# Response of the City of Westminster and Holborn Law Society to the Legal Services Board ("LSB") Consultation "Approaches to Quality"

## 1 The City of Westminster and Holborn Law Society

The City of Westminster and Holborn Law Society ("CWHLS") enjoys perhaps the most diverse membership amongst local Law Societies, encompassing as it does, a membership ranging from larger firms, including those which have been called in recent years "the silver circle" down to small high street practices and individual in-house solicitors, including those working for public bodies and government. Our membership includes those who practice at all levels of the profession, including those who regularly represent solicitors in SRA investigations and members of the Solicitors Disciplinary Tribunal, and those who have practised extensively in the field of solicitors' negligence and professional indemnity insurance.

Membership is voluntary and CWHLS is run by a committee comprising 33 solicitors representing a very wide range of specialisms. Its work is carried out by 11 specialist sub-committees, one of which, the Professional Mattes Sub-Committee, concentrates on matters such as regulation of solicitors, and matters affecting their practice, including matters relating to professional indemnity etc.

## 2 A Flawed Approach by the LSB

2.1 The LSB is an oversight Regulator. Its website says that "*The Board itself is responsible for overseeing legal regulators in England and Wales.*" The Framework Document (an Agreement between the Ministry of Justice and the LSB) states that the LSB will achieve its overall aim "*by seeking to improve the delivery of legal services to the general public, and to businesses, by providing consistent oversight regulation to the legal services sector helping to improve performance by ensuring that the Approved Regulators…carry out their functions to the required standard.*"

2.2 This implies that the Authorised Regulators will be responsible for the day to day regulation, with the LSB having a watching brief to ensure that they do so properly. There is a real danger of duplication of effort with accompanying unnecessary cost and confusion to the regulated parts of the legal profession if this division of labour is not adhered to. It cannot be stressed enough that duplication is not in the public interest. The consumer will face muddled messages and some of the extra cost will have to be passed on to them. As a quango, the LSB will inevitably seek to enlarge its role, and may feel that it is safe to do so because the legal profession rather than the taxpayer is funding it. That does not make it appropriate to do so. The Chairman's Foreword demonstrates this tendency. It states that: "*Assessing risk and appropriate targeted responses in particular areas of the legal services market is of course ultimately the task of the front line regulators. As oversight regulator, our aim is to support them in this task, and to deliver*

*frameworks or guidance for consistency and coherency across the whole market."* We do not disagree with that statement. Subject to the need to substitute the word "*primarily*" instead of "*ultimately*", it sets out an appropriately backseat role for the LSB as against the front line regulators. However that is rather contradicted when it apparently goes on to envisage a much more active role for the LSB in saying that: "*The LSB has an important role to make sure that legal services regulation is strong, fair and effective. It cannot do this in an evolving market unless it is also both targeted and agile*."

2.3 In practice the LSB is setting itself an impossible task in expecting to anticipate all the risks in an evolving market. Hitherto that has not been a problem because common standards apply across the board to all solicitors, and the same applies to barristers. All work undertaken by members of those professions is regulated regardless of whether it is reserved work. We understand that the LSB wishes to move away from that approach (and from "brands" such as "solicitor" and "barrister"). The alternative approach favoured by the LSB has obvious dangers for consumers in that lacunae in regulation are almost bound to arise. If work has to be declared as reserved before it can be regulated, that will cause delay. It will also be likely that when the regulation is introduced it will seem heavy-handed because a whole new scheme of regulation will have to be put in place. This seems to us to be creating a problem where currently none exists. No amount of agility and targeting by the LSB can be expected to avoid this. The onus must be on the LSB to justify changing to such a system from one that has worked well and is simple to operate.

2.4 The Consultation indicates that the LSB is afraid of saying anything positive about the regulation of the legal profession to date. Coupled with that is an over-reliance on reports from outside consultants. Common sense and the accumulated experience of the profession should not be ignored in attempting to put the interests of consumers first. In practice the interests of consumers will suffer as a result of a failure to do so.

2.5 One very important subject that is not mentioned is client confidentiality and legal professional privilege. These are fundamental principles of legal advice which are recognised in all free countries. They do however limit the scope for regulators to supervise or test such advice for quality. We refer to this more than once in answering the specific questions in the Consultation. The fact that regulators may have a duty to maintain the confidentiality and privilege is not a sufficient answer to that. Sometimes the work is so sensitive in nature that clients insist on only one partner being aware of it. If there was a danger of the regulators wishing to see this other than at the client's instigation the client would often not be prepared to instruct the solicitor or other lawyer. That is neither in the public interest nor in the best interests of clients. As Lord Taylor of Gosforth stated in the House of Lords case of *R v Derby Magistrates, Court Exp B*[1]*:*

*". ..a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyers in confidence will never be revealed without his consent. Legal professional privilege is thus much more than an ordinary rule of evidence,*

[1] 1996 AC 487, HL

*limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests."*

2.6 In the following paragraphs of this section of our Response we highlight two other areas where clear thinking appears to be absent but is of critical importance to consumers and to the reputation of the legal profession.

2.7 The Consultation identifies "*three dimensions which may exhibit potential for risk to consumers of legal services: technical competence, service competence (client care), and utility of advice (a service of quality).*" We do not disagree with the three elements identified. However they are by no means of equal importance. In our view it is self-evident that technical competence is by far the most important, and the one that regulation should be most concerned with (as by and large has traditionally been the case). (We will refer to utility of advice-which we assume s meant to refer to something other than the technical accuracy of the advice-in our answer to Question 1. As we explain there, it is the element that is least amenable to regulatory intervention.) The Consultation makes the point that consumers will often concentrate on service rather than technical competence. The reason is obvious. They can more readily judge service than they can judge technical competence. That is true even of so-called sophisticated clients with panels of solicitors. They tend to assume competence and monitor service standards. That is the clients' privilege. However it is a common phenomenon that clients have a different view of the qualities of individual practitioners than that held by their colleagues. The clients will be more aware of the quality of service provided by the individual, and will tend to give instructions on that basis. The individual's colleagues will be more aware of his or her technical competence, and if they were choosing a solicitor for their personal work would tend to give instructions on that basis. The adage that "the customer is always right" is a truism in marketing terms. It is not a sure guide to the quality of legal work.

2.8 This can be tested by looking at the potential impacts of failures in each. Service failures may leave clients discontented, and potentially leave the lawyer with a finding of inadequate professional service and a need to make relatively modest compensation. Commercial clients will probably not complain to the regulators but will speak to the firm involved and/or not instruct them again. A technical failure on the other hand could leave the client with a major problem and expose the lawyer to a major negligence claim and liability to pay very heavy damages. (In certain circumstances it could also lead to disciplinary action against the lawyer.) The problem is that service failures will be readily apparent but technical incompetence may not become apparent for many years. Unless and until it becomes apparent, the client may well be under the impression that the lawyer guilty of technical incompetence is a finer lawyer than the lawyer guilty of a service failure. This is a classic case where the client's needs and perceptions may not be the same. Regulation has a part to play in protecting the clients from the risks that they are not aware of.

2.9 This leads to our second point, which is that the Consultation seems to downplay the importance of educational and other requirements for entry into the profession. It refers to them as a barrier to entry and thus an impediment to competition. It is time for the LSB to accept the obvious reality on this issue. We accept that the LSB is required to promote competition in the provision of legal services. We do not object to that. Up to a point it is reasonable for a new body to look afresh at

issues which may have been taken for granted for a long time in case they are in need of revision. However there comes a point where this becomes fudge.

2.10 By definition the educational and other requirements for entry into the profession are a barrier to entry. We would expect a sophisticated regulator to recognise and state unequivocally that they are a necessary and proportionate barrier which helps to ensure that practitioners of the law have an understanding of the law and legal ethics. What are sometimes referred to as "day one outcomes" are impossible without that. To say that this hinders competition in the legal services market is only true in the sense that it prevents those with no knowledge of the law or legal ethics from offering legal services. In part 3 of this Response we refer to an example (and there are others) of the phraseology of the Consultation apparently suggesting (we hope unintentionally) that LSB questions the need to prevent them from doing so. The LSB should reflect on the message that this sentiment gives out in a paper ostensibly addressing quality in the provision of legal services.

2.11 These educational and other requirements for entry into the profession requirements may not be sufficient in themselves to ensure quality in the delivery of legal services. However the LSB has not suggested that there is any sensible alternative to insisting on such requirements as one of the core elements (and the most important because without it nothing else is likely to be effective) in ensuring such quality. Both robust common sense and past experience indicate that there is no alternative. There should be no more fudge on this point. There is already considerable competition in the provision of legal services, and that will no doubt increase. However it should be combined with upholding proper professional standards of competency and integrity.

## 3 The Language of the Consultation

3.1 We feel it necessary to protest at the language of the Consultation. It is written in the impenetrable modern jargon parodied by Magnus Linklater in an article in "The Times" headed "*I'll be plain: structurise step-change input priority-wise for cognizable advances"*. He described how a friend tried to explain to a local education authority that a school was small, friendly and offered new opportunities to pupils who found learning in bigger schools difficult. Despite the clarity and simplicity of that description, the LEA was polite but non-committal. In order to obtain a positive reaction it became necessary to re-phrase this as follows: "*This school offers a pupil-orientated experience for those who have found the larger learning environment educationally challenging. It is one where cognitive skills are prioritised, using delivery mechanisms tailored to individual needs, with outcomes benchmarked according to a properly monitored evaluation framework."*

3.2 Magnus Linklater developed this point by saying that the rules of this modern jargon include:

- "*Never use one word when six will do. Thus, "improving "becomes "the incremental acquisition of ongoing knowledge"…"*

- *"Avoid precision - talk about "issues around" something rather than the point at issue, "development priorities" rather than aims, "development mechanisms" instead of how you do it. Leave them still trying to work out the meaning of the last phrase you used while you blind them with the next one. "Transformational processes" is a good one, "evaluation framework" another."*

3.3 There are uncomfortable reflections of this gobbledygook in the language used in this Consultation. The entire paper is full of "management speak", a language revealing the background of management consultancy of the authors. Is it necessary to use the expression in paragraph 31 "regulated cohort"? The LSB's language is impenetrable, supercilious, antagonising. We note with great regret and concern that the oversight regulator of the legal profession adopts such jargon. A good example of how this can be improved is provided by the lucid and human language used by the Legal Ombudsman in its papers.

3.4 This is an important point. Lawyers are often criticised for not using clear language. However good lawyers try to draft clearly, using legal expressions only where they aid understanding because they have an established meaning. CWHLS awards a prize for trainees who can demonstrate *"ability to reduce a complicated subject to simple and lucid language which is suited to a lay client*". They would not be commended for using expressions such as "*granularity of understanding*" (as appears in paragraph 27 of the Consultation). If the regulators cannot make their meaning clear then that creates uncertainty and gives a very poor impression both to the profession and to the public.

3.5 There is an added concern that the language of the Consultation hides a lack of clarity of thought by its authors combined with ill-informed preconceptions as to the regulatory requirements of the profession. We could quote several examples of this. A good one is paragraph 7:

"*This in itself may require a fundamental shift by regulators, since assurance of technical competency has historically, and continues to be, focused upon educational attainment and requirements for entry and retention within the profession. Whilst these might be held out as protecting quality, it is difficult to accept that they serve as proxy indicators for all aspects of quality assurance such as demonstrating continued competency*." All this is saying is that the educational and other requirements for entry into the profession may not be sufficient <u>on their own</u> to ensure quality. That is to state the obvious. However (as referred to in part 2 of this Response), it is alarming that the paragraph then seems to disparage these requirements with a complete change of track in the following sentences of the paragraph: "*A continued focus upon barriers to entry, and indeed the scale of barrier this presents, hinders competition in the legal services market*."

3.6 The final convoluted sentence of paragraph 7 seems to be a good example of unnecessary verbiage stringing together a series of random thoughts: "*Nor does it afford the agility necessitated of professional regulation in an evolving market where traditional descriptors such as number of partners are becoming out-dated and need to be swiftly replaced by more appropriate descriptors, for example through market segmentation describing the type of legal activity and type of*

*consumer."* This has nothing to do with the educational and other requirements for entry into the profession, which is the subject addressed at the beginning of paragraph 7. It just adds to the impression of incoherence and lack of clarity.

3.7 The Consultation refers to utility of advice as one of the elements of quality in the provision of legal services. Clarity and precision of language is an important component of this. The LSB should take note and set an example.

## 4 Response to Questions in the Consultation

**Question 1: In your experience, when consumers do not receive quality legal services, what has usually gone wrong? Where problems exist, are these largely to do with technical incompetence, poor client care, the service proving to be less useful than expected by the client – or something else?**

Matters can go wrong for a whole host of reasons. Some of us have experience of professional indemnity claims in defending lawyers. Their insurers and the Solicitors Indemnity Fund ("SIF") could point to several common failures such as failure to comply with time limits. Overwork and poor diarising are much more likely to be the cause of these than any of the suggested reasons. Lawyers are fallible and will occasionally make mistakes, particularly if they are working under pressure.

Technical incompetence will inevitably cause a significant number of problems. However that expression can give the wrong impression. In our experience it is rare for solicitors to be unfit to practice by virtue of general technical incompetence (although a few such solicitors do exist). More common will be the case that the solicitor has made an error on a particular point of law. Sometimes that will be due to failure to keep up with changes in the law. Given that no practitioner will know all the law, it is not always easy for lawyers to recognise where an issue (such as a regulatory issue) arises on which he should seek help from a colleague or specialist. (In our experience continuing education is important on the specialist areas of practice undertaken by individual solicitors. However it is sometimes important to extend continuing education to areas in which that solicitor does not intend to practice so that he or she will recognise that say a regulatory issue has arisen on which he should seek help from a colleague or specialist. Otherwise these issues can be missed.)

Poor client care can be the cause of smaller problems, but are seldom the cause of negligence claims. As mentioned above, clients will often be more aware of such issues than of more significant underlying ones.

Cases of advice proving less useful than expected by the client fall into a different category, assuming that no negligence or poor client care is involved. They are the least susceptible to regulatory intervention, because the lawyer has not as such done anything wrong. Such cases are more likely to arise in the provision of non-standard legal services. For instance they are unlikely to arise in the case of a client buying or selling a house, where the desired outcome is clear. It is however possible for learned advice to explain the client's position accurately and well but fail to advise in a practical sense what the client should do next. Sometimes it may advise a course of action that may be technically correct but is overly complicated and expensive in practice. Quite often this is due to inexperience of the real world. This can be

covered during the training contract and by supervision of junior solicitors. Equally the ability to discuss matters with a colleague can often be very helpful in arriving at a practical solution.

**Question 2: Would it be helpful if the regulators approached issues of quality by looking separately at different segments of the legal services market? Which segments do you perceive as being greatest risk to consumers?**

In the immediate future we think it would be sensible to concentrate on the impact on the legal services market of Alternative Business Structures.

**Question 3: How can regulators ensure that regulatory action to promote quality outcomes does not hinder (and where possible encourages) innovation?**

The Consultation has no practical suggestion. Innovation is unlikely to emerge from any positive action by the regulators. It can be stifled by it. Innovation is stifled by too much regulation and cost. Stability and certainty are also important. The regulators must therefore make it clear what standards (such as standards for entry into the profession) are essential and permanent. It should keep other interventions to the minimum necessary.

As mentioned in part 2 of this response, the LSB is creating a problem for itself by seeking to move away from the concept that all work done by a lawyer in the course of his practice is regulated work. If it stuck to that concept it could react much more quickly and less heavy-handedly once problems are identified.

It is also important to have a genuine and continuing dialogue with the profession. Genuine means that it is two-way. The regulators have much to learn from those with direct knowledge of legal practice. Often experienced practitioners can point to issues which the regulators had not thought of.

**Question 4: What balance between entry controls, on-going risk assessment and targeted supervision is likely to be most effective in tackling the risks to quality that are identified?**

The Consultation does not spell out what it means by on-going risk assessment and targeted supervision. Talk of a balance between them and entry controls misses the point. Entry controls dealing with matters such as the education in law and legal ethics are essential. They are probably still the most important requirements. Without them nothing else is likely to succeed. Continuing education also has a part to play. However it must have the basic legal knowledge to build on.

As explained in our answer to question 6, we are sceptical about "consumer-empowerment".

We reserve comment on targeted intervention until we know what is proposed. We repeat however that it will be important to keep a close eye on Alternative Business Structures so as to address any unforeseen problems at an early stage..

**Question 5: Quality can also be affected by external incentives and drivers. Some examples include voluntary schemes (for example the Association of Personal Injury lawyers (APIL) Accreditation), consumer education and competition in the market place. How far do you think these external factors can be effective in tackling the risks to quality that exist? Which external factors do you think are most powerful?**

We must protest at the statement that historically the "*requirements for qualification…was to erect a barrier to entry to protect the legal qualification from competition"*. That is insulting and betrays ignorance of the legal profession and its history. It seems to be part of a general trend in the Consultation to downplay the importance of the educational and other requirements for entry into the profession. The upholding of proper professional standards has always been an important part of the ethos of what used to be referred to as a learned profession. Members were jealous of their reputation for learning and integrity and imposed regulation to uphold them. That was in the interests of clients. Rules about conflict of interest and putting the interests of the client above those of the lawyer were not introduced out of self interest.

Increasing specialisation has been a feature of legal services for a long time. Generalists are on the decline. Some voluntary schemes to bring specialists together will be better than others at promoting quality. They can also all too easily serve more to promote the lawyers rather than to increase their competence. Equally some areas of practice more readily lend themselves to such categorisation than do others. Personal injury lawyers may all have some common areas of interest. Lawyers in what different firms may categorise as their media departments could be doing completely different types of work from each other, so that an attempt to form a scheme embracing them all would achieve no purpose. Partly for that reason such schemes are best worked out by the market rather than by the regulators. They are not a panacea. They will not be appropriate for all areas of law; and some will prove ephemeral because the nature of the work will change.

There are also the vital issues of client confidentiality and legal professional privilege. Some of our member firms could not contemplate any form of accreditation which would involve outside inspection of their files. Their work is too sensitive for that. The fact that regulators may have a duty to maintain the confidentiality and privilege is not a sufficient answer to that. Sometimes the work is so sensitive in nature that clients insist on only one partner being aware of it. In such cases clients would not wish to share their confidential information with a regulator.

It is sensible for regulators to share information in appropriate circumstances. However we are sceptical of the statement in paragraph 50 that:-

"*Segmenting services and consumers of those services will provide a much more targeted and proportional approach. Sophisticated consumers can assess risk and determine their degree of acceptance of it or requirements for its mitigation. It is unlikely that the individual consumer is able to mirror this. The regulators interventions could therefore be centred upon these less empowered users."*

We have three points on this:

i) There is a serious danger in segmenting the profession. Because of the fluidity of legal practice, the segments can change, so that models become outdated. In addition we repeat the point that is important that lawyers know something about the law outside their specialist areas because they will otherwise not be able to recognise that a legal issues outside their immediate specialisation needs to be addressed. We have already made the point that whilst continuing education is important on the specialist areas of practice undertaken by individual solicitors, it is sometimes important to extend continuing education to areas in which that solicitor does not intend to practice so that he or she will recognise that say a regulatory issue has arisen on which he should seek help from a colleague or specialist. Otherwise these issues can be missed.

ii) It is also dangerous and misleading to draw too much of a distinction between so-called sophisticated and other clients, just as there is in drawing a distinction between commercial and private clients. The Consultation seems to recognise that so-called sophisticated clients are not always able to judge technical competence. The point of consulting a lawyer will usually be because he or she is more knowledgeable about the legal issues than the client (or consumer of the legal services). Our members include in-house solicitors who instruct outside lawyers. They would certainly not welcome lower standards of regulation being introduced in respect of the work done for their employers. Often companies employ one lawyer to cover all the legal issues encountered by the company – it is impossible for them to be sophisticated consumers of legal services in all those areas.

iii) Hitherto it has always been the case that common standards apply across the board to all solicitors, and the same applied to barristers. We understand that the LSB wishes to move away from reliance on the brands of solicitor and barrister. It should reflect on the obvious dangers this course of action poses. It is much easier to regulate a profession on the basis that all the work undertaken by its members is regulated regardless of whether it is reserved work. That avoids lacunae in regulation developing as they are otherwise bound to do, because in practice regulators cannot be expected to anticipate all developments in the provision of legal services. The onus must be on those seeking to change that approach to justify such a proposal, which has very real and apparent dangers for consumers of legal services.

**Question 6: Another possible tool for improving quality is giving consumers access to information about the performance of different legal services providers. How far do you think this could help to ensure quality services? How far is this happening already?**

We disagree with the statement that "*Client care is not proactively quality assured; rather it is a reactive process triggered by consumer complaint or fitness to practise investigation and is therefore an "after the event indicator."* Many of our member firms proactively promote good client care, and we know that that is a common phenomenon among solicitors' practices. It is of course true that regulators will tend only to be made aware of the negative stories.

We have always supported the Legal Ombudsman's practice of publishing material that may help the profession to benefit from experience of mistakes.

However this proposal seems to envisage the very different suggestion of essentially giving details of the complaints history of firms and possibly of individual lawyers.

We are sceptical about the value of this suggestion because any information available is likely to be partial and could be misleading. It could thus give a false choice to consumers which may not be in their best interests. We would add the following points to illustrate the problems inherent in the suggestion being put forward.

i) The material available will tend to be the negative stories and may give a very unbalanced view of a firm's performance. That will be compounded by differences in the extent to which material will be made available for different types of work. As mentioned above, commercial clients will often deal with matters privately within the firm so that no information is available to the regulators. That may suggest a misleading comparison with firms specialising in areas of the law more likely to give rise to complaints.

ii) An even more serious lacuna is that usually the more serious negligence claims will not enter into the regulators' statistics. They fall outside the Legal Ombudsman's jurisdiction, but usually do not involve professional misconduct.

iii) It would be quite wrong for the regulators to seem to endorse the type of gossip and uncorroborated rumour found on some websites. That could actively mislead consumers. It could also expose the regulators to defamation claims.

iv) Legal directories have their place, but in our view it is a limited one. They cannot always readily compare firms because they do not divide their departments up in the same way. They are also overly dependent on the firms and their marketing departments providing the material they rely on.

v) Directories and any other proposed scheme also face the fundamental problem that most legal work is confidential and subject to the client's privilege. Clients would not welcome any intrusion by regulators in an oversight capacity. The fact that regulators may have a duty to maintain the confidentiality and privilege is not a sufficient answer to that. Sometimes the work is so sensitive in nature that clients insist on only one partner being aware of it.

vi) In contentious matters firms and barristers will boast of their successes in reported cases. However it is only in rare cases that a client's best interests are served by bringing a matter to trial. Often the best work is done under the cover of confidentiality so that no details can be given. That will usually be the case where lawyers successfully persuade a claimant not to pursue a claim against their client or reach a settlement. Confidentiality is usually a condition of mediations.

vii) Some of us have in the past had experience of regular users of legal services who have asked their panel of solicitors to share information with them and with other panel members. This included comments on particular barristers. Quite apart from the data protection issues this would now give rise to, such information often proved counter-productive in practice. Some barristers became overwhelmed with work because one panel member had recommended them. This diminished their

usefulness to those which recommended them and impeded the instruction of barristers who were more available and were often more suitable for the particular case. (Often the barristers recommended received other types of work from other panel solicitors for which they were not as suited as others would be.) Equally information rapidly became out of date or inaccurate. A barrister could be characterised as "a poor advocate" based on one experience many years previously. Currently others found him to be a first class advocate. Some comments appeared to be based on false premises or misunderstandings.

If this was the experience of sophisticated users of legal services who were able to target the information they sought to share, it can be readily seen that unsophisticated clients might be ill-served by this.

viii) The Consultation rightly identifies the technological risks involved. Sometimes disgruntled users of legal services (and others) conduct vendettas against lawyers based on false premises. Frequently they will not even have been a client of the lawyer complained about. It often happens that the lawyers complained about successfully acted for the complainant's opponent. Thus they provided a good service to their client, but the complainant will portray them very differently. It is not difficult to envisage that this could pose a real threat if the technology had insufficiently robust defences against such complainants (and it would be difficult to be confident that it always would have sufficient defences).

**Question 7: What do you believe are the greatest benefits of such transparency? What are the downsides and how can these be minimised?**

This question follows a section headed "Utility of Advice" which is earlier referred to as the advice not being as useful as the client expected. That is unlikely to lead to a successful negligence claim, so insurers will probably have limited useful information as to it.

However on the general principle of asking professional indemnity insurers to share information with the regulators, we think it essential to check the data protection and confidentiality issues. We also think it essential to discuss the issue with the insurers. With all the research apparently commissioned to underlie this Consultation we find it very strange that such a proposal should be floated without first conducting these relatively simple and practical pieces of research. Insurers may not be happy to share information except perhaps on a generic basis. It would increase the burden on them at a time when market capacity is diminishing. In the days when SIF was the sole provider of indemnity this would have been easier. In an open market where firms may change insurers this may be more difficult. Insurers such as Independent or Quinn have left the market so their information is unlikely to be available. If insurers were asked to share information on individual practices that could expose them to claims by practices which felt that they had been unfairly prejudiced. Insurers have a choice as to whether to accept a particular risk, but might not relish having to justify their decisions.

It is very important that lawyers are open with their insurers and notify them promptly of circumstances likely to give rise to a claim. If however lawyers knew that such notifications were reported to the regulators it would provide an incentive not to

notify. That would be a serious downside to the proposal. There are other practical problems. It would be difficult to fairly deal with the following scenarios.

- Circumstances that might give rise to a claim may be notified but no claim might in fact be made.
- A claim might be made but not pursued.
- A claim is settled subject to a confidentiality clause.

Even if the proposal is practical, we do not think that too much faith should be put into its utility. From experience of insurers, we would say that it should not be assumed that the information will all be of a very detailed or sophisticated nature.

**Question 8: The table (Figure 3) gives some examples of how risks to quality can be mitigated and actions that can be taken by regulators to ensure this happens. Can you suggest any other actions that can be taken?**

The LSB would do better to build on the strengths of current regulation of lawyers, and in particular of solicitors and barristers. They are currently regulated in all the professional work they do regardless of whether the work is reserved work. That is the model that gives greatest client protection.

**Question 9: Which of the possible interventions by regulators do you think likely to have a significant impact upon quality outcomes?**

The most practical (and therefore the ones most likely to work in practice) are entry and authorisation and CPD requirements. We are not clear how CPD will be "outcomes focused assessed". Learning from mistakes is helpful and can be used in training and in appropriate cases into standards (although new standards should only be introduced very rarely). However we would urge a healthy scepticism as to what can realistically be achieved if regulation is not to become plodding and heavy-handed. The more ambitious-sounding the proposals are the less they are likely to be satisfactorily implemented. Keep it simple.

**Question 10: To what extent should the LSB prescribe regulatory action by approved regulators to address quality risks?**

On the whole it should avoid doing so. It is in any event too early to be thinking of this, and there is a real danger of getting it wrong. The front line regulators should be allowed to work out how best to do their own job.