

Enhancing consumer protection, reducing regulatory restrictions

Summary of responses to the discussion paper and decision document

This Decision Document may be of interest to:

Approved legal regulators

Providers of legal services

Legal representative bodies

Legal advisory organisations

Other third sector organisations

Consumer groups

Law schools/universities

Legal academics

Members of the legal profession

Accountancy bodies

Potential new entrants to the ABS market

Think tanks

Political parties

Government departments

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Executive summary

1. This document explains 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). Having reviewed the responses to our discussion paper “Enhancing consumer protection, reducing regulatory restrictions”, there appear to be three options for taking this work forward:
 - Take no further action and intervene only in response to specific problems such as will-writing and estate administration
 - Argue that all legal activities should be brought within the scope of existing legal services regulation that applies to the majority of the legal services market
 - Seek to tackle problems in the market caused by the current pattern of reserved and unreserved activities in a segmented approach, focusing on risks
2. It is our view, and the view of the vast majority of respondents to the discussion paper, that the current pattern of reserved and unreserved activities is no longer fit-for-purpose. It does not deliver the regulatory objectives. It does not deliver the regulatory protections and certainty that consumers and the public require. Professor Stephen Mayson’s paper¹ illustrated the lack of a consistent rationale for the existing list of reserved activities. We believe that the LSB must therefore take a leadership role in ensuring the appropriateness and effectiveness of the scope and regulation of reserved legal activities going forward. This aligns with the mandate provided to us by the Act - in particular sections 24 and 26.
3. We reject the option to pursue the regulation of everything based on the existing models of legal services regulation, such as the solicitor model. It is our view that this currently makes little differentiation between the different segments of the market which carry very different risks. For example, the risks for individual consumers purchasing legal services around “life events” are very different than those faced by large businesses regularly purchasing legal advice. Moreover, such an untargeted approach seems at variance with better regulation principles.
4. Therefore, we reject immediately moving to bring all legal activities within existing legal services regulation. We believe that analysis of the risks and proportionate regulatory protections should precede any extension. We are not convinced that approved regulators’ existing approach to tailoring regulatory interventions is yet developed enough to avoid unnecessary regulatory burdens if extended to all legal activities.

¹http://www.legalservicesinstitute.org.uk/LSI/LSI_Papers/Discussion_Papers/Reserved_Legal_Activities__History_and_Rationale/

5. The approach we favour therefore is to tackle problems in a risk based manner segmenting the market where common risks are identified. This approach is not without challenges. At an implausible extreme, such an approach would result in regulation tailored for each individual transaction based on its risk of harm. Clearly some aggregation is appropriate to make regulation practical and proportionate. In some cases, such as will-writing, probate and estate administration, activity based segmentation makes sense. We have published alongside this document a consultation paper on our proposals for the regulation of these activities.
6. However, we have also concluded that a strong case has been made for looking at a higher level aggregation, namely all general legal advice for individual consumers. We intend to initiate an assessment to see whether there are common risks and features across this segment that indicate that the regulatory objectives would be best served by reservation delivering a common minimum set of regulatory protections. It should be stressed that this approach is predicated on assessing the *minimum* levels of protection required. For example, the starting point may be consumers having proper access to redress at the first tier and to the Legal Ombudsman.
7. We propose to use as a starting point for discussion a definition of “general legal advice” that uses terminology from the definition of legal activity contained in section 3(12)(3) of Act –

The provision of legal advice or assistance in connection with the application of the law or with any form or resolution of legal disputes
8. Our view is that it is may well prove impossible to aggregate general legal advice into a single activity. To target the work further, we propose to consider consumer segmentation from the outset. We will initially focus on the most vulnerable group – individual consumers. We will exclude all large business. It may be sensible to include in our initial scoping exercise advice to self employed people and some small businesses. We will need to consider where we draw the boundary between those businesses covered and those outside of the regulatory protection. We will do so with reference to the problems that regulation is seeking to address and the regulatory protections likely to be introduced. The existing boundaries for complaints to the Legal Ombudsman may provide a useful model for this work.
9. We propose to exclude from our concept of “general legal advice” all litigation and advocacy activities.
10. We continue to believe that the only feasible approach to assessing the need for regulation above any basic minimum is to prioritise areas for analysis. It is our expectation that on-going developments in the operation of proportionate outcomes and risk based regulation by approved regulators will allow such analysis to take place within the approved regulators themselves. More sophisticated risk profiling would allow for assessments about the risks presented by different activities, consumers and business models to be matched by proportionate regulatory responses according to the particular

circumstances. This could inform decisions about authorisation as well as the level of monitoring, inspection and supervision that providers can expect.

11. As set out in the discussion paper, we expect to focus on regulatory solutions favouring entity based regulation as we believe this best matches the consumer experience in purchasing a legal service and enables more effective risk monitoring and intervention by regulators. Both authorisation and regulation would likely to focus much more on the entity and less on the individual. Where requiring authorisation of an individual is deemed appropriate we anticipate that that this would likely involve greater bespoke authorisation for the activity. Reservation should not result in restricting activities to individuals on the basis of their professional title.
12. We are not convinced that the existing legal services regulators are currently able to deliver such a tailored regulatory solution. We expect our work on regulatory standards to be able to support future judgements about whether the approved regulators are developing risk based approaches sufficiently to facilitate such tailoring in the future - once the basic minimum regulatory protections have been established. In the fullness of time, this may lead to further questions about the future role of the LSB or the need for changes to the architecture of legal services regulation.
13. Further, in drawing a definition of general legal advice for individual consumers we will need to be careful that we avoid creating rules that prevent the provision of help, for example in filling out benefit forms, by creating an unnecessary degree of exclusionary “professionalization” for activities that are currently delivered at relatively low risk by non-lawyers. We will need to draw a careful line in this work and test the definition carefully for unwanted impacts on the market. During the review we intend to analyse further potential problems caused by any boundaries resulting from the definition we use.

Next steps

14. In autumn 2012 we will commence a review of general advice to individual consumers.
15. We intend to hold initial discussions with a broad range of stakeholders in autumn / winter.
16. We aim to publish a discussion paper containing our developing thinking in Q4 2012-13.
17. This is a major piece of work, the implications of which will stretch well into 2014-15.

Introduction

18. Following the close of our discussion period on 5 November we have reviewed all of the responses we received and concluded that we should prioritise a review of general legal advice for individual consumers.
19. The responses we received were clear that the potential problems caused by the current pattern of reserved and unreserved activities were significant and should be addressed. In particular, it is commonly believed that consumers are unsure over the protections offered by regulation and often presume a greater level of protection than is in fact present. We believe that by considering general legal advice for individual consumers first, we can start to address many of the key areas where gaps in minimum protections and consumer confusion currently arises to the detriment of the consumer and public interest.
20. Our paper outlined our proposed evidence based approach to analysing the need to extend reservation. We continue to believe that this is the approach most consistent with the better regulation principles and likely to deliver the correct balance between our desire to enhance consumer protection and reduce regulatory restrictions.
21. 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 regulation², we set out in our consultation the following approach to reviewing the scope of regulation:
 - *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. Central to our consideration will be the public interest and, in particular, whether this is wider in its implications than the consumer interest alone in relation to the specific

² <http://www.bis.gov.uk/policies/better-regulation>

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 is very likely to involve undertaking empirical assessment, a call for evidence and wide ranging consultation. The importance of both wide-ranging and properly targeted consultation is particularly important in the context of difficult to define public interest concerns, about which we will seek views. It is also particularly 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. We will be wary of introducing sector specific regulation if this simply duplicates existing protections. 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.
- *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.
- *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 consumers (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 as well as the likely form of the recommendation itself. Dependent on any changes in our analysis as a result of feedback received, we will then decide whether to 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 and licensing authorities whose members currently provide the legal activity that is being reserved. In assessing such applications, we will take account both of our general guidance on the issue and any specific S162 guidance which we have issued
22. We are not proposing to change this overall approach. But in applying the approach we need to ensure that we find the right balance between conflicting pressures to ensure the approach taken in practice is:
- Practical
 - Consistent across the market
 - At a sufficiently aggregate level to reform the market
 - With sufficient disaggregation to reflect differences in the market
23. Our analysis will focus on looking for legal markets with sufficient commonality to allow us to develop minimum regulatory standards that are proportionate to and targeted at the risks posed.

General comments

24. There was a broad consensus in response to our discussion paper that the current boundaries of regulated activities were no longer fit –for- purpose. The existing reserved activities were not designed with any reference to the consumer or public interest. Although some elements of the framework may be justified retrospectively on this basis, the current application of reserved activities is highly disjointed. Many of the activities within the associated legal service that might be considered equally worthy of regulatory protection.
25. Many of those responding were also concerned that consumers were adversely impacted by problems occurring with legal services that sit outside altogether of the reserved activities when undertaken by unregulated providers. This concern has been expressed particularly by the Legal Ombudsman, given his emerging experience of complaints about services which have proved ineligible for its consideration.
26. Respondents also agreed that there was a case to assess whether the existing scope of reservation and attached regulation were adequately protecting the public interest. Increasing numbers of consumers are choosing to buy legal services from outside of the current legal professions and many law firms increasingly utilise non-lawyers. These consumer and market trends have put increasing strain on the ability of the current regulatory framework to deliver adequate, consistent and understandable regulatory protections.
27. Despite our concerns, respondents were keen to stress the many strengths of the existing professions and the high esteem in which many millions of clients hold them. We must ensure that changes to regulation do not undermine the many strengths of the profession.
28. In our discussion paper we outlined two possible approaches that we could take to addressing the problems identified – activity based thematic analysis or a single one-off review of the regulation of all legal services. We favoured an activity based approach. Respondents noted attractions and problems in each of these approaches. The majority of respondents in both camps agreed that the challenges in the will-writing, probate and estate administration market were such that it remained a priority to tackle this market separately.

One-off review

29. We are unconvinced by arguments that, to reduce either actual or potential consumer confusion, the existing regulatory regime should be extended to all legal advice. Such an assertion starts from an untested assumption that, not only is the current framework uniquely fit for purpose in its current parts of the market, but that, by definition, it can instantly be rolled over into other areas without examination of impact. Significantly more analysis would be needed to persuade the LSB of these assertions. On the contrary, we believe that the potentially dulling effects on innovation and harmful effects on access to justice of potential price increases caused by the exclusionary effects of new regulation in low risk areas are likely to outweigh the benefits of consistency per se. We also do not believe that such “blanket” new regulation of this nature is consistent with the LSB and approved regulators responsibilities to pursue

better regulation principles, set out in Parts 2 and 4 of the Act. But we are, in principle, persuaded by the Legal Ombudsman's narrower point that there should be more consistent access to redress across legal activities.

30. We have therefore rejected a whole of market one-off general analysis of regulatory protections for three reasons:
- It is too "top down" as it starts with an assumption that everything should be regulated in the same way as now
 - It fails to answer how anything should be regulated, in order to meet better regulation principles regulation must be proportionate and targeted at identified risks so inevitably there must be some sector by sector or activity by activity approach even in the one-off scenario
 - It is inflexible to changing circumstances in future: as risks change, so regulation must change
31. We can understand why many have found it attractive to move quickly in identifying risks and developing regulatory solutions. But we believe that a single solution to regulation risks imposing unnecessary costs on consumers and the public. We do not believe that the Act, notably the duty to adhere to the better regulation principles would lead us to copy across the full weights of regulators' rule books (and the accompanying regulatory burdens) to all legal activities with an intention to liberalise in areas where the full protections are found not to be required at a future date. Such an approach would first significantly increase regulatory burdens in the short-term, but only later prompt assessment of areas where such regulatory burdens could be reduced. This, we believe, would undermine our priority to meet the regulatory objectives. It may provide additional consumer protections but is likely to have a negative impact on competition, access to justice and ultimately the consumer and public interest. Further, it cannot be targeted or proportionate to start from an assumption that the need for regulation and the level of protections needed is the same for either all areas of activity or all purchasers, whether corporate clients or individual consumers.
32. It is our view that a general extension of reserved activities would only be possible in a market where activity and outcomes focused regulation was strongly embedded in practice. Doctor Decker and Professor Yarrow made clear in their paper for the LSB on the regulation of legal services, that there are significant differences in the risks posed by different areas of legal activities³. Regulation must tailor its approach in dealing with these risks to avoid undermining public interest and access to justice. At present most regulators are in the comparatively early stages of developing tailored risk based approaches to regulation.

³ Dr Decker and Professor Yarrow, Regulatory Policy Institute, Understanding the economic rationale for legal services regulation, March 2011

33. In the absence of strong and consistent practice of risk based regulation, we believe that it would be inappropriate at this stage to extend approved regulators' reach generally across all legal services on a blanket basis. We will monitor regulatory developments and consider adjusting our approach based on evidence of changes in regulatory practice from frontline regulators.

Activity based analysis

34. We have carefully considered the arguments against our original proposal for activity based thematic analysis and in particular that an approach that is too granular will be too slow and unresponsive to the changing legal services market. We have been persuaded that an approach of examining areas too narrowly on a case-by-case basis would have the potential to leave wide gaps in consumer protection for the foreseeable future and at least, in the medium term, could exacerbate the "regulatory maze" that the Act was designed to reduce.

Proposed approach

35. Having considered all the responses we believe that the apparent dichotomy between the two main approaches can be bridged by looking at the need for a foundation of minimum protections for general legal advice for individual consumers. Our proposed approach therefore is to initiate an assessment to see whether there are common risks and features across this segment that indicate that the regulatory objectives would be best served by reservation delivering a common minimum set of regulatory protections. Analysis by regulators of specific risks through their risk frameworks would then allow a more tailored approach to regulation above this basic minimum.

Minimising consumer confusion

36. Respondents to the discussion paper rightly highlighted that the presence of multiple regulators as an additional source of potential consumer confusion. While multiple regulators are both a long-standing feature of the legal landscape and the Act positively enables the entry of new regulatory bodies, we accept that it is not in the interests of effective or efficient regulation to increase the number of frontline regulators as an end in itself. The present regulatory structure is a consequence of the historical nature of regulation in legal services i.e. title based. The move to outcomes focused regulation, with its analysis of the activities undertaken, will start to address this. What needs to be ensured is that consumers enjoy appropriate regulatory protections (whether to complain to the Legal Ombudsman or be served by a provider who is supervised by a regulator), wherever this required in light of the risks: and customer certainty about their rights and safeguards rather than uncertainty about what different titles imply about the kind of protection available. This will require a further move towards activity and indeed entity based regulation.
37. To avoid exacerbating consumer confusion over regulatory protections we will of course seek to minimise the circumstances where additional regulators are required. The hurdle for new *regulations* remains high: and for new *regulators*, even higher.

Ensuring our approach is flexible

38. Responses to the discussion paper have confirmed our initial view that existing protections were no longer appropriate given changes in the delivery of legal services. Technology and innovation in practice are moving the market away from the traditional structures of supply supported by the existing reserved activities. This remains a core driver of the need to reassess the current scope of the reserved activities.
39. We should not expect that these changes have or, we suspect, will ever reach a steady state. Regulation must be responsive to changes in the market and the risks posed to the regulatory objectives including the public and consumer interest. Regulators must continually assess how their regulations work in practice and where changes are required.
40. In the absence of a steady state world, it makes no more sense to seek a one-off solution to regulatory problems than carry out ongoing assessments of individual areas or activities. Regulation will need to continually evolve over time, while balancing the needs for consumer certainty and removing unnecessary regulatory burdens.

Fit with regulatory objectives

41. We believe an analysis of the scope of regulation fits squarely with our regulatory objectives, particularly protecting and promoting the public and consumer interests. Our work and the responses to our consultation have highlighted the concerns that the current regulatory framework fails to provide consumers with the regulatory protections they believe that they have. The absence of regulatory protections can, as demonstrated in our work on will-writing and estate administration, lead to significant consumer detriment and in

turn damage our other regulatory objectives such as understanding legal rights and duties.

42. Our proposed approach to addressing this incorporates detailed analysis of the risks *both* from leaving areas outside of regulation and through the potential for introducing overly burdensome regulatory requirements. We believe that we need to address both issues if we are to meet our objective to promote competition in the provision of services. Wrongly abstaining from regulation may lessen confidence in the market and hence depress both activity and competition. But badly focussed or overly prescriptive regulation may also deter entry and innovation to the consumer detriment. Any recommendations would seek to find an approach taking account of the full ramifications of each of the regulatory objectives.

Starting with general legal advice

43. While we are not persuaded that a single market-wide assessment of appropriate levels of regulatory protection is sensible, we do believe that a strong case has been made for undertaking an assessment to see whether there are common risks and features within the market for general legal advice for individual consumers (given the diversity of legal advice and consumers) to indicate that reservation, with a common minimum standard of regulation would best meet the regulatory objectives. This will allow us to take a relatively high-level assessment of a wide area of legal advice for specified segments of consumers, tackling some of the challenges inevitable with a more segmented approach.
44. Our approach is aimed at assessing the minimum levels of protection required, for example access to redress at the first-tier and to the Legal Ombudsman. This will allow approved regulators to carry out further assessments to place regulatory standards above this minimum for particular market segments or customer types where particular risks are identified.
45. We recognise that a substantial element of the work will be in considering whether we can produce a sensible workable definition, but propose to use as a starting point the terminology used in the definition of legal activity contained in section 3(12)(3) of the Act:

The provision of legal advice or assistance in connection with the application of the law or with any form or resolution of legal disputes

46. We propose to exclude all litigation and advocacy activities from our definition of “general legal advice”, as these activities appear to be properly caught within the current framework. Furthermore we would also seek to exclude all advice to the majority of businesses. It may be sensible to include advice to self employed people and some small businesses, given this we will need to consider where we draw the boundary between those businesses covered and those outside of the regulatory protection. This will be considered with reference to the problems that regulation is seeking to address and the regulatory protections likely to be introduced. It is possible that the current Legal Ombudsman rules will provide an effective model for this distinction.

47. We continue to believe that the only feasible approach to assessing the need for regulation above any basic minimum will be to prioritise areas for analysis. It is our expectation that on-going developments in the operation of proportionate outcomes and risk based regulation by approved regulators will allow such analysis to take place within the approved regulators themselves. More sophisticated risk profiling would allow for assessments about the risks presented by different activities, consumers and business models could be matched by proportionate regulatory responses according to the particular circumstances. This could inform decisions about authorisation as well as the level of monitoring, inspection and supervision that providers can expect.
48. Initial work that the LSB has carried out on immigration and conveyancing has confirmed that the priority in these areas is to improve regulatory performance within the current framework, rather than to undertake more theoretical work on regulatory scope. We are consulting separately on immigration issues, one aspect of which is a proposal that the regulators of immigration services improve their data capture to inform themselves better about the activities of their regulated community.
49. We are not proposing to carry out any further work on the scope of protection within the conveyancing market at this stage. Instead we will focus our work in this area on improving the working of existing regulations and the use of outcome focused regulation by the existing approved regulators.

Individual versus entity

50. We have seen no evidence to suggest that consumers are able to make distinctions between the regulatory status of individuals within a business. For this reason we continue to believe that regulation at entity level is best suited to minimise consumer confusion about regulatory protections. Both authorisation and regulation would be likely to focus much more on the entity and less on the individual. Where requiring authorisation of an individual is deemed appropriate, we anticipate that that this would likely involve greater bespoke authorisation for the activity. Reservation should not result in restricting activities to individuals on the basis of their professional title alone.
51. Entities would have to take responsibility for ensuring all of the work they undertake for clients is compliant with the regulations and delivers good outcomes. This would include any work that they outsource to third party companies. We therefore expect that any changes to reservation are likely to favour a further shift to regulation at entity level.

Boundaries in regulation will remain

52. Despite our best efforts, it is inconceivable that we will be able to remove all of the boundaries of regulation that may confuse consumers. Inevitably, in line with the principles of better regulation, some areas of legal services will rightly be regulated more lightly than others, reflecting the risks these activities pose to public and consumer interest. Even if we applied a single level of regulation across the widest definition of legal activities, some services may be perceived as legal by consumers but not captured by our definition. Instead we propose

to seek to minimise uncertainty and wherever possible and provide a route to complain where consumers are dissatisfied.

53. A further area of confusion may exist where providers of services with a legal component (e.g. tax advice) are regulated by non-legal service regulators, for example accountancy bodies. Any existing or prospective approved regulator or licensing authority will have to demonstrate that they meet the requirements at sections 52 and 54 of the Act around preventing regulatory conflict and unnecessary duplication of regulatory provision. Where necessary we may also explore the options available to exempt organisations from specific legal services regulation under Schedule 3 to the Act, to ensure we avoid “doubling up” regulation imposed. The test must be whether their equivalent regulatory arrangements outside of legal services are sufficiently robust.

Defining activities

54. Some of the reserved activities such as probate activities are defined tightly and focused on specific easily definable legal activities e.g. filling in the probate form. This has the advantage of simplicity but leaves much of the real regulatory risk technically outside of regulation. Our consultation document on will-writing and estate administration graphically illustrates the detriment that can occur. Historically regulation has remained in place through the title based regulation used by the professional regulators. Changes in the market, whether through outsourcing by traditional law firms or the development of new types of firms specialising in non-reserved activities has challenged this traditional model of reservation.
55. In future we may need to consider whether activities can be designed around the broader services provided, to ensure that all relevant elements of the legal service are within the scope of regulation. The desire to ensure a broad definition of the legal service must of course be balanced against the need to ensure the definition is robust and legally clear. We expect to carry out further work considering this point over the coming year, but believe such an approach is more consistent with outcomes and allowing approved regulators to use their judgement in regulation.

Legal Ombudsman – voluntary jurisdictions

56. The Legal Ombudsman is currently examining the potential merits of creating a voluntary jurisdiction that would provide access to the Ombudsman for unregulated providers that opt in to the scheme including providers of unregulated will-writing and estate administration providers. This could help deliver more consistent redress in the absence of reservation. However, we do not believe that this of itself can provide a comprehensive long-term solution in areas where detriments are identified. First, access to redress may be only one of the required protections in many circumstances so may provide a necessary, but not sufficient, condition. Second, although many good providers may welcome this option, the most unscrupulous providers targeting the most vulnerable consumers are unlikely to opt-in.

Summary of responses to consultation

Q1: 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?

57. Respondents generally agreed that the three themes put forward were appropriate. The Law Society considered that the principles of better regulation should be centre stage to the LSB's vision of regulation. They also pointed out that the lack of consistency around the scope and enforcement of the regulation of legal services causes consumer confusion and questioned the LSB's mandate to put consumers at the heart of the regulatory system. The Office of Fair Trading (the OFT) supported the three themes and the LSB's approach to assessing the boundaries of legal services regulation. The Legal Services Consumer Panel (the Panel) emphasised its support for better regulation as a core theme and in particular the importance of improving the effectiveness of existing regulation
58. The Bar Council, while agreeing that the three themes identified all made sense individually, suggested that consumer protection and redress should not be the sole focus of regulatory action. Instead, they suggested that all of the regulatory objectives must be properly assessed and balanced and in some cases this may mean that the interests of individual consumers must be of lower priority than the regulatory objective of supporting the rule of law. The Council for Licensed Conveyancers (the CLC) similarly are concerned that the LSB has identified one regulatory objective (consumer protection) and prioritised it over others. In the CLC's view, identifying a particular regulatory objective as a separate theme creates the risk that it will assume a priority which was not intended by Parliament.

LSB Response

59. The LSB welcomed the feedback which recognises the difficult challenge of balancing the competing regulatory objectives and the principles of better regulation. While in all our work we strive to balance all these objectives it is our view that in looking at the regulation we must ensure that we maintain a particular focus on achieving the appropriate level of consumer protection and redress given the imbalance in power consumers face when using legal services. Considering the priority traditionally given to many of the other regulatory objectives, we think it is only appropriate to highlight consumer protection to remind ourselves of the wider scope of the regulatory objectives introduced by the Act.
60. However, while we highlight consumer protection and redress we also have made it clear that we will account for all of the regulatory objectives when considering the minimum necessary levels of regulatory obligations. Balancing the regulatory objectives to ensure that regulation works in the overall public interest is essential and we welcome the support we received.

Q2: 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 the role of regulation should be?

61. Several respondents stated that regulation can serve the important function of protecting the independence of regulated providers. Respondents commented that the LSB's approach to consumer protection and redress should be appropriate to the particular market with simple and accessible regulation helping deliver consumer focused services that are not burdensome in terms of cost.
62. Some respondents, such as the Bar Council, took the view that the approach adopted is too narrowly focused on economic models rather than delivering regulation which is focused more on public interest issues such as access to justice. The Legal Services Institute, in their submission, agreed that there were cultural pressures to deliver high standards, but suggested that those forces can equally apply in the opposite direction and may in fact work against the interest of consumers. The SRA, however, disagreed with this view and suggested that the purpose of regulation is to ensure that market failure, primarily arising from asymmetry of information, is corrected so as to ensure that the public interest is served. In their view, the role that competition and cultural pressures can play is misstated in the question, in that issues which competition will not solve such as obligations to the court can only be secured through regulation.

LSB Response

63. The LSB takes the view that the role of regulation is to ensure that appropriate protections are in place for consumers and to provide a basic safeguard against detriment for consumers. The LSB also appreciates that, above this, there are both practical and cultural benefits arising from voluntary membership to professional bodies which may assist in improving standards and providing benefits to consumers of legal services. This can, in turn, improve access to justice by ensuring vulnerable consumers are covered by common standards. However, these benefits complement those offered by formal regulation and produced by the efficient operation of competition over and above that basic protection. They cannot be used to argue for monopoly provision by one category of provider or for a lessening of either protection or competition. Equally we recognise that the LSB must ensure that regulation delivers, or at least does not block the delivery, of the full range of regulatory objectives including access to justice. Indeed it is our view that regulation that is not consistent with the principles of better regulation poses the greatest risks to securing improved access to justice by depressing innovation and competitive pressures.

Q3: 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 realm of the Legal Ombudsman and, if so, how can this best be achieved?

64. Respondents, including the Panel, noted that the current regulatory structures within the legal services market are confusing to lay people and the key weakness is that many consumers are unaware of the inconsistencies in approach to regulatory coverage. The Law Society believes that difficulties arise if activities come within the remit of the Legal Ombudsman without them becoming reserved and that potential risk remains for unregulated providers to voluntarily sign up to the Legal Ombudsman, only to ignore its adjudication at a later date. Other respondents pointed out that a single complaints service would go a considerable way to achieve greater coverage of the Ombudsman's remit and that the LSB should also consider bringing services such as telephone help lines and generalist advice within the remit of the Legal Ombudsman.

LSB Response

65. The LSB agrees with the view that some of the current arrangements within the legal services market are confusing for lay people and that many consumers are not fully aware of the gaps in regulatory coverage between different types of service providers. In undertaking a review of the regulatory landscape, the LSB will focus on these issues and consider taking action where and when there is sufficient evidence of detriment occurring. This approach is not about regulating everything but rather taking a risk based approach segmenting the market where common risks are identified. For example, in will-writing and estate administration, the extent and nature of detriment means that it is appropriate to consider the possibility of extending reservation and therefore access to the Legal Ombudsman.
66. The LSB regards regulatory scrutiny as a crucial element in assessing whether specific action needs to be taken. The LSB will monitor the changing market for legal services and the Act provides a framework that allows flexibility to review the regulation of different services on an on-going basis. This is why we are looking at general legal advice for individual consumers and assessing whether the features of that market share enough similarities to warrant reservation with a common minimum standard of regulation. This allows us to take a high-level assessment of a wide area of legal advice and allows us to assess minimum levels of protection required, such as access to the Legal Ombudsman.

Q4: What are your views of our diagnosis of the weakness of the existing system and the problems within it?

67. Respondents pointed out that one of the other weaknesses are the apparent gaps in understanding the market for legal services. The Law Society believes that the paper places too much emphasis on a view that unregulated providers are the only driving force behind the changes in the market and that there does exist sufficient competition in the market among solicitors.
68. The Institute of Chartered Accountants in England and Wales (ICAEW) highlights that the unintended consequences on non-lawyer providers (such as accountants) is not taken fully into account as an essential and required part of setting regulatory 'boundaries'. The CLC were critical that some of the arguments presented to support the diagnosis of the weaknesses appear to exaggerate the problems at large, and that some of the options presented by the LSB were hypothetical only. Other respondents were content with the LSB's diagnosis of the weaknesses of the existing system.

LSB Response

69. The LSB recognises that innovation is occurring within both the regulated and unregulated sectors of the market. Innovation, whether through changing business practice, outsourcing, greater use of Information Technology as well as the significant number of applications to become Alternative Business Structures (ABS), demonstrates the impact of competition in the regulated market. But, the LSB believes that regulation can and should do more to ensure that regulated providers are able to innovate and compete while ensuring that the regulatory objectives are met.
70. We also recognise the important need for the regulation of legal services to work together with regulation in other sectors (e.g. financial services regulation) where there are overlapping boundaries and for there to be similar cooperation in relation to redress providers. The LSB believe that this can ensure that providers are not burdened with multiple layers of regulation and consumers can resolve multi-faceted disputes effectively. Equally, the LSB is working to ensure that there are no gaps in regulation in areas that are considered as posing a risk to consumers. Part of this work will be in identifying and assessing the boundaries of regulation in areas where we are carrying out assessments.

Q5: What do you see as the benefits and downsides of regulating through protected titles such as solicitor and barrister?

71. Most responses regarded protected title as having a benefit to consumers that include setting entry requirements as well as providing a recognisable brand. According to the ICAEW, the use of protected title is a key regulatory mechanism and an element of professionalism. The Legal Services Institute pointed out that whilst there are 'consequential' benefits for consumers by way of regulation of all activities including complaints procedures, access to the Legal Ombudsman, indemnity and compensation arrangements, there is a risk

that 'blanket' authorisation confers legitimacy to qualified providers to provide all services, despite not being sufficiently experienced to do so.

LSB Response

72. There are benefits to protection by title for consumers as consumers typically understand 'brands' in legal services such as 'solicitor' and 'barrister' and so they are more likely to recognise regulatory protections. This is important specifically for those activities which are not reserved. But, the LSB is keen to ensure that, consistent with better regulation principles, regulation is wherever possible tailored to actual risks. These may be driven by the activities undertaken or the types of consumer who purchase those legal services. In this respect, our view is that regulation must tailor its approach in dealing with risks to avoid undermining the public interest and access to justice. At present regulators are in the early stages of developing tailored risk-based approaches to regulation.

Q6: What are your 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?

73. Respondents displayed a diversity of views on this question. The ICAEW took the view that further analysis is required as it broaches a wider debate as to what constitutes a 'profession' as a collective technical body. According to the Law Society, the use of titles is governed by statutory provision and so the scope for LSB initiatives is limited. They also were not clear what linking titles to activities might mean in practice.
74. The submission by the Legal Services Institute questioned the need for protection of title to be confined to barristers and solicitors. They argued that all of the authorised persons' titles should receive equivalent and consistent treatment and questioned that the entitlement to the use of a title should necessarily and inevitably carry with it the authorisation to perform a reserved activity.

LSB Response

75. The LSB recognises the complexities of this question and we appreciate the diversity of views submitted. In our view, reserved title helps consumers identify services with minimum appropriate levels of regulatory protections in place and assists them in making an informed purchasing decision. We note that the Panel would like to see a shift towards activity-based regulation as this reflects that legal services are changing, with firms increasingly becoming more specialised in areas of law and such an approach would fit better within a risk-based regulatory framework. It may be that further work could be useful to seek to link titles to distinct activities but the LSB regards that such work sits outside the scope of the LSB's current work programme.

Q7: 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?

76. Respondents were generally in favour of the LSB's case-by-case methodology as the most practical way to proceed. But that the LSB should note that such an approach should not be allowed to result in additional inconsistencies or conflicts. The Bar Council expressed reservation about the benefit of regulation in will writing as a live case study of promoting "deserved public confidence in the legal system" as quality standards in the regulated parts of the market were also found to be wanting, which contravenes the professional principles regulatory objective. They believe that the starting point should be to address quality issues among regulated lawyers.
77. Some respondents, including the SRA, however disagreed with the approach as in their view it would not address the current problems and runs a risk of compounding them. Rather, the SRA suggests that the time is right now for a broader examination (rather than a case-by-case approach).

LSB Response

78. The LSB has been persuaded that an approach of examining areas too narrowly on a case-by-case basis would have the potential to leave wide gaps in consumer protection and to exacerbate the "regulatory maze" that the Act was designed to reduce. However, the case for consistency cannot be answered by jumping to reserving all legal work to existing authorised persons and imposing the existing regulatory regimes. We recognise, as many noted, the strengths of a case by case approach to ensure that the analysis is practical. A priority is to ensure that regulation helps deliver the regulatory objectives to promote competition, improve access to justice and protect and promote the interests of consumers.
79. We have rejected a whole of market one-off general analysis of regulatory protections for three main reasons:
 - It is too "top down" as it starts with an assumption that everything should be regulated in the same way as now.
 - It fails to answer how anything should be regulated, in order to meet better regulation principles regulation must be tailored and so inevitably there must be some sector by sector or activity by activity approach even in the one-off scenario.
 - It is inflexible to changing circumstances in future: as risks change, so regulation must change.
80. Instead we favour an analysis of the market for general legal advice for individual consumers to see whether similarities in risks can be identified that would warrant reservation and an attached minimum level of basic regulation. Analysis by regulators of specific risks through their risk frameworks would then allow a case-by-case approach to regulation above this basic minimum.

Despite this, where particular market issues are raised, as was the case for will-writing and estate administration, we will continue to take a narrower case-by-case approach as set out in the discussion paper. We believe that this approach balances the strengths of the alternative approaches suggested in responses to our discussion paper.

Q8: What are your views on the proposed stages for assessing if regulation is needed and, if it is, what regulatory interventions are required?

81. Respondents suggested that, where regulation is based on consumer protection, the LSB should compile the evidence of harm by involving stakeholders and undertaking empirical research. Some respondents agreed to the LSB's proposal of assessing the impact on the broader regulatory framework. For Immigration Services Commissioner, forthcoming priorities include preventing unregulated, illegal activity in the provision of immigration advice.

LSB Response

82. The LSB has seen nothing in the responses to suggest that we need to change the stages set out in the discussion paper. The review process set out will ensure that 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.

Q9: What are your views on the implications of our approach for professional privilege?

83. Respondents raised the issue concerning how professional privilege can function adequately in a modern multi-disciplinary practice, with simplicity and clarity for clients. The Law Society regards it crucial that, if professional privilege applied to advice given by other types of lawyer, they must be subject to the same level training and regulation, in respect of the advice that they give, as are solicitors. The OFT suggests where privilege adversely affects competition then evidence is required to show that its presence is justified by public interest considerations.

LSB Response

84. Whenever a decision is made to extend the list of reserved legal activities, consequential decisions will need to be made about legal professional privilege. Section 190 of the Act may be utilised to extend the legal professional privilege enjoyed by solicitors and barristers for all of their legal work to other authorised persons in relation to that activity. The position will be reviewed on a case by case basis. Any AR applying to be designated to regulate a reserved activity attracting privilege will have to demonstrate that their regulatory arrangements make appropriate provision in relation to authorised persons protecting their client's rights to confidentiality and taking action if the rights are misused.

85. The LSB has been granted permission to intervene in the Supreme Court case about privilege due to conclude in 2012: Prudential Plc and Prudential (Gibraltar) Ltd v Special Commissioner for Income Tax and Philip Pandolfo. We will be mindful of the findings in developing recommendations for consequential provision to accompany any recommendation to the Lord Chancellor to extend the list of reserved legal activities.

Q10: 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?

86. Most respondents accepted that there is no clear rationale for which activities are currently reserved and which are not. To some extent discussions about priorities for review were focused on whether areas and activities should be examined case-by-case or through a general recasting of the boundaries of regulation. In relation to the latter a variety of views were put forward about the areas that should be prioritised. Many agreed with the priority of reviewing will-writing and estate administration including the appropriateness of current reservation relating to the grant of probate.

LSB Response

87. The LSB has set out in response to question 7 that our next priority will be an analysis of the market for general legal advice for individual consumers to see whether similarities in risks can be identified that would allow reservation and an attached minimum level of basic regulation. The case to prioritise review of any of the existing reserved activities, with the exception of probate as part of our wider will-writing and estate administration investigation, has not been made.

Q11: What are your views of our analysis of the regulatory menu and how it can be used?

88. The Panel highlighted the benefits of the regulatory menu offering a more tailored and risk-based approach to regulation. They also warn of risks to consistency for consumers and a race to the bottom among competing regulators. The OFT, for their part, considered that regulatory obligations should be kept to a minimum when looking at the regulatory menu and that the current regulatory framework is not flexible in its approach to the increased liberalisation that ABS brings to the market. This could especially be the case when there are several layers of regulation or several regulators involved. The Law Society suggested that certain activities such as advocacy require targeted regulation and that the LSB should consider regulatory arrangements on the basis of their suitability to achieve the proper regulation of authorised persons. The ICAEW took the view that the regulatory menu was a good place to start but that the LSB should open dialogue with professional bodies in other sectors and not just approved legal services regulators to issue guidance to help approved regulators develop appropriate regulatory arrangements that strike the right balance between all the regulatory objectives

LSB Response

89. The LSB believes that regulatory arrangements should be tailored using preventative and remedial tools within the regulatory menu to target identified risks. This compliments existing moves towards outcomes focused regulation and our work on developing regulatory standards. We are alive to any unintended consequences for the overall quality of services provided to the consumer and the simplicity of the regulatory environment. With any review we will consider the benefits of issuing guidance on high level regulatory arrangements that would be expected of any approved regulator and would set a foundation of core minimum protections needed to target the detriments identified. Existing regulators needing to reform and new bodies applying to be legal services regulators for the first time would both need to meet the standards we set out in our guidance, or justify deviance, in order to be designated and have their regulatory arrangements approved. However, we do not propose that we have a one size fits all regulatory system with identical rules and regulations across the board. The LSB will work closely with existing and potential approved regulators as part of the review process.

Q12: 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?

90. The Law Society viewed it as not practical to regulate general legal advice and instead considered that specific areas should be investigated on a case-by-case basis. The Bar Council regarded a review of harmonisation of rule books and commissioning research to look at how the LSB could promote the regulatory objectives in the LSA as priority areas for the future period.
91. The Legal Services Institute expressed concern with the LSB's suggestion of reviewing general legal advice over the timescale 2012-15. They suggest that general legal advice could be too imprecise an area to regulate and they struggled to see where a clear line could be drawn and that the LSB runs the risk of casting the regulatory net too wide, with the risk of being unnecessarily restrictive of competition.

LSB Response

92. The LSB has set out in our response to Q7 and Q10 that our priority will be an analysis of the market for general legal advice for individual consumers. This will sit alongside the areas that are currently under review:

- Our proposals relating the regulation of will-writing, probate and estate administration that are published alongside this decision document
- Our proposals relating to the regulation of non-commercial bodies that are also published alongside this decisions document
- Our discussion paper about the regulation of immigration advice and services that closes on 24 May

93. We will remain flexible to the need prioritise further areas for review during this period should new market issues arise.

Q13: Do you have any comments on the approach that we have adopted for reviewing the regulation of will-writing, probate and estate administration?

94. The Law Society questioned the LSB's approach as being too narrowly focused on consumer protection and that the public interest is greater. The Law Society also believes that in order to be effective there is a need to widen the reservation beyond the scope of will writing. They include: preparing a will or other testamentary instrument; preparation or lodging of a power of attorney; administration of an estate following a grant of probate or letters of administration.

LSB Response

95. The LSB's approach to the regulation of will-writing, probate and estate administration follows the general approach set out in the "Enhancing consumer protection, reducing regulatory restrictions" discussion paper. We have set out in our answer to Q8 that we believe that this an appropriate approach to deliver the regulatory objectives and better regulation principles. We welcome comments on our initial proposals about the regulation of will-writing, probate and estate administration activities. Please see the consultation paper published alongside this document.

Glossary of Terms

ABS	Alternative Business Structures. From October 2011 non-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.
ACCA	Association of Chartered Certified Accountants. Approved regulator in relation to reserved probate activities
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
BME	Black, Minority and Ethnic
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
ICAEW	Institute of Chartered Accountants of England and Wales – the representative body for Chartered Accountants in England and Wales
ICAS	Institute of Chartered Accountants of Scotland – the approved regulator in relation to reserved probate activities
ILEX Professional Standards Board	Institute of Legal Executives – the independent regulatory arm of the Institute of Legal Executives
Impact Assessment	An assessment of the likely impact of a policy on cost, benefits, risks and the likely or actual effect on people in respect to diversity
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	Legal Ombudsman - The single organisation for all consumer legal complaints
Levy	The LSB is required by the Legal Services Act (2007) to meet all its, and the OLC's costs through a levy on the Approved Regulators.
LSA or the Act	Legal Services Act 2007
OFT	Office of Fair Trading. A <u>non-ministerial government department</u> of the <u>United Kingdom</u> , which enforces both <u>consumer protection</u> and <u>competition law</u> .
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
Regulatory arrangements	The rules and regulations that make up the conditions of authorisation and practice for authorised persons
Regulatory Objectives	There are eight regulatory objectives for the LSB that are set out in the Legal Services Act (2007): <ul style="list-style-type: none"> • 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 in the legal sector • encouraging an independent, strong, diverse and effective legal profession • increasing public understanding of citizens legal rights and duties • 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 Rules or rule books	Set out a regulatory arrangements of Regulators
Reserved Legal Activity	Legal services within the scope of mandatory regulation by the Approved Regulators
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 respondents

Advice Services Alliance (ASA)

Association of Personal Injury Lawyers (APIL)

Bar Standards Board (BSB)

Citizens Advice Bureau (CAB)

Costs Lawyer Standards Board (CLSB)

Council for Licensed Conveyancers (CLC)

Legal Ombudsman (LeO)

Legal Services Consumer Panel (LSCP)

Legal Services Institute (LSI)

Liverpool Law Society (LLS)

Office of Fair Trading (OFT)

Office of the Immigration Services Commissioner (OISC)

Society of Trust and Estate Practitioners (STEP)

Solicitors Regulation Authority (SRA)

The Association of Chartered Certified Accountants (ACCA)

The Bar Council

The Chartered Institute of Taxation

The City of Westminster and Holborn Law Society (CWHLS)

The Institute of Chartered Accountants in England and Wales (ICAEW)

The Institute of Legal Executives (ILEX) and Ilex Professional Standards Limited (IPS)

The Institute of Professional Willwriters (IPW)

The Judiciary of the Employment Tribunals in England & Wales

The Law Society (TLS)

The Society of Will Writers & Estate Planning Practitioners (SWW)

TLT Solicitors

