



**A RESPONSE BY
THE INSTITUTE OF LEGAL EXECUTIVES
AND
ILEX PROFESSIONAL STANDARDS LIMITED**

**ENHANCING CONSUMER PROTECTION,
REDUCING REGULATORY RESTRICTIONS**

**A DISCUSSION DOCUMENT BY THE LEGAL
SERVICES BOARD ABOUT THE ARRANGEMENTS
FOR ASSESSING THE BOUNDARIES OF LEGAL
SERVICES REGULATION AND CONNECTED
REGULATORY DECISIONS**

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Introduction

This response represents the joint views of the Institute of Legal Executives (ILEX) an Approved Regulator under the Legal Services Act 2007 (the Act), and ILEX Professional Standards Limited (IPS), the regulatory body for 22,000 members of ILEX. For the purposes of this discussion document, 'we' is used to mean both ILEX and IPS unless the context suggests otherwise.

ILEX and IPS promote proper standards of conduct and behaviour among members of ILEX. We aim to ensure ILEX members are competent and trusted legal practitioners and are fully aware of their obligations to clients, colleagues, the courts and the public. We aim to help good practitioners stay good and improve throughout their careers and to ensure the public know the quality of work Legal Executives can provide.

ILEX and IPS welcome the opportunity to comment on proposals put forward by the Legal Services Board (LSB) on the boundaries of legal services regulation. Answers are set out below, to the questions in the consultations, where we are able to offer a view.

General Point

This is an important subject and we are pleased that the LSB has initiated debate. The way in which particular areas of legal practice have been selected to be regulated, through designation as 'reserved', has demonstrably been arbitrary, inconsistent and thoroughly confusing for the public. It is impossible to discern any rational pattern in this; and it is hard to find anyone who is able to articulate any coherent principle behind the present position.

The LSB is in danger of missing a real opportunity here. It is clearly both necessary and desirable to address the questions whether, and which, further activities should be reserved. We do not propose that any such work be delayed: the issue of will writing is pressing and in need of early resolution.

But the subject is also crying out for a 'first principles' review with the aim of reaching a clear and consistent understanding, first, of the purpose of the process; and, then, of which activities should in future be reserved in the interests of the public and the administration of justice.

As a practical suggestion, we would invite the LSB, with the approved regulators and other stakeholders, to work to establish some firm principles to underpin analysis of which activities should be reserved and/or regulated. A clear understanding, based on a thorough and consistent approach to the risks each potentially regulated or reserved activity is likely to pose to the public, is long

overdue and would immeasurably assist not only the present exercise but also the taking of future decisions about which legal services activities belong in which category. ILEX and IPS, as the standards setting organisation for speciality lawyers, would be more than happy to help with such an exercise.

The LSB's Questions

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

The three themes at the core of the LSB's vision encompass the most significant elements of regulation.

The first theme, consumer protection and redress, is fundamental to regulation. It is essential that consumer interests are adequately protected. Regulation must be consumer focused as it is consumers that drive markets. Markets stagnate if consumers stop buying particular products or services and, equally, a sudden increase in consumers buying a particular product or service can lead to increases either in prices or the number of providers. Therefore consumers can shape markets. Consumer focused regulation should be viewed as setting the framework for well functioning markets in which good businesses can thrive and bad businesses are driven out.

The second theme is similarly vital to regulation. The regulatory objectives outline the framework and minimum level that must be reached for the delivery of effective regulation. Regulatory obligations should be kept to the minimum provided that they meet requirements. Furthermore as outlined in the third theme, it is important that regulation lives up to the better regulation principles.

On the third theme the LSB comments that setting out the scope and nature of regulation must be linked to performance among regulators. It is unclear what the LSB intends here and therefore further clarification would be helpful.

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

The purpose of regulation includes ensuring that minimum standards and mechanisms are in place to protect consumers and provide redress. Regulation can address the inherent inequality of bargaining power between provider and consumer by rebalancing this power.

Further, we take the view that it is legitimate to anticipate risk (to foresee circumstances where risk may arise in the future even in the absence of current evidence that such risk has materialised). This is very much part of policy based regulation

Effective regulation includes putting in place robust standards which are set at a level that prevents consumer detriment from occurring whilst also containing the flexibility to respond to future market changes. Provided regulation does not inhibit innovation consumers will be able to choose from a range of options. However, it should be noted that providing adequate consumer protection can result in increased regulatory costs which are usually passed on to the profession and borne by the consumer. Increased regulation can increase the prices consumers pay for legal services. Therefore it is important to carry out a cost benefit analysis on any measure which increases regulation.

In summary, regulation should seek to determine the minimum level of intervention necessary to set a framework for a market which puts consumers at its centre, ensures a level playing field, and allows providers to compete.

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

We agree that it is important to ensure there is adequate consumer protection.

The inclusion of non-reserved legal activities within the Legal Ombudsman's remit could easily result in a regulatory maze. This would create confusion amongst consumers and legal service providers as to which non-reserved

activities fall within the jurisdiction of the Ombudsman. It would create a further category of legal service activity, which is regulated but not reserved. The precise distinction between reserved and non-reserved activity and the means of redress are already understood by few. Very careful consideration needs to be given to how such arrangements can be introduced, how they can be clearly articulated to consumers and how redress mechanisms could be enforced against unregulated providers who fall within such remit.

Further, the LSB must also recognise that extending the remit of the Legal Ombudsman will have a consequential impact on the leviable OLC expenditure, as well as the LSB leviable expenditure. Consideration will have to be given to how providers of non-reserved activities, who are not an authorised person, contribute to the levy.

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

ILEX and IPS do not take issue with the diagnosis.

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

There are benefits to regulating through protected title. One is that all the activities provided by someone with a protected title are regulated, including those that are non-reserved activities. Furthermore, the title signifies to consumers that the individual is regulated and that there may be a mechanism for redress available to the consumer if necessary. Title also acts as a useful indicator for consumers in identifying the regulatory body and it makes for much more effective enforcement of regulatory decisions, for example, to exclude a person from membership or withdraw their registration.

There are a few downsides to regulation through protected title. The entry requirements applicable to such professions can act as a barrier to individuals who want to undertake similar work, especially when the title is necessary to carry out a particular activity. The qualifications required to be granted such a title may not be linked to the type of activity being carried out; and may be unsuitable for the purpose of ensuring whether the individual is competent to carry out the activity. Furthermore, regulation through protected title can create monopolies whereby individuals with the title control the market inappropriately. This can also have a detrimental impact on competition in the provision of services.

6. 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?

There should be a consistent approach to the allocation of title to authorised persons. Activity based regulation would lend to titles being linked directly to the activities that a person is authorised to undertake. The latter approach will enable consumers to be clear as to the services the practitioner is regulated to undertake. This allows the public and clients to know (if they choose to enquire) the qualification of the practitioners with whom they deal and it is essential to reputation.

In some cases Parliament has chosen to add to the regulatory framework by protecting a title against misuse or appropriation by those not entitled to it. For example, it is an offence for someone who is not a solicitor to be pretend to be such (section 21 of the Solicitors Act 1974). We support the existence of such offences, given the public or consumer harm that might be caused by relying on the advice or services of someone who claims to be a qualified and authorised solicitor when they are not.

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

A case by case approach is practical, manageable and preferable to a blanket overhaul or review of regulatory boundaries. However, thought must be given to the legal services market as a whole. For example, it will be important to ensure that de-regulation or regulation of one area of practice does not create regulatory conflict or imbalances with another.

It is necessary to be clear about when regulation is appropriate. Regulation should be based on a firm understanding of the issues that need to be resolved and calls for robust detriment analysis, an assessment of the alternatives and examination of possible unintended consequences. It also calls for recognition of good practice and an understanding of the benefits of removing or loosening regulation where it is not necessary. A case-by-case approach will enable such detailed assessment to take place.

It would nonetheless be helpful if the LSB, with the approved regulators and other stakeholders, could at the outset establish some firm principles to underpin analysis of which activities should be reserved and or regulated. A clear understanding, based on a thorough and consistent approach to the risks each potentially regulated or reserved activity is likely to pose to the public, is long overdue and would immeasurably assist the taking of future decisions about which legal services activities belong in which activity.

A further point is that it is unclear whether reviews of different areas would take place on a rolling basis without assessment of whether particular areas are in any need of review. It is important that some form of 'need analysis' takes place in order to avoid unnecessary detailed reviews.

8. What are your views on our proposed stages for assessing if regulation is needed, and if it is, what regulatory interventions are required?

It is important that any decision to regulate or deregulate a legal service be based on a compelling case underpinned by appropriate evidence and a thorough assessment of risk. The proposed review process appears to provide a thorough investigation into the boundaries of legal services regulation. The investigation should produce the required detailed evidence to assist in making a decision regarding required regulation or deregulation.

In the discussion document, the LSB states that the review process is to ensure that consumers are better and more consistently protected. It is unclear what is meant by 'consistently', whether it means consistency across regulatory areas or consistency between legal service providers.

In relation to the stages themselves, two elements appear to be missing. It would be beneficial to include some form of benefit analysis. Any decision about whether to regulate (or de-regulate) should comprise an analysis of the benefit of not regulating in terms of the detriment or potential detriment compared against the benefits of regulation. A simple process beginning from the bottom, with the minimum regulatory arrangements, would offer a straightforward way of addressing specific issues, stopping when it has been identified that arrangements are sufficient.

A further stage could be included in between the seventh stage (Optimum standards) and eighth stage (Application from potential approved regulators). Such a stage would involve assessing interim measures and transitional provisions to apply to existing legal service providers and approved regulators whilst formal applications for approved regulator status are being considered.

9. What are your views on the implications of our approach for professional privilege?

Professional privilege is an important client protection mechanism. The LSB should ensure that professional privilege is retained where appropriate. It will be necessary to pay close attention to legal provisions and case law related to professional privilege. Furthermore, as corporate clients heavily rely on privilege, any decision to deregulate this area may affect them if privilege cannot be assured through other mechanisms.

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

We agree with the list of reserved legal activities planned for review and with the decision to review probate, including estate administration and will writing first. There are no other reserved legal activities which appear to be in need of urgent review. However, as explained in more detail below, it is worth assessing whether reserved instrument activities should be added to the list of areas that might be reviewed in the period 2012-15.

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

The LSB has proposed that an activity brought within the scope of regulation would not necessarily trigger the full range of regulatory requirements imposed on current reserved activities. As a result the regulatory menu would be used flexibly in which combinations of regulatory tools were exercised. However, we are concerned that such an approach could lead to a maze of rules and regulations for each type of reserved legal activity, leading to confusion for consumers and legal service providers about which rules may or may not apply to various activities. It is important that, if such an approach were adopted, that the regulatory tools would be exercised in a consistent and transparent manner.

It was highlighted in the discussion document that the LSB may issue guidance under Section 162 of the Act. It is unclear whether approved regulators will be obligated to follow such guidance. The guidance would need to apply to the different approved regulators and the different legal service providers; and it is difficult to be confident that it would be applied consistently across the board. If the guidance is too specific, approved

regulators may find it difficult to follow and apply it to the legal service providers they regulate. Furthermore it is important that the guidance does not produce homogenous approved regulators and therefore compromise on legal service providers' choice of regulator.

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

Corporate law has been listed as an area that might be reviewed in the period 2012-15, it is important to consider the effect deregulation could have on small businesses in need of advice that might be defined as corporate law. Such clients may be as vulnerable as non-corporate clients if regulatory protections are removed.

The LSB was struck by the symmetry of information and power between the client and the legal services provider in corporate transactions than in many other legal transactions. However, the different levels of symmetry should be assessed, as clients at the other end of the spectrum, where there is less symmetry, could be greatly affected by deregulation.

We are of the opinion that reserved instrument activities should be added to the list of areas that might be reviewed in the period 2012-15. Reserved instrument activities are a small part of conveyancing. Conveyancing activities outside reserved instrument activities are unregulated. It would be worthwhile analysing whether there are risks or detriments that need to be addressed by reservation or increased supervision.

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

These are areas which, it has been demonstrated, need urgently to be reviewed and assessed as to whether they should be regulated.

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