compensation fund. [49] Similar schemes exist for providers of many different types of legal services and types of advisor (e.g. paralegals).

3. However, there *are* of course the same risks around the propensity for self-regulation to maximise the provider rather than consumer interest apply and an inherent issue with any voluntary scheme is of course that it is voluntary. This means that a member can opt out at any time, or even be expelled, and continue to deliver non-reserved legal services to consumers.

4. It is clear from both Clementi and the DCA white paper that preceded the Act that there is an expectation that we also consider non-statutory safeguards where gaps in regulation need to be filled. The DCA explicitly sets out that "the options might include:

    a. Trade bodies working on a voluntary basis with the LSB to raise their standards
    b. The LSB approving a trade body under a non-statutory voluntary regime and
    c. The LSB encouraging bodies to seek, via the OFT Consumer Codes Approval Scheme, approval of their codes of practice."

[49] See the Panel's report on will-writing for further detail on the two biggest will-writing trade bodies, Table 8, p.69

5. In many cases the impact of additional statutory regulation could be negative with any benefits being outweighed by unwanted side effects. A key concern is finding a balance between protecting the consumer and the wider regulatory objectives while minimising the burden of regulation that may raise costs and limit choice and access for many consumers. There must be a compelling case underpinned by appropriate evidence – this is a core principle for reviewing regulation.

**Key consumer protection regulation**

**Competition Act 1998**
The Competition Act prohibits agreements which are intended to or have the effect of, "preventing, restricting or distorting competition in the UK". The Act also prohibits the abuse of a dominant position in the UK or part of the UK. Such actions include, "limiting production, markets or technical development to the detriment of the consumer".

**Consumer Credit Act 1974**
The Act provides for how credit providers must treat consumers. Provisions in this Act include, credit providers being required to offer cooling-off periods, and being liable for any breaches of contract or misrepresentations of the good or service that was purchased on credit.

**Consumer Protection Act 1987**
The Act makes producers liable for loss or damages caused to consumers by defective products. Producers have an obligation to ensure that their products are safe and free from defects. The Act places liability on producers, importers and own-branders. It is not concerned with products that are not fit for purpose, which are covered by the Sale of Goods Act 1979.

**Consumer Protection (Distance Selling) Regulations 2000**
The Regulations aim to provide a minimum level of protection for consumers who purchase goods or services by means of distance communication (e.g. Internet, mail order, email, fax and telephone). They include the right to a cooling-off period and the right to cancel the contract and have any money already paid refunded if the supplier is in breach of the Regulations.

**Consumer Protection from Unfair Trading Regulations 2008**
The Regulations prohibit unfair, misleading and aggressive commercial practices. The Regulations include a general prohibition of unfair practices where these could affect the average consumer's behaviour and also ban specific practices that are unfair in all circumstances.

**Enterprise Act 2002**
The Act places conditions on mergers, introduced the criminal cartel offence, and gives the Office of Fair Trading the power to apply to the court to disqualify an individual from being a director of a company. In addition, designated consumer bodies will be entitled to apply for rights to bring damages claims on behalf of named individual consumers.

**General Product Safety Regulations 2005**
The Regulations ensure that all products intended for or likely to be used by consumers under normal or reasonably foreseeable conditions are safe. The Regulations apply to almost all products, new and second-hand, used by consumers whether intended for them or not.

**Sale and Supply of Goods to Consumer Regulations 2002**
The Regulations provide for if a product goes wrong within the first six months, the onus is on seller to prove there's not a fault. It also requires that guarantees offered by manufacturers or retailers must be legally binding, written in plain language and provide clear detail on how to make a claim.

**Sale of Goods Act 1979**
The Act provides that consumers are entitled to demand that their purchases correspond with the seller's description, are of satisfactory quality, and are fit for purpose.

**Supply of Goods and Services Act 1982**
The Act requires businesses supplying services to carry them out with reasonable care and skill and, unless agreed to the contrary, within a reasonable time and to make no more than a reasonable charge.

**Unfair Terms in Consumer Contracts Regulations 1999**
The Regulations protect consumers against unfair standard terms in contracts they make with traders. The Regulations requires that a standard term must be expressed in plain and intelligible language.

**Criminal Law - Fraud Act 2006**
The Act created a new general offence of fraud, which can be committed in three ways; fraud by false representation; fraud by failing to disclose information; and fraud by abuse of position

## Annex 3: Summary of the Schedule 6 process[50]

1. The LSB must follow the same procedure for both a 'section 24 investigation' (regarding an extension of the reserved legal activities) and a 'section 26 investigation' (reduction of the reserved legal activities).

2. Anyone may request in writing that the LSB conducts an investigation into a legal activity (Schedule 6, paragraph 2). If such a request comes from the Lord Chancellor, the Office of Fair Trading, the Consumer Panel, or the Lord Chief Justice, the Board is under an obligation to conduct preliminary inquiries to determine whether a full investigation is appropriate (Schedule 6, paragraph 3). The preliminary inquiry period is the period of three months from the date of receipt of the request, but it may be extended up to a maximum of four months if the Board publishes written reasons for that extension (Schedule 6, paragraphs 3 to 7). If a request for an investigation is made by anyone other than these four parties (or if the LSB otherwise considers it appropriate to do so), the Board may choose whether or not to carry out preliminary inquiries (Schedule 6, paragraph 4(1)).

3. As part of its preliminary inquiries, the LSB may seek advice from either or both of the OFT and the Consumer Panel, who must respond within any reasonable time period set by the Board (Schedule 6, paragraph 5(1) and (2)). In preparing their advice, the OFT should pay particular attention to possible effects on competition within the market for reserved legal services that the proposed changes would have, whilst the Consumer Panel should consider the likely impact on consumers (Schedule 6, paragraph 5(3)). Either body may request information from any person to assist in the preparation of their advice to the Board (Schedule 6, paragraph 5(4)).

4. The LSB may also request an opinion from the Lord Chief Justice. If it has already requested information from either the OFT or the Consumer Panel or both, it must wait until the period for the submission of their responses has ended, and provide a copy of those responses to the Lord Chief Justice for consideration (Schedule 6, paragraph 6(1) and (2)). He in turn must respond within any reasonable timescale set by the Board, and pay particular attention to the likely effects of the proposed changes on the courts system (Schedule 6, paragraph 6(3) and (4)). The LSB must consider and publish any advice provided by any of these three parties (Schedule 6, paragraph (7).

5. The LSB may refuse a request to hold a full investigation after conducting its preliminary inquiries. To refuse such a request from the Lord Chancellor, the OFT, the Consumer Panel or the Lord Chief Justice, it must have consulted with the latter three parties and either have received advice from them, or the time period for the submission of that advice must have expired (Schedule 6, paragraph 8(2) and (3)). The Board must also have provided the Lord Chancellor with a copy of any advice given to it by these parties, and gained his consent to its refusal of the request (Schedule 6, paragraph 8(2) and (4)).

[50] As set out in Legal Services Institute, the regulation of legal services: what is the case for reservation? February 2011 (updated and reissued July 2011)

6. If the LSB chooses to hold a full investigation into either extending or reducing the list of reserved legal activities, it must notify each of the four parties, and within that notification provide both reasons for its decision and a description of the following procedure (including any relevant time limits) (Schedule 6, paragraph 9).

7. The investigation period runs for 12 months following notification of the LSB's intention to conduct an investigation (Schedule 6, paragraph 11(1)). This may be extended up to a maximum of 16 months after consultation with the OFT, the Consumer Panel and the Lord Chief Justice; reasons must be given for the extension (Schedule 6, paragraph 11(2) to (5)). The Board is entitled to set rules regarding the submission of written and oral evidence and representations but must, so far as is practical, consider all submissions made in line with those rules (Schedule 6, paragraph 12). The LSB may pay the reasonable costs of any person providing oral evidence in line with these rules (Schedule 6, paragraph 18).

8. After publishing a provisional report, the LSB should determine whether to hear any further evidence. In particular, it should exercise its own rules in a way that allows practitioners of the legal activity under investigation to make representations on the provisional report (Schedule 6, paragraph 13). The LSB should consider this evidence specifically, and any other information that it considers relevant (Schedule 6, paragraph 15).

9. The final reporting period commences on the date of publication of the provisional report and runs for three months, but may be extended by the LSB on notice to the OFT, the Consumer Panel, and the Lord Chief Justice up to a maximum of five months (Schedule 6, paragraph 17). Within that period, the Board must publish a final report, and provide a copy to the Lord Chancellor. This report should contain: the Board's decision; reasons behind that decision; any recommendation to be made for the purposes of sections 24 or 26 of the Act; and, if a recommendation is to be made, what the Board considers should be the wording of the relevant provision or order (Schedule 6, paragraph 16). Whilst activities are under consideration for becoming reserved, the Lord Chancellor may allow, by order, provisional designation of approved regulators and licensing authorities (section 25).

## Annex 4: Making decisions to review the scope of regulation within a specific area of legal services – draft prioritisation process.

1. This document sets out our proposed approach to deciding priorities about reviewing the scope of regulation within a specific area of legal services.

2. In developing our approach we have considered expectations set out within the government's independent review of legal services regulation[51] and subsequent White Paper[52], which together form the basis of the Act. The proposed prioritisation process draws on the OFT's approach to prioritising market studies.[53]

3. Schedule 6 to the Legal Services Act 2007 sets out the statutory process for considering alterations of reserved legal activities. The process differs depending on where the prompt to consider a review originates.

4. If the Lord Chancellor, the Office of Fair Trading, Consumer Panel or the Lord Chief Justice asks the Board to investigate the case to expand or reduce the list of reserved legal activities we have a statutory duty to make at least preliminary inquiries and reach conclusion on whether to undertake a full investigation within 3 months (extendable to 4 months). The LSB may only refuse the request if has consulted with those bodies and the Lord Chancellor consents to the LSB's refusal (if the request was not made by the Lord Chancellor). Therefore, such requests will be treated as a priority.

5. Schedule 6 also provides that the LSB may undertake preliminary inquiries if any other person makes a similar request (but there is no requirement to do so) or of our own accord where we consider it appropriate to do so. We propose the following approach for making prioritisation decisions in these circumstances.

6. Prioritisation will be based on analysis evidence, intelligence, feedback from our stakeholders and consideration of the LSB's wider strategic objectives and business plan. Consideration of public concerns will be a key component of our analysis.

7. The range of source information that may indicate cause for concern and support the above hypotheses may include:
    a. Research, literature reviews and publicly available information

[51] Clementi, Review of the Regulatory Framework for Legal Services in England and Wales, March 2004
[52] DCA White Paper, The Future of Legal Services, Putting the Consumer First, October 2005
[53] OFT, Market Studies, Guidance on the OFT approach, June 2010. Market studies can recommend self-regulation by an industry, recommend to Government changes to regulations to improve competition or consumer protection, other action such as consumer information campaigns to encourage better purchasing decisions. They may also lead to a market being referred to the Competition Commission for further investigation.

b. Market review information (such as the current regulatory information review and Oxera research into market segmentation)
c. Information gained in the course of the LSB's project and business as usual work
d. Intelligence from front-line regulators including enquiries, complaints and information acquired through monitoring and enforcement work will be of particular relevance
e. Enquiries and complaints made to the Legal Ombudsman and other complaint handling bodies such as Consumer Focus and Trading Standards Departments
f. Information and enquiries made directly to the LSB
g. Views and information provided by the Consumer Panel and other consumer interest organisations
h. Views and information provided by practitioners, businesses, professional associations and trade associations
i. Views of and information provided by government departments and associated non-departmental bodies
j. Views of and information provided by other regulators including the OFT
k. Views and information provided by the judiciary and the courts
l. Views and information provided by other bodies connected with or responsibility for the administration of justice.
m. Views of other interested parties such as academics, commentators , and the legal press
n. Any other relevant information and leads

8. Unless initial information strongly suggests that there is no case to answer, any easily available market information should be pooled at this stage which may assist with prioritisation decisions. If the work is progressed this information base will be developed further. Information may include:
    a. Size and value of market
    b. Number of transactions and range of values
    c. Existing service providers and delivery options available to consumers (and the different market shares)
    d. Typical types of consumer (initially split by individual, small business and business with in- house counsel, but taking account of any particularly vulnerable cosumer groups if such evidence exists)
    e. Range of possible outcomes for consumer from legal process (to identify possible level of detriment if things go wrong)
    f. Interaction with bodies responsible for administering justice such as state, courts and administrators of legal aid.

9. Review initial evidence - at this point a gateway review / initial assessment will be made to decide whether there is merit in prioritising an area and progress the inquiries and work that has been started if there is a prima facie case to be answered. Wherever possible concerns about current arrangements in particular areas and particular activities should be framed in terms of:
    a. A hypothesis of possible problems and causes

b. A hypothesis of possible detriments that may result
c. A hypothesis of potential impact on the regulatory objectives (including competition, consumers and access to justice[54]) and the wider public interest
d. Defined activities which may need regulation

10. This will inevitably require consideration of the likely next steps and the level of LSB (and any other identified) resource needed to progress. If we have not already done so we may seek the initial views of the Consumer Panel at this point to ascertain its interest in and available capacity for investigating the activity or area under consideration and advising the LSB about the consumer interest.

11. A good deal of judgement and reasoned balancing will be required for determining priority area each but we intend to use a set of indicators to frame our considerations. The list is illustrative and not exhaustive. We have closely aligned these to the published prioritisation principles of the OFT and those of the Consumer Panel.

12. The indicators can be summarised as:
    a. Is there evidence to suggest a high probability of significant detriment to the public interest, consumer detriment (which could be measured in different ways such as numbers affected or severity of impact) or detriment to one or more of the other regulatory objectives?
    b. Is there a high probability that there is a systematic failure in achieving the consumer outcomes?[55]
    c. Is there evidence to suggest a significant probability that existing regulation may not be consistent with accepted standards of better regulation?
    d. Is the problem likely to continue or increase without intervention?
    e. Does the work fit with the LSB's vires, strategy and objectives? Are there linkages and dependencies with other parts of the LSB's work programme?
    f. Is the LSB best placed to act?
    g. Is there a realistic prospect that our work will have an impact?
    h. Are resources available to deliver the work effectively?

13. The area or activity under consideration is judged to be a priority area for further work we will review the LSB's overall work programme to allocate a start time and available resource. This may be the next possible opportunity or if deemed to be exceptionally urgent the LSB may decide to re-prioritise the work programme and start sooner.

14. We are likely to publish a statement of our findings, evidence, analysis and hypotheses of harm developed so far at this point. This will include any initial assessment of public interest considerations. We will then either undertake a call for evidence or formally ask for Consumer Panel advice (which will

[54] Emphasis of these regulatory objectives made in DCA White Paper
[55] http://www.legalservicesboard.org.uk/news_publications/latest_news/pdf/consumer_outcomes_final_research_report.pdf

include developing a wide evidence base). This will aim to establish the prevalence and impact of public interest concerns, the consumer detriment / damage to the regulatory objectives and explore the range of possible remedies. The initial evidence base will be expanded with l market evidence, widespread consultation, literature review and potentially other new research.

15. Analysing existing mechanisms and non-statutory interventions: We will assess the extent to which the existing broader legal framework (e.g. consumer law) and infrastructure (e.g. small claims machinery) does or could address the apparent detriment. Analysis of the effectiveness or potential effectiveness of non-statutory safeguards such as voluntary schemes operated by trade bodies and increased consumer education will also be considered where relevant.

16. Option appraisal: In the absence of effective alternatives to statutory regulation, we will consider what forms of regulatory arrangements might be triggered if the activity was reserved to address the issue in the most proportionate way. Cost-benefit analysis techniques and considerations of practicability would underpin this assessment.

17. Identifying impacts: We will identify and assess the impact of proposals to introduce changes to what is regulated and how it is regulated on the broader regulatory framework (e.g. concerning professional privilege and the responsibilities of existing approved regulators) in the legal services sector and beyond. We will consider likely impacts on the courts and the wider administration of justice. We will seek the views of practitioners. We will need to be alive to any unintended consequences on the overall quality of services provided to the consumer, simplicity of the regulatory environment to aid consumer understanding, the culture and norms of the professions as well as confidence in regulated services for consumes (including for “UK plc” as a whole).

18. Recommend reservation: We will publish and invite comment on a provisional report setting out where we are minded to make a recommendation to the Lord Chancellor that the list of reserved activities is extended (or reduced) under the Act if this is the most proportionate response. We will also set out our analysis of what regulatory arrangements should flow from that decision. Dependent on any changes in our analysis as a result of feedback received, we will then make the appropriate recommendation.

19. Optimum standards: Where reservation is recommended we will consider issuing Section 162 guidance on the regulatory arrangements that are most likely to proportionally address the problems and protect against the detriments that have been identified.

20. Application from potential approved regulators: Where there is reservation, we will receive applications from bodies wishing to be designated to regulate the

new reserved activity. This includes applications from existing approved regulators whose members currently provide the legal activity that is being reserved.

21. The point in the process at which the LSB reviews whether there is sufficient evidence to decide whether or not to conduct a full s.24 or s.26 investigation with a view to determining whether or not to make a recommendation to the Lord Chancellor is not fixed. For example, the threshold will likely be lower when the request is made by one of the bodies named in Schedule 6: Lord Chancellor, Office of Fair Trading, Consumer Panel or the Lord Chief Justice.

## Annex 5: Initial analysis of harms identified by Decker and Yarrow against the regulatory objectives

| Cause of harm | How does it impact the Regulatory Objectives? Potential negative effects on: | What could the consumer harm look like? |
|---|---|---|
| Information asymmetry[56] | • *Public interest*<br>Consumers who do not understand why or how they can access legal services may undermine public confidence in the legal system<br><br>• *A2J*<br>Consumers do not obtain the legal service they need or obtain the wrong type of legal service<br><br>• *Interests of consumers*<br>Consumers do not make informed choices about quality, access and value<br><br>• *Citizen's legal rights and duties*<br>Consumers not understanding their rights and responsibilities may increase complaints, conflicts and decrease confidence in the legal system<br><br>• *Professional principles*<br>Authorised Persons that do not provide the appropriate information in the most accessible format to consumers may undermine the profession principle of acting with integrity, maintaining standards or work and acting in the best interests of their clients | Consumers do not know:<br>• whether they need legal services<br>• which legal services they need<br>• where they can get legal services<br>• what questions to ask and may get the wrong service or advice<br>• if they've been sold unnecessary services or products<br>• the risks associated with a particular type of provider |
| Inability to assess quality of service[57] | • *Public interest*<br>Consumers who are unable to assess the quality of they need or have received may undermine public confidence in the legal system<br><br>• *Interests of consumers*<br>Consumers do not make informed choices about quality and value<br><br>• *Competition in the provision of services* | Consumers:<br>• do not get the level of service they want (they either get poor service or a gold plated service)<br>• may unknowingly agree to unfair terms and conditions or purchase unwanted services<br>• may only be able to assess the quality of |

[56] Refer Decker and Yarrow, pp73-74.
[57] Refer Decker and Yarrow, pp73-74

| Cause of harm | How does it impact the Regulatory Objectives? Potential negative effects on: | What could the consumer harm look like? |
|---|---|---|
| | Lack of information provided by providers about the quality of their service may indicate that there are elements of uncompetitive behaviour<br><br>• *Citizens' rights and duties*<br>Consumers who are not empowered are less likely to make informed choices, which would drive providers of legal services to develop the range of quality, access and value that consumers should feel confidence to demand<br><br>• *Professional principles*<br>Authorised Persons that do not provide the appropriate information to assist them to assess the quality of their services may undermine the profession principle of acting in the best interests of their clients | the legal service long after the service has been provided or never (credence good)<br>• are reliant on price to determine the quality of service between providers<br>• may revert to using brands/titles when deciding which provider to use<br>• the high search costs deter consumers from choosing a provider at all<br>• do not assess quality (and price) at all |
| *Inexperience or vulnerability of consumers*[58] | • *Public interest*<br>Consumers who are inexperienced or vulnerable may not have the confidence in obtaining legal services and/or the legal service that they have received, thereby, they do not have confidence in the legal system and the rule of law<br><br>• *Constitution rule of law*<br>Consumers who are inexperienced or vulnerable may not have the confidence in obtaining legal services and/or the legal service that they have received, thereby, they do not have confidence in the legal system and the rule of law<br><br>• *A2J*<br>Consumers do not feel confident or empowered to obtain the legal service they need or obtain the wrong type of legal service<br><br>• *Interests of consumers*<br>Consumers do not make informed choices about quality, access and | Consumers:<br>• lack the confidence to shop around<br>• may be overcharged or purchase goods/services that they do not want or need<br>inexperience or vulnerability is exploited by the provider (intentionally and unintentionally)<br><br>• do not obtain the legal service they need |

[58] Refer Decker and Yarrow, p75

| Cause of harm | How does it impact the Regulatory Objectives? Potential negative effects on: | What could the consumer harm look like? |
|---|---|---|
| | value<br><br>• *Independent, strong, diverse and effective profession*<br>The profession is not fully informed of consumers' needs and how to meet them<br><br>• *Citizens' legal rights and duties*<br>Consumers who are not empowered are less likely to make informed choices, which would drive providers of legal services to develop the range of quality, access and value that consumers should feel confidence to demand<br><br>• *Professional principles*<br>Authorised Persons that do not provide the appropriate information to assist them to determine what services they need and assess the quality of their services may undermine the profession principle of acting in the best interests of their clients | |
| Limited choice in the type providers[59] | • *Public interest*<br>Having limited choice in the type of legal services provider may make consumers lose confidence in the services provided by the legal services market (in terms of type of provider and price)<br><br>• *A2J*<br>Consumers have a limited choice in providers, or cannot find a provider that they like<br><br>• *Interests of consumers*<br>Consumers have a limited choice in providers, or cannot find a provider that they like<br><br>• *Competition in the provision of services*<br>A limited choice in providers may result in limited competition in price and services | • Consumers may only have a limited choice in providers, which may lead to lack of competition in price<br>• A dominant provider may exert its market power and increase prices or limit the range of service available<br>• Barriers to entry may impact on the ability of new entrants entering the legal services market, which limits choice for consumers<br>• Consumer harm is likely to be exacerbated for specialised legal services |

[59] Refer Decker and Yarrow, pp74-75

| Cause of harm | How does it impact the Regulatory Objectives? Potential negative effects on: | What could the consumer harm look like? |
|---|---|---|
| Poor sales practice | • *Public interest*<br>Poor sales practices may create a negative impression on consumers, and therefore, may result in a lack of confidence in the legal system<br><br>• *Interests of consumers*<br>Consumers have are pressured into purchasing legal services/products that they do not want, or are unable to find a preferred provider<br><br>• *Independent, strong, diverse and effective profession*<br>The profession is not fully informed of consumers' needs and expectations and how to meet them<br><br>• *Citizens' legal rights and duties*<br>Consumers who feel pressured into making a decision are less likely to make informed choices, which would drive providers of legal services to develop the range of quality, access and value that consumers should feel confident to demand<br><br>• *Professional principles*<br>Authorised Persons that have poor sales practices may undermine the profession principle of acting with integrity, maintain proper standards of work and acting in the best interests of their clients | • Consumers may be pressured into making decisions that they would not have otherwise have made<br>• Consumers are not informed of their rights and options<br>• Consumers are not informed of how they can make a complaint |
| Poor client care | • *Public interest*<br>Poor client care may create a negative impression on consumers, and therefore, may result in a lack of confidence in the legal system<br><br>• *Interests of consumers*<br>Consumers are unable to obtain the service that they expect<br><br>• *Independent, strong, diverse and effective profession*<br>The profession is not fully informed of consumers' needs and expectations and how to meet them | • Consumers may incur additional costs in rectifying the problems they have with their legal provider<br>• Consumers are not aware of how they can make a complaint |

| Cause of harm | How does it impact the Regulatory Objectives? Potential negative effects on: | What could the consumer harm look like? |
|---|---|---|
| | • *Citizens' legal rights and duties*<br>Consumers who receive poor client care are likely to make complaints, which would result in decreased confidence in the legal system<br><br>• *Professional principles*<br>Authorised Persons that have poor client care may undermine the profession principle of maintaining proper standards of work and acting in the best interests of their clients | |
| Difficulty in switching providers | • *Public interest*<br>Difficulty in switching providers may create a negative impression on consumers, and therefore, may result in a lack of confidence in the legal system<br><br>• *A2J*<br>Consumers are unable to leave the existing provider to find one that they prefer<br><br>• *Interests of consumers*<br>Consumers are unable to go with the provider of their choice<br><br>• *Independent, strong, diverse and effective profession*<br>The profession is not fully informed of consumers' needs and expectations and how to meet them (in this case, advising them how they can go with another provider)<br><br>• *Citizens' legal rights and duties*<br>Consumers who experience difficulty in switching providers may have a negative impact on their capacity and confidence to access services that they need<br><br>• *Professional principles*<br>Authorised Persons that make it difficult for their clients to change providers may undermine the profession principle of maintaining proper standards of work and acting in | • Consumers are 'stuck' with a provider that they are not happy with, which may result in them incurring more costs or continuing to receive a quality of service that they are not happy with<br>• Consumers are not informed of how they can make a complaint |

| Cause of harm | How does it impact the Regulatory Objectives? Potential negative effects on: | What could the consumer harm look like? |
|---|---|---|
| | the best interests of their clients | |
| Ineffective redress | • *Public interest*<br>Ineffective redress may create a negative impression on consumers, and therefore, may result in a lack of confidence in the legal system and the rule of law<br><br>• *Constitutional rule of law*<br>Ineffective redress may create a negative impression on consumers, and therefore, may result in a lack of confidence in the legal system and the rule of law<br><br>• *A2J*<br>A legal system with ineffective redress may deter consumers from accessing legal services or making a complaint<br><br>• *Interests of consumers*<br>Consumers are unable to seek the redress that they deserve<br><br>• *Independent, strong, diverse and effective profession*<br>The profession is not fully informed of consumers' needs and expectations and how to meet them (in this case, FTCH arrangements)<br><br>• *Citizens' legal rights and duties*<br>Consumers who experience difficulty in making complaints are likely to increase the desire to make complaints and decrease confidence in the legal system<br><br>• *Professional principles*<br>Authorised Persons that have inadequate FTCH arrangements may undermine the profession principle of maintaining proper standards of work and acting in the best interests of their clients | • Consumers do not how to seek redress or make a complaint if they are not satisfied with the service<br>• The first-tier redress measures are ineffective |
| Self-regulation framework[60] | • *Public interest*<br>Consumers may consider that a self- | • The professional bodies' rules are not |

[60] Refer Decker and Yarrow, pp74-75

| Cause of harm | How does it impact the Regulatory Objectives? Potential negative effects on: | What could the consumer harm look like? |
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| | regulation framework would not put appropriation consideration of consumers' interests<br><br>• *Interests of consumers*<br>The professional bodies' rules do not consider the impact they would have on consumers<br><br>• *Competition in the provision of services*<br>The professional bodies' rules may place unwarranted restrictions on the range of service, price and quality that are provided by Authorised Persons<br><br>• *Independent, strong, diverse and effective profession*<br>The profession is not fully informed of consumers' needs and expectations and how to meet them. Entry requirements into the professional bodies may restrict the diversity in the profession.<br><br>• *Professional principles*<br>Rules that are made in the interests of the profession may undermine the profession principle of acting in the best interests of their clients | made in the interests of consumers<br>• Restrictions on business models or practice limits the choice for consumers<br>• Complex rules make it difficult for consumers to understand what they can do if they are unsatisfied with the service |
| Regulatory diversity | • *Public interest*<br>Consumers may be confused with the diverse range of regulators and the potentially similar (but different) regulatory arrangements of each regulator. This may lead to a lack of trust of whether all aspects of regulated activity are treated equally by all regulators<br><br>• *Constitution rule of law*<br>The LSB's and the ARs' regulatory arrangements may be perceived as confusing and duplicative, which may undermine our duty to ensure that our work is accessible<br><br>• *Interests of consumers*<br>Consumers may be confused about how they can access a service, how | Consumers may be confused:<br>• about how the service that they obtain is regulated<br>• how they can make a complaint (e.g. some conveyancers could be regulated by the SRA, and not the CLC) |

| Cause of harm | How does it impact the Regulatory Objectives? Potential negative effects on: | What could the consumer harm look like? |
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| | that service is regulated and how they can make a complaint | |
| Regulatory gaps (reserved versus unreserved; regulated versus unregulated) | • *Public interest*<br>Consumers may not understand the difference between reserved and unreserved activities, and regulated and unregulated providers. This may lead to a lack of confidence in the legal system and the rule of law<br><br>• *Constitution rule of law*<br>Consumers may not understand the difference between reserved and unreserved activities, and regulated and unregulated providers. This may lead to a lack of confidence in the legal system and the rule of law<br><br>• *A2J*<br>Consumers may be reluctant to obtain certain legal services if they know that it is not regulated, or regulated to the same degree as RLAs<br><br>• *Interests of consumers*<br>Regulated (but not under the LSA or another Act) and unregulated providers/activities may expose consumers to higher risks<br><br>• *Citizens' legal rights and duties*<br>Consumers may be confused with the complexity between un/reserved and un/regulated activities and providers. This may increase the number of complaints and decrease confidence in the legal system | • Consumers assume that all legal services are regulated<br>• Consumers may need to rely on other laws to seek redress from an unregulated provider, which may result in confusion and extra time to seek redress under a different system (i.e. not via the OLC)<br>• A non-regulated provider may hold itself to be a regulated provider |

## Annex 6: Menu of regulatory tools - overview and narrative

| | Tools | Narrative |
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| 1 | Entry and licensing requirements. e.g.<br>• Education, training, qualifications to enter general or specific practising registers and markets<br>• Requirement to have certain individuals in set positions such as COLF, COFA, HOLP, HOFA<br>• One or more authorised person if undertaking certain activities<br>• Protection of title<br>• Ownership restrictions | Where potential for harm is such that it is necessary to control who should be allowed into a particular market and on what terms. This is both the most extreme and most restrictive position for intervention so requirements should be targeted at identified needs and demonstrably proportionate. There should be no assumption that qualification and entry requirements always guarantee appropriate quality (and value).<br>Education and training requirements are used where knowledge and skills of the individual are considered of paramount importance and guaranteeing a certain level of competence among providers before they are allowed to practice is considered necessary. This may mean general legal qualifications and work based training requirements such as those required to qualify as a solicitor, barrister, ILEX fellow etc or more specialised legal qualifications such as those for trade mark attorneys, costs lawyers etc. It may mean further post qualification requirements (compulsory or voluntary) for particular functions for example accreditation schemes such as the Quality Assurance Scheme for Advocates or on-going requirements such as Continued Professional Development (CPD).<br>Legally protected titles are attached to qualification and being admitted to some parts of the professions (e.g. solicitor, barrister, and trade mark attorney) but not for all (e.g. costs lawyer). Where a title is protected it is a statutory offence for a non-qualified person to hold themselves out as that title lawyer. Legal services regulation, with the professional bodies as approved regulators, usually requires membership of a "profession".<br>There are requirements for at least one person within an organisation with a position of responsibility and personal accountability for ensuring high (and professional) standards to meet authorisation criteria. This may for example be a qualified supervisor of the work non-qualified staff or a Head of Legal Practice acting as the bridge between individual and entity to ensure that standards are maintained.<br>The authorised entity and those at the top of it will play a key role in setting and ingraining the behaviours and instilling ethics in the workforce that together will shape the culture of the organisation. For this reason, and because of the importance of confidence in the legal system to maintain the rule of law, it is vital that only fit and proper persons may own legal services providers. |
| 2. | On-going requirements e.g.<br>• Education, training, qualifications including CPD<br>• Supervision by authorised person<br>• Risk systems and internal processes<br>• Quality indicators | Where controls are needed once a person is practising. This may be for example to ensure that a person is keeping up to date with developments in law or process or that the skills required to apply their knowledge remain sharp. It may be a requirement to progress or take on more responsibility. This may be through choice e.g. a solicitor seeking rights to represent clients in the higher courts. Or because the regulator considers that new responsibilities are inherent in the practice of a role e.g. a solicitor is required to undertake a management course within three years of admission.<br>There will be work which does not require the highest levels of specialist knowledge or skill and where it is unlikely that significant non-correctable consumer harm will result from mistakes being made. In such circumstances restricting work to individuals that have completed qualification and entry requirements such as those for a qualified lawyer would disproportionate and may result in a more expensive service than is required. However, there may remain a level of risk that means that checks and controls on quality |

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| | | will be required. Alternatives may be to allow for non-qualified persons to undertake the work under the supervision of a qualified and authorised person.<br>At present some regulators require that any non-qualified individuals performing legal work within a regulated entity must have their work supervised by an authorised person even though that the work does not appear on the list of reserved activities. This is comparable to normal working practices in other industries where work is delegated by a more senior person with accountability for the quality and outcome to a less senior colleague who is not. Schedule 3 of the Act also provides that individuals who are not authorised persons can perform reserved legal activities under supervision in certain circumstances. For example, an individual without rights of audience may advocate in certain types of court under supervision if they have been assisting in the conduct of litigation.<br>Management and risk systems can mitigate risks to quality where there are choices to be made about work allocation. For example even the smallest providers operate case allocation systems to ensure that work is given work to a person that is able to do it.<br>Systems can also ensure that other known risks are being spotted and managed. For example, this may mean checks on indicators that there may be a conflict of interest.<br>It is increasingly common for larger providers to employ skilled risk managers tasked with developing and operating systems for identifying and controlling risks.<br>Consumer research indicates that consumers would welcome transparent information that would help them differentiate between providers and make judgements about quality. This could include recognised quality marks, complaints data, experience and caseload of provider in different areas. Our Consumer Panel we are currently looking at the essential characteristics that voluntary quality schemes should have to be a robust and reliable signal of quality for consumers. |
| 3. | Outcomes and rules, Monitoring, supervision and compliance e.g.<br>• Codes and rule books governing the professions<br>• Education and training to support codes and outcomes<br>• Professional culture and incentives (Influence, pressure of expectation, norms, reputational risk)?<br>• Regulator activity once on the practising | Having a codified understanding of the standards and expectations that are required of a regulated person is central to most regulatory schemes. Equally important are provisions for identifying where it is likely that they are not being met and / or the activity of a regulated person may result in detriment (either to the consumer or more widely).<br>We have argued that in most cases regulation would be better targeting outcomes rather than using rules targeting inputs. For example setting out the needs of consumers, and the needs of the wider justice system, such as the courts. Prescribed rules setting exactly how these must be achieved are then removed to allow the practitioner, within certain guidelines, the flexibility to decide how to achieve them. Prescription can lead towards a tick box mentality and away from being accountable for thinking about and delivering what are simply expressed consumer (and wider justice system) needs which can be met in a variety of ways.<br>As technology and practice changes it is possible that defining standards of practice rather than outcomes could restrict the ability of providers to offer new ways of delivering services to customers in ways that maintain quality but at a lower cost.<br>Under the traditional model of self-regulation there are high entry requirements, prescriptive rules about what can and can't be done, dealing with complaints of alleged misconduct by individual practitioners leading to disciplinary action. There was little by way of risk assessment backed by active monitoring and supervision.<br>This picture is beginning to change with some approved regulators moving |

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| | register | away from a detailed rule book and towards “risk and outcomes” based schemes. Outcomes are backed by greater monitoring and supervision of the regulated practitioners. The level of monitoring, inspection and supervision that the practitioner can expect is based on an analysis of the level of risk that they present. This creates efficiencies both for providers assessed as being lower risk because they will have to provide less information to the regulator and spend less time complying with monitoring and supervision requirements and for the regulator who expends less resource. Risk analysis is normally undertaken at the entity level rather than individual practitioner level. A firm will get a risk rating and the firm’s systems and processes to mitigate will be looked at.<br>It is not a binary position however and where there is likely only one way of doing something then the regulatory certainly of prescribed rules and regulations will be advantageous. There will also be circumstances where considerations of consumer confidence may be deemed paramount – for example set education and training requirements as opposed to less well defined assessments of capability. |
| 4. | After service protections and provisions e.g.<br><br>• Complaints<br>• Financial protection<br>• Disciplinary and enforcement regimes | A dissatisfied consumer having appropriate redress when things go wrong is a key component within the Act. Section 21(1) and 122(1) requires that authorised person provide their clients with access to a first-tier complaints process and one of the acts major achievements was to introduce a single Legal Ombudsman for individual and small business clients of authorised persons when the first-tier complaints system is not considered to have provided an acceptable outcome in relation to a service issue.<br>Section 21(1) provides that approved persons must have appropriate indemnification and compensation provisions as part of their regulatory arrangements. The definition of appropriate may vary significantly in different circumstances depending on the risks involved. If an approved regulator proposed that provisions were unnecessary in particular situations they would be required to provide convincing justification as part of their application for approval made to the LSB. Although members of some voluntary regulation schemes must have appropriate provisions as a condition of membership – there is not normally any statutory requirement to so for practitioners who are not authorised person under the Act.<br>One of the main arguments cited by people calling for the expansion of mandatory regulation to more legal services is greater certainty about the availability of after the event compensation and remedy. This should not automatically mean that before the event protections including high entry requirements will also be required. Regulators can target regulation on remedial protections and conduct provisions.<br>Equally if you cannot adequately reverse or adequately recompense for the detriment that is likely to be incurred and would not have happened if the advisor was competent – relying on remedial protections will be insufficient and consideration to preventative measures within the available tool-kit should be considered. The level of specialist skill and knowledge, the level vulnerability of the client and the level of detriment will all be relevant to the consideration. |