



Risk and responsibility

Implications for regulating legal services

June 2013

Consumer challenge



About Consumer Challenge

Our Consumer Challenge series is designed to create a space for fresh thinking where the Legal Services Consumer Panel can stimulate debate, question the received wisdom and propose new solutions to old policy issues. These documents do not necessarily represent the Panel's final policy position, but instead allow us to test ideas and spark discussion.

Previous titles in the series:

- Third party complaints
- Legal Education and Training Review
- Empowering consumers

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1 Executive summary

Context

- 1.1. A decline in personal responsibility is being blamed for a variety of social ills from the workshy, to fat cat pay and the compensation culture. In a consumer context, business leaders complain they are excessively regulated and consumers are now not expected to do enough to protect their own interests. Over the years there has been a major expansion of consumer protection laws as governments recognised the contribution that confident consumers make to fuelling economic growth. However, the same period has also witnessed policies that have shifted risk away from the state and on to individuals, as in the move from a cradle to grave welfare system towards people providing for their own financial needs through the market. Most recently, there has been experimentation with 'nudge' style tools that encourage people to make more responsible lifestyle choices.
- 1.2. Last year the Legal Services Board asked to Panel to consider the appropriate level of risk consumers should be expected to bear. Their request related to financial protections such as indemnity insurance and compensation funds. However, we have used this opportunity to consider the broader picture as the theme of risk and responsibility cuts across a range of issues currently facing the sector. At its heart it touches on some fundamental and difficult questions that regulators must grapple with: how much freedom of choice consumers should have, what steps it is fair to ask consumers to take to protect themselves, what obligations providers should have towards consumers and what regulatory protections should overlay all this.
- 1.3. When the former Financial Services Authority considered this issue its work sharply divided consumer and industry representatives. Nevertheless, while reaching a consensus may prove difficult, it's important to explore the issues as only then can

we assess whether regulators are making correct decisions about the allocation of risk between consumers and providers based on fair principles. Finding the right balance is also crucial to achieving well-functioning markets as consumers will only drive competition if they are confident that regulation will protect them.

Some risk is healthy

- 1.4. Our starting point is that some risk is healthy for consumers. Consumers ultimately pay for the costs of managing risks at an excessive level, while innovations which benefit consumers often involve exposure to new risks. We know that consumers value freedom of choice and are irritated by regulations which impinge on this. Equipping consumers with the information and tools to manage risks means they are better placed to avoid being exploited by providers. When consumers show responsibility by searching the market and demanding more of providers, their collective strength can be a powerful driver of competition. And they are more likely to make better decisions about the legal issues facing their lives when they take an active and informed role in managing their case.
- 1.5. The Panel wishes to tackle the climate of fear and risk-aversion that surrounds the use of legal services and which is preventing consumers from doing these things. Competition is part of the answer and we are already seeing incumbent providers and new entrants alike making changes – dispensing with legal jargon, focusing on customer service, fixed fees – that should make dealing with lawyers seem a less intimidating prospect and allow greater and more informed participation. However, consumers remain information poor when it comes to choosing and using legal services, especially when compared to information about provider performance they can obtain in other areas, such as in financial services and healthcare. Regulators can help consumers to exercise greater responsibility by unlocking this information and building confidence in tools that support better decision-making.

Limits to consumer responsibility

- 1.6. Building legal capability in these ways is important, but there are important limits to consumer responsibility which are important to acknowledge. Events in financial services have shown the dangers when the division of risk between consumers and providers is drawn in the wrong place. As a basic point of fairness, it is unfair to ask consumers to accept risks which they either do not know about or cannot manage. For reasons linked to public attitudes towards the legal system, the vulnerability of clients and third parties, the nature of the legal services market, behavioural biases and absence of information, our analysis is that consumers are currently poorly placed to manage many of the risks of using legal services.
- 1.7. The consequences of making poor decisions can be very severe, potentially involving loss of liberty, large financial loss and damage to relationships and health. Importantly, legal services do not simply involve a transaction between a lawyer and their client, but affect other parties who might be vulnerable, such as victims of crime or children. These third parties do not have a say on whether the risk they are exposed to is fair and cannot protect themselves by actively managing the risk.
- 1.8. Consumers understandably find it difficult to choose and use legal services. They suffer wide knowledge gaps relative to lawyers, use legal services rarely and often at times of high emotion. They may also be asked to make both numerous and complex decisions as their legal matter progresses. Consumers are also subject to innate behavioural biases that make their decisions particularly prone to errors, which providers may exploit. Since consumers do not always act in their own interests due to these biases, this has important implications for where regulators see the limits of responsibility and the scope for paternalistic interventions.
- 1.9. The low public appetite for risk is also important. Consumers feel vulnerable when using legal services, a feeling shared even among those who are generally confident in other areas of life. People view going to a lawyer as a last resort, feel powerless in face of the legal system and intimidated by lawyers. They doubt their abilities to make informed choices and value the protections offered by regulation.

A proportionate approach

- 1.10. These are the realities of being a consumer of legal services, but this does not justify blanket regulation of every activity to the highest degree. Indeed, over the years the Panel has supported policy proposals that transfer risk to consumers, as long as they are properly balanced. It is also important to avoid making too broad generalisations about risk and responsibility – the correct allocation of risk will vary both across and within different markets. Equally, it is important not to be fatalistic about the difficulties facing consumers, but instead work to break down the barriers that prevent consumers from taking greater responsibility.
- 1.11. With a clear set of principles at hand, it becomes easier to decide what would be a fair share of risk between consumers and providers in each case. Judgements about where risk should fall will inform decisions on big issues such as the right balance between authorisation and supervision, or which activities should fall within the scope of regulation and which should remain outside. The Panel's attitude towards risk, as outlined in this paper, explains our wish to see access to redress extended across the whole market, and the greater emphasis we place than some other stakeholders on entry standards and ongoing quality assurance.
- 1.12. The unique features of the legal services market justify a strong and preventative consumer protection framework. We want regulators to support consumers to better protect their own interests, but the sequencing of policy policies is crucial to get right. It would be damaging to remove regulation from consumers and watch to see if they sink or swim. Instead, regulators need to maintain a tight safety net whilst at the same time dealing with unfair business practices and unlocking the information and tools that would enable more informed choices. Any transfer of risk should then be a gradual process and only follow when consumers are sufficiently empowered to navigate the market safely.

2 Whose risk is it anyway?

The shifting risk landscape

- 2.1. This paper considers how risk between consumers and providers of legal services should be shared and the implications this has for regulation. Last year the Legal Services Board (LSB) asked us to look at the appropriate level of risk consumers should be expected to bear in relation to financial protection arrangements, such as indemnity insurance and compensation funds. In fact, this theme cuts across a range of issues currently facing the sector and by its nature touches on some fundamental issues concerning regulation, such as freedom of choice versus protecting people from their own mistakes, and the level of regulation needed to give consumers confidence to participate effectively in markets.
- 2.2. This being the case, the Panel decided to step back from the financial protection regime and think about the bigger picture. In doing so, we have carried out focus groups to ask consumers what they think about risk and responsibility and reviewed other literature and research on the topic. We expect the thinking in this paper to underpin the policy approaches we adopt across our work programme.

High on the political agenda

- 2.3. These issues are in fact occupying the minds of politicians in each of Britain's main political parties. One of the Coalition Government's core policy themes is that people should take more responsibility for decisions affecting their lives, reflecting concern that there is an over reliance on government to manage all risks. Clearly, this issue is of personal importance to the Prime Minister:

“Over many decades this country has become too centralised, too bureaucratic and too top-down. And this is not just inefficient and overly-bureaucratic but also has an insidious cultural effect, because it robs people of responsibility. Regaining this shared sense of personal responsibility goes to the heart of my political philosophy – in fact to the heart of my whole approach to life.”¹

- 2.4. The political and media debate around personal responsibility has focused in large part on sensitive issues centred on individuals and corporations: the English riots of 2011, rewarding people on long-term benefits at the expense of savers, high levels of executive pay, use of tax avoidance schemes, MPs expenses etc. However, this agenda also touches on important issues of direct relevance to consumer affairs and regulation. Business leaders complain that excessive rules and red tape are creating costs and restrictions that are holding back economic growth. Over time they feel they have become excessively regulated and consumers are now not expected to do enough to protect their own interests. Linked to this are perceptions of a compensation culture in which, so it is said, people accept little responsibility for their actions and feel entitled to obtain redress for anything bad that happens to them. Due to fear of litigation, the business response is to go beyond the minimum legal requirements. And all this is seen to create a worrying spiral: as personal responsibility decreases, so too do people’s abilities to manage risks, such that responsibility for managing any new risks is pushed back on to the state.

A historical view

- 2.5. Taking a historical view², the balance between obligations on businesses and consumer responsibilities has shifted as society has changed. In pre-industrial times, the caveat emptor principle – “let the buyer beware” – prevailed and the state took little interest in deals made between traders and consumers. As customers

¹ David Cameron’s speech to the Business in the Community Leadership Summit, 2 December 2010.

² For example, see <http://stage6.pbworks.com/f/Consumer+Law.pdf>

knew tradesmen personally, there was little need for regulation beyond such things as weights and measures laws. However, as the industrial age gave rise to the mass consumption society, people became more vulnerable to being misled or sold inferior or defective products. While a laissez faire approach continued to operate, based on the theory that market forces would regulate quality and price fairly, gradually the law recognised the inequality in bargaining power between providers and consumers. Changes in the economic structure of society and technological changes have increased consumer choice, but also widened this power imbalance still further. However, thanks in no small part to the efforts of consumer groups, the 1960s onwards saw a significant expansion of consumer protection laws and more recently the creation of a wide range of statutory regulators to oversee markets. Few areas of consumer life are now untouched by regulation.

- 2.6. More recent years have witnessed a limited rolling back of the regulatory state seen, for example, in the abolition or merger of regulatory bodies, better regulation policies such as “one in two out” and the promotion of self-regulatory initiatives. Policies have also been introduced that shift risk away from the state and on to individuals, including through ‘nudge-style’ tools such as opt-out default choices and rewarding people for responsible behaviour. Examples include auto-enrolment in pensions and reduced health insurance premiums for gym members.³ This trend is most evident in the growing emphasis away from a cradle to grave welfare state towards individuals providing for their own financial needs through market solutions. This is most evident in the shift from state to private pensions and people paying for their own long-term care. The narrowing scope of legal aid and promotion of legal expenses insurance is an example of this trend in our setting.
- 2.7. Further, successive governments have recognised how empowering consumers to vote with their feet by rewarding the best providers can contribute to economic growth and so people are now exhorted to research the choices they make and

³ Max Wind-Cowie, Control Shift, Demos, March 2013.

switch their loyalties. The expansion of information about providers to enable such decisions has arguably been most dramatic in public services, such as higher education and health and social care. Personalisation – where citizens are no longer passive recipients of pre-purchased services but have a right to control and shape their own support, such as through direct payments and personal budgets – is another type of example. This exposes the mixed views that people have about risk and responsibility: while some emphasise the benefits of greater choice and control, others worry more about the risks of exploitation and poor decisions.⁴

- 2.8. The way in which the risk landscape has shifted over time reminds us that the law does not develop in a neutral space but reflects economic cycles and the prevailing political ideologies and social norms. In the 1960s, the link between consumers and economic growth was properly recognised by government for the first time and so lawmakers afforded greater protections to consumers in order to give them the confidence to support the economy. Today, most new consumer law is made in the EU where the role of consumers in enhancing competitiveness and completing the single market has been an explicit policy driver. Empowering consumers is likewise a central plank of the UK government's growth strategy, although counterbalanced by the desire to remove those regulations perceived as stifling growth.

The risk equation

- 2.9. The Better Regulation Commission defined risk in a regulatory context as: "*the full range of social, environmental, economic, technical, health and other threats, large and small, that we as a society recognise and believe that the Government should in some way protect us from*".⁵ Taking risks is part of life and no regulator can remove all dangers of harm. However, risk drives policy-making in the sense that

⁴ Jon Glasby, *Whose risk is it anyway? Risk and regulation in an era of personalisation*, Joseph Rowntree Foundation scoping paper, September 2011.

⁵ Better Regulation Commission, *Risk, Responsibility and Regulation – Whose risk is it anyway?*, October 2006.

every policy seeks to increase the chance of one outcome relative to another.⁶

Regulators make judgements about risk all the time, for example about how much freedom of choice consumers should have, what steps it is reasonable to ask consumers to take to protect themselves, what obligations providers should have towards consumers and what regulatory protections should overlay all this.

Importantly, these decisions usually involve a sharing of risk between consumers and providers. It is difficult to think of examples of risk allocation where consumers are absolved of all responsibility for looking after their own interests.

2.10. One difficulty is that there hasn't been a consistent planned approach in policy across all goods and services so consumers can't rely on being intuitive about the levels of protection in place and so the risk they are taking on. In theory, they must forever check sector by sector for information on regulation and self-regulation, ease of gaining redress and so on. Differences in risk sharing may be justified due to differences in market environments and consumer capability, but they are more likely to be a result of historical accident and silo thinking. The current exercise to streamline consumer law under a single Consumer Bill of Rights reflects the desire to make it easier for consumers to understand their rights (and for traders to know their obligations). Greater convergence in the economy, for example mobile payments and banking and, indeed, the multi-disciplinary nature of alternative business structures, suggests that greater joined-up thinking on these issues across regulators and consumer organisations would be sensible.

2.11. Some familiar examples from other markets help to illustrate the risk equation:

- Money deposited in personal savings accounts is protected should a bank become insolvent, although only up to £85,000. Advance payment in cash for a sofa would be lost should the furniture store go under before the item

⁶ Ibid.

is delivered, but payment would be protected if a credit card was used and possibly if a debit card was used (if voluntary schemes are in place)

- Foods containing levels of sugar in excess of the maximum recommended daily intake can be sold, but the nutritional content must be clearly labelled. Foods high in salt, fat and sugar may not be advertised during children's TV, but can be at any other time. Supermarkets voluntarily agree not to sell some species of fish for sustainability reasons
- A contract made in the home after an unrequested visit from a salesperson can be cancelled, but only if this is done within seven days. A cooling off period of 14 days applies to all credit agreements. There is no requirement for shops to refund unwanted gifts, but many have goodwill returns policies
- Consumers can complain to an ombudsman about an estate agent offering poor service, but not about a lettings agent unless it is voluntarily a member of a redress scheme
- The ATOL scheme protects consumers who book a package holiday from losing money or being stranded abroad if their travel company collapses. However, consumers are not usually covered if they book different parts of their holiday with different companies, i.e. 'DIY holidays'

2.12. These examples also highlight that risk is not uniformly distributed. The degree of risk that consumers are expected to bear varies depending on the type of business they are dealing with, the nature and scale of potential harm they are exposed to, and whether there are things that people can do themselves to manage the risks. The food example in particular shows that people are free to act in ways that may be harmful to their own interests as long as this is can be an informed choice. Vulnerable consumers, such as children, are expected to bear less responsibility for their decisions than others. And in some cases choice may be removed altogether. The examples also demonstrate that sometimes businesses may voluntarily accept more risk than is required by law where this makes commercial good sense.

2.13. Finally, there is a danger that working out the allocation of risk between consumers and providers becomes an artificial exercise. This is because the costs of regulation are ultimately passed on to consumers or taxpayers. In reality, risk in markets is therefore either borne by individual consumers or spread across society as a whole. Although the costs of mistakes are borne disproportionately by individual victims. Since some people are better able to manage risks than others, when an activity is regulated the costs of managing this risk involves an element of cross-subsidy across the population. Where activities are unregulated, insurance products, where available, serve to pool risks among those policyholders who can afford to protect themselves against the future risks they may face.

What this means for legal services regulators

2.14. The Legal Services Board has asked the Panel to consider '*the appropriate level of risk consumers should be expected to bear*'. The question was posed in the context of financial protection arrangements such as professional indemnity insurance and compensation funds to protect against risks of fraud, negligence and insolvency. The Board's preliminary view was that since many such arrangements have been in place for several years, '*the current regulatory solutions for meeting these risks may not necessarily reflect a good current understanding of what is an appropriate level of consumer risk*'. It went on to express concern that: '*consumers may take false confidence from the very fact that there are some regulatory arrangements in place and assume that all legal transactions take place in a "zero risk" environment. That in turn may lead them to be less discerning about the type of adviser they use and, as a result, end up taking more risks than they might with other significant transactions (for example investment decisions)*'.⁷

⁷ Letter from Chris Kenny to Elisabeth Davies commissioning advice on financial protection arrangements, send on 1 October 2012

2.15. We address the issue of the correct level of consumer risk in relation to financial protection arrangements in a separate report.⁸ In fact, issues around risk and responsibility underpin a series of important decisions about the regulation of legal services. For example, these issues have been central to:

- Decisions about which legal activities should be regulated, e.g. the LSB's view that will-writing should be regulated but not estate administration
- Different regulatory approaches to conflicts of interest, for instance in rules allowing or preventing conveyancers acting for both buyer and seller
- The Legal Ombudsman's compensation limit, which in part reflects a view about providers' maximum liability for poor service through an ADR scheme (of larger importance given the realities of individuals financing litigation)
- The LSB's policy objective of empowering consumers, which it sees as potentially enabling the stripping back of unnecessary regulation
- Judgements about whether take up of legal expenses insurance is likely to grow and so offer a viable alternative to legal aid

2.16. Reaching a shared view on the appropriate sharing of risk between consumers and providers is unlikely to be easy. Unusually, the Financial Conduct Authority's (FCA) establishing legislation requires that, in deciding what might be the appropriate level of protection for consumers, it should have reference to the '*general principle that consumers should take responsibility for their decisions*'.⁹ After issuing a discussion paper on consumer responsibility and consulting both its consumer and practitioner panels on how this should apply, the FCA's predecessor organisation, the Financial Services Authority (FSA), was unable to reach a consensus and saw no prospect of one emerging in the foreseeable future. The Financial Services Consumer Panel

⁸ Legal Services Consumer Panel, *Financial protection arrangements*, May 2013.

⁹ Section 5, Financial Services and Markets Act 2000.

(FSCP) saw that: “*industry professionals tend to interpret ‘increasing consumer responsibility’ as a way of negotiating the limits of consumer protection and, arguably, reducing their own liabilities*”.¹⁰

2.17. While reaching agreement across stakeholders might prove difficult, the Panel considers this is nevertheless a worthwhile issue to explore in legal services. Regulators must make correct decisions about the allocation of risk between consumers and providers consciously and based on fair principles and sound reasoning. The Panel’s recent work on empowering consumers has demonstrated how confidence that the system will protect them is a crucial pre-cursor to people shopping around and driving competition.¹¹ Therefore, getting the right balance should encourage responsible behaviour among both consumers and providers and thus facilitate well-functioning markets.

¹⁰ Financial Services Consumer Panel, *Consumer responsibility: the Financial Services Consumer Panel response to discussion paper 08/5*, June 2009.

¹¹ Legal Services Consumer Panel, *Empowering consumers – phase one report to the LSB*, March 2013.

3 Risk and regulation

Why risk and responsibility is healthy

- 3.1. In an entirely risk-free legal services market, consumers would need to take no responsibility for their behaviour or decisions as regulation would protect them from any harm. However, this would be bad news on a number of levels.
- 3.2. Firstly, consumers pay for the costs of managing risks at an excessive level since in a competitive market providers can be expected to pass on the costs of regulation. Unnecessary regulation, therefore, makes the law less affordable for more people. This is of special significance in legal services given access to justice concerns. It is in the consumer interest to have the right amount of regulation and no more.
- 3.3. A risk-free world would limit innovation that benefits consumers. Change usually involves some degree of risk, and deregulatory measures are often opposed on the grounds that they would expose consumers to an unacceptable level of risk. Often, though, this opposition is led by incumbents for protectionist reasons. Changes seen in the legal services market as a result of disruptive technologies and alternative business structures – automated document services, new patterns of service delivery, fixed fee deals, and so on – are unlikely to have happened without those triggers. However, while this change is significant, the reforms did not herald a wild west, but involved some carefully considered decisions designed to limit risk to consumers and the wider public interest (e.g. fitness to own tests).
- 3.4. Greater choice normally benefits consumers, whereas regulation can limit choices or freedom of action. Research has shown that the public view regulation as an

imposition and impinging on personal choice and freedoms, although they accept regulations are necessary to minimise risk and afford protection.¹² Of course, freedom brings the risk of making bad choices and there are issues about allowing consumers to harm themselves or third parties. Exercising informed choice would allow consumers to protect themselves, while the legal services market will also work better if consumers become more empowered to choose the most suitable provider for their needs. The Panel has discussed these issues in detail in a recent paper¹³, in which we highlighted the connection between empowered consumers and economic growth. The more that consumers can signal their preferences, providers will be better able to design services that meet these needs. And the more often that consumers reward the best providers and enter into transactions with their eyes open, the less scope there is for weak or unscrupulous providers to get away with poor service or to exploit consumers. However, as we explore later, providers can respond to these signals by exploiting people's innate behavioural biases, such that consumers may make poor choices. An example is teaser interest rates on ISAs – providers know that consumers will be attracted by the high interest rate available for the initial term but that inertia means many will not switch provider once this term expires. Enabling good consumer decision-making can prove to be a constantly moving target for regulators.

- 3.5. An interesting development is how technology is enabling consumers to pool resources, for example through customer feedback websites and collective purchasing schemes (e.g. for switching energy suppliers). This has interesting implications for risk and responsibility, as it potentially alters the risk equation described earlier. Consumers are able to secure better outcomes by acting together than they can alone since the imbalance of power in relation to providers is

¹² Peter Lunt, Sonia Livingstone and Sarita Malik, *Public Understanding of Regimes of Risk Regulation: A report on focus group discussions with citizens and consumers*, September 2008.

¹³ Legal Services Consumer Panel, *Empowering consumers – phase one report to the LSB*, March 2013.

narrowed. Even so, choice in an online environment is open to manipulation, as concerns over the operation of price comparison websites in other sectors testify.

- 3.6. Active participation is another desirable form of consumer responsibility as it's likely that people will get better outcomes in their legal matter if they exercise greater personal control over decisions in their case. While the lawyer remains the expert, this expertise can be put to greater use if their advice is informed by a proper understanding of their client's needs and wishes. Lawyers have to act in the best interests of their client, but ultimately they must accept their client's instructions even if, in their view, this is not the right course of action. There is now a far less deferential attitude towards professionals than in the past. In the health arena, there has been a shift from 'doctor knows best' to active patient involvement. One major development is the emergence of the 'expert patient' who plays an important role in managing their long-term medical conditions. This goes beyond choosing a provider to taking responsibility during the provision of a service. This change has not happened to the same degree in legal services, partially because access to knowledge about the law has not spread in the way it has done in healthcare. That the public is researching their health needs and exercising a greater degree of control over treatment options, is evidence that people are willing and able to take more personal responsibility for critical decisions.
- 3.7. Yet the consumer's freedom to take risks should not be entirely unchecked. Problems of moral hazard may arise if consumers do not face the consequences of their actions. In particular, this may occur if consumers are insulated from risk but have more information about their actions and intentions than the party paying for the negative consequences of the risk. Here consumers have incentives to act less carefully than they would normally because the costs of their mistakes will be borne by others, such as businesses or insurers, rather than themselves. In other words, they are free to behave irresponsibly in the knowledge that they won't be penalised should something go wrong. For example, insurers avoid moral hazard problems by requiring people to disclose certain pre-existing medical conditions.

Do consumers actually have responsibilities?

- 3.8. This question was a vexed issue in the FSA's work on this topic. The FSA drew on case law to show how the courts can limit the extent to which consumers are able to recover any loss suffered by reference to whether they acted unreasonably or made a reasonable effort, when compared to what an average person of his/her kind would be expected to do. However, the FSCP strongly resisted the idea that consumers had responsibilities beyond civil law and argued there was no locus for the regulator to set out any responsibilities in a formal sense. It argued instead that the FSA should limit its activities to promoting sensible actions consumers might take when engaging with financial services.
- 3.9. The wider consumer movement acknowledges that consumer rights should be balanced with responsibilities. In the 1980s, Anwar Fazal, then president of Consumers' International, led a call to introduce the 'consumer responsibilities' listed below to complement an established set of 'consumer rights'.
- Critical Awareness – the responsibility to be more alert and questioning about the price and quality of goods and services we consume
 - Action – the responsibility to assert ourselves by acting to ensure that we get a fair deal. As long as we remain passive consumers we will continue to be exploited and manipulated
 - Social Concern – the responsibility to consider the impacts of our consumption patterns and lifestyles on other citizens especially the poor disadvantaged or powerless consumers whether they be in the local national or international community
 - Environmental Awareness – the responsibility to realise the environmental costs and consequences of our consumption patterns and lifestyles. We should recognise our individual and collective social responsibility to conserve natural resources and to preserve earth for present and future generations

- Solidarity – the responsibility to come together and organise consumers in order to enhance the strength and influence required to promote and protect our interests

Current practice in legal services

- 3.10. It is interesting to observe any informal expectations of consumer behaviour that influence the way regulators and complaints-handling bodies currently work. At one level, as long as lawyers adhere to their codes of conduct, consumers remain responsible for their decisions. Yet outcomes-focused regulation arguably pushes more responsibility on to providers than a prescriptive rules-based system does. Information remedies are a useful illustration of this. A rules-based approach means lawyers would have fulfilled their obligations if they communicated certain information in the specified way. However, the outcomes-focused model adopted by the SRA states that lawyers **must** achieve certain outcomes, for example that clients are in a position to make informed decisions about the services they need, how their matter will be handled and the options available to them. Since the focus is on the outcome, rather than compliance with a specific requirement, this places greater responsibility on providers to secure regulatory objectives. This is a positive step as it better reflects the power imbalance between consumers and lawyers. It implies that lawyers need to become more skilled in providing advice and checking this has been understood, at which point it is then right to expect the consumer to accept negative consequences of the instructions they give based on this advice. If a consumer knows they are taking a risk, but understands this and appreciates the possible consequences having received advice they consider is competent, it would likely go against their conscience to complain should these events then materialise.
- 3.11. In a different context, consumers might lose out if they fail to protect themselves. The Legal Ombudsman has confirmed it does not have specific guidance on the extent to which consumer responsibility should be considered when investigating complaints as each case will be considered on its own facts. However, in general, it would expect consumers to provide their lawyer with adequate information to enable the lawyer to act in their best interests. Good communication is also at the

heart of avoiding problems and preventing complaints – and ombudsmen consider the role of both sides in this, including unnecessary over communication resulting in delays and increased costs for the consumer. Furthermore, ombudsmen can only make decisions on the evidence which is presented to them, which is often in the form of written communication and documentation. Therefore, if consumers do not equip themselves with an adequate understanding of the effect of documents that they are signing, or the ability to provide supporting information on their instructions to lawyers, they might find it harder to demonstrate their complaint – in each case the subject matter and nature of the complaint affects this assessment. Equally, if it was felt a lawyer had made it difficult for consumers to fully understand the process or the terms of their engagement, this would weaken the position of the lawyer.¹⁴ In this context it is seen that the inquisitorial approach that ombudsman schemes use thus has greater value than purely paper-based dispute resolution mechanisms.

3.12. These examples of current practice suggest it may be useful to distinguish between general and specific responsibilities. For example, it is perhaps reasonable to expect consumers to seek to provide their lawyer with full details of their matter, but not to be held responsible if a provider does not make clear what information they need. When asking a professional to prepare a will a consumer should set out how they wish their assets to be divided, but the provider has responsibility to ask probing questions to tease out issues, such as about children from previous relationships, that might cause legal problems later. Similarly, consumers might be said to have a general responsibility to try to make good use of information given to them. However, they should not be held responsible for reading pages of terms of conditions in a contract in order to extract all the information they might later need.

¹⁴ Email from Legal Ombudsman, 20 March 2013.

Helping consumers to protect themselves

- 3.13. The Panel wants to tackle the climate of fear and risk-aversion that surrounds the use of legal services. We want to work towards a world, as has started to develop in health and social care, where consumers are more active partners in decisions about their legal case. This shift could take place if legal services consumers had the same kinds of information and tools patients have at their disposal (although staff training and cultural shifts are also significant). This includes educative initiatives – the Cabinet Office has highlighted the role of advice agencies in focusing on early intervention, prevention and education to help clients be better placed to resolve problems themselves in future and prevent reoccurrence.¹⁵ Moreover, we want to see more consumers shopping around for legal services and rewarding innovative firms that provide better services at value for money prices. Again, this could happen if there was greater transparency about the performance of firms and the emergence of intermediaries to filter this information to support informed choice.
- 3.14. Market liberalisation is part of this answer as competition should force providers to design services which are responsive to consumers' needs. We have already witnessed innovation in the market following the advent of alternative business structures, among both new entrants and existing providers. At a simple level, these firms are helping to break down the mystique that unnecessarily surrounds the law and present solutions to legal problems in a language that is easy to understand. By pressuring firms to focus on giving excellent customer service, competition should result in improving elements of service where many lawyers currently do badly, such as lack of empathy, that will make legal services feel more accessible to ordinary people. The focus groups for this project revealed that the most common perceived risk of using legal services is fees that spiral out of control,

¹⁵ Cabinet Office, *Not-for-Profit Advice Services in England*, October 2012.

but one early consequence of competition is the growth in fixed fee deals that offer consumers greater certainty. The LSB's research indicates that 12% of people do not act on an identified legal problem.¹⁶ All these developments should help to make legal services seem a less risky prospect in the eyes of consumers and start to tap the significant latent demand in which large numbers of people currently reject getting legal advice when this might benefit them.

3.15. However, competition is unlikely to succeed on its own. As we explore later, market features and people's innate behavioural biases, place significant limits on the level of responsibility that it is fair to expect consumers to accept. In addition, providers sometimes seek to exploit consumers and lack the incentives to provide information about their performance to allow informed choices. Even putting aside issues of vulnerability, consumers are information poor when it comes to choosing and using legal services. While consumers can compare the complaints records of banks, mortality rates in hospitals or school exam results, there is very little information about the performance of legal services providers. Intermediaries who can filter such information, such as the media and comparison websites, which are a common feature in other markets, are not prevalent in legal services. If one means of enabling consumers to accept more responsibility for their decisions is to provide them with the information and tools to make more discerning choices, currently this equipment is sorely lacking in the legal services market. The Panel has identified elsewhere¹⁷ the need for regulators to empower consumers to choose and use legal services with confidence. We have proposed solutions, such as more credible choice tools and a feasibility study on an NHS Direct equivalent for law that would enable consumers to take more personal responsibility and exercise greater choice.

¹⁶ BDRC Continental, *Legal Services Benchmarking*, Legal Services Board, June 2012.

¹⁷ Legal Services Consumer Panel, *Empowering consumers – phase one report to the LSB*, March 2013.

4 Finding the right balance

- 4.1. Some risk is a good thing, but it's important to get the balance right. As a basic point of fairness, it is unreasonable to ask consumers to accept risks which they either do not know about or cannot manage. It is simply wrong to expose people to harm if they have no means of protecting themselves. Finding the right balance is also important because errors of judgement could produce the wrong behaviours among consumers, from recklessness at one extreme to, at the other extreme, refusal to engage in legal services due to a lack of confidence. Equally, providers can exploit a situation in which consumers lack sufficient protection.

Context is everything

- 4.2. A Demos pamphlet described the challenge as follows:

“By viewing responsibility through the lens of risk, and of risk-control, we are able to begin to make judgements about where responsibility properly lies – at what level and in what sense. It allows us to start to appropriately apportion responsibility to the individual, to the community and to the state – and to avoid the twin evils of diminishing the relative responsibility of individuals and of overburdening people with responsibility for outcomes that are beyond their control.”¹⁸

- 4.3. The general policy objective of encouraging greater consumer responsibility across markets may have laudable aims, but consumers' ability to understand and manage risks will vary greatly depending on the context. Therefore, legal services regulators

¹⁸ Max Wind-Cowie, *Rebalancing risk and responsibility*, Demos, February 2012.

should carefully evaluate the scope for consumer responsibility **in a legal services context** before making decisions about how risk can be fairly shared between consumers and providers. Of note, government has acknowledged this balance was wrongly drawn in financial services and decided that a more interventionist approach will be taken by the FCA. Speaking in July 2012, Mark Hoban, Treasury Financial Secretary, said:

“The more interventionist approach from the FCA will not only protect consumers, but in the long-term it will strengthen the reputation of the sector and give consumers more confidence to buy because they know the right processes are in place to make sure the market is well regulated... That does not mean to say it will be a zero failure regime. There will still be problems. But, there will be a better balance between the risk we expect an individual to take and how we protect them when they make decisions about their financial futures.”¹⁹

- 4.4. Depositor protection is one practical example where government altered the balance of risk in order to increase confidence following the run on Northern Rock. Many consumers in the Northern Rock queues had balances over the protected limit which then stood at £50,000. Today the protected deposit is £85,000 (€100k) and has in fact been increased several times over the last decade. At the time of the panic over Northern Rock, the government felt compelled to guarantee deposits of unlimited sums demonstrating the need to take account of public risk appetite when deciding how risk and responsibility should be allocated. Important limits to consumer responsibility
- 4.5. For a range of reasons linked to public attitudes towards the legal system, the vulnerability of clients and third parties, the nature of the legal services market and a lack of information about providers, our analysis is that consumers are currently

¹⁹ See <http://www.moneymarketing.co.uk/politics/hoban-interventionist-regulation-is-price-for-consumer-responsibility/1054155.article>

poorly placed to manage many of the risks of using legal services. This situation justifies a high level of regulation, but at the same time there should be efforts to reduce consumer vulnerability and so make it easier for people to make better choices and protect their own interests when using legal services.

Severe consequences of poor decisions

- 4.6. One important factor is the consequences of poor consumer decision-making. Such harms could result from inability to access support at the right time or due to problems with the service provided. The nature of legal services means that these harms can be very serious, including loss of liberty, health problems, financial shortfall, damaged relationships or breach of privacy. Moreover, often there is no real choice about whether to use legal services; it is either necessary to achieve something (e.g. a house purchase), or it results from an unwelcome event (e.g. being unfairly sacked). And people's ability to influence events is also constrained by the fact that their matter sits within a legal framework of rights and duties.
- 4.7. We should also remember that legal services are not simply a transaction between a lawyer and their client, but may involve other parties. Therefore, the level of risk that one client bears can have consequences for others who do not have a say on whether this is fair or who cannot protect themselves by actively managing the risk. These third parties might be vulnerable, such as victims of a crime, children subject to a custody battle or someone lacking mental capacity. And, of course, lawyers act for clients who are vulnerable due to their own personal circumstances, for example someone with a learning disability who is in dispute with their local council over schooling, or a deaf person who has been discriminated against by an employer. Other consumer research has shown that people are conscious of their own

abilities to manage risks and show concern that some individuals, typically children and older people, are more vulnerable to risk.²⁰

- 4.8. Research has shown that the risk issues of most concern to consumers are those that most directly affect their lives and those of their families.²¹ Perceptions of risk are heightened if the consumer has no choice about dealing with risk, has no control, or the decision is a one-off. The potential outcome contributes to a heightened sense of risk if it is irreversible or potentially devastating, is felt immediately and affects others. Legal services tick all these boxes – our focus groups saw, for example, a washing machine breaking down as a far cry from an unfavourable divorce settlement or a house purchase falling through. This means that consumers do invest effort in finding a good advisor in order to avoid problems, but they find it difficult to find the right information to make informed decisions.

Market challenges and behavioural biases

- 4.9. While it is desirable to increase legal capability, wide gaps in knowledge and power between consumers and lawyers will inevitably remain. We do not wish to do consumers a disservice by suggesting they are incapable – clearly, many people deal with lawyers satisfactorily, but the stressful and high stakes nature of legal services means this will always be a challenging environment even among consumers who demand the most of providers in other areas of life. Other well-rehearsed aspects of legal services transactions make mistakes by consumers more likely including asymmetries of information and infrequent purchases. People may also need to make a series of decisions as their case progresses and these in turn may involve difficult decisions about trade-offs, for example during litigation or a divorce settlement; each decision may carry its own risks and potential for error. So the decisions consumers have to make may be both numerous and complex.

²⁰ See, Ipsos MORI, *Citizens Perceptions of Regulation*, Better Regulation Executive, January 2007.

²¹ National Consumer Council, *Running risks*, October 2002.

4.10. It's also essential that decisions on risk sharing take full account of behavioural biases. The FCA has significantly made behavioural economics the first topic in its occasional paper series.²² As the paper says, one of the key insights offered from this discipline is that consumers do not always act in their own best interests due to these biases, while firms can also exploit these traits in ways that harm consumers. The paper suggests this has important implications for where the FCA sees the limits of consumer responsibility and how much value it places on choice and product variety. Thus if '*consumer mistakes are predictable, there is scope for a regulator to intervene paternalistically, by which we mean to benefit consumers by affecting their choices or otherwise protecting consumers from their own mistakes*'. However, the paper highlights that acting paternalistically does not necessarily imply restrictive regulation, but creates scope for nudges which encourage consumers to choose options that are more likely to be beneficial for them and make mistakes less likely.

4.11. The LSB has commissioned a paper which reviews the application of behavioural economics principles to the legal services market.²³ In reading both papers there are some clear parallels between financial and legal services in how behavioural biases are affecting consumer decision-making. These include common factors, such as inherently complex products, infrequent decisions and emotion, that make consumer decisions particularly prone to errors. For example, legal situations involve a broad range of strong emotions such as anger at a spouse, sadness at the loss of a close relative, anxiety having been charged with a crime or happiness at the prospect of receiving compensation. These emotions change how decisions are taken in terms of depth of thinking, which information is used to make the decision, how much control a person believes they have over events and how

²² Kristine Erta, Stefan Hunt, Zanna Iscenko, Will Brambley, *Applying behavioural economics at the Financial Conduct Authority*, Financial Conduct Authority, Occasional Paper No.1, April 2013.

²³ Linstock communications, *Understanding Decision Making in Legal Services: Lessons from Behavioural Economics*, Legal Services Board, April 2013.

confident they are about their evaluations. The emotion can also push people towards taking inappropriate action, such as a desire in angry people to ‘move against’ persons or obstacles by fighting, harming or conquering them.

- 4.12. The regulatory framework must recognise these realities and not attempt to shift a higher degree of risk to consumers than they can cope with. Crucially also, the responsibility should lie with providers to design simpler services and present clear and understandable information to consumers, rather than expect consumers to wade through mountains of paperwork filled with gobbledegook. Law firms must be held responsible for their behaviour, not blame consumers for lacking capability. Regulators can help by ensuring consumers can access good quality information which is available at the right time and in a way they can engage with. They should also be aware of the influence of behavioural biases on consumer and provider behaviour and consider options that can help to overcome these traits.

Low public appetite for risk

- 4.13. The Vanilla Research study commissioned for this project shows that consumers feel vulnerable when using legal services and reject taking a greater burden of risk. People see legal services as a special case, since it deals with life-changing events, it is a rare purchase, their knowledge of the law is limited, and they are confused and put off by the wide use of jargon and legalese. Consumers make a distinction between lawyers and other types of businesses they deal with. While they would feel confident standing up to an electrical goods salesperson or car mechanic, this confidence is usually lacking when dealing with lawyers.
- 4.14. Quite understandably, consumers view using legal services as a hard thing to do. Indeed, new research commissioned by the LSB shows that many people see going to a lawyer as a last resort, partly due to the potentially high costs involved,

but also because they are simply daunted by the prospect.²⁴ Feeling intimidated by lawyers was also a strong theme in research commissioned by the Panel and the Legal Ombudsman on barriers to making a complaint.²⁵ Therefore, people feel a real sense of powerlessness in face of the legal system. Even normally confident consumers feel unable to deal effectively with lawyers. And they must sometimes do so when the personal stakes are high or, as at times of grief, when they are simply not feeling at their best.

- 4.15. Other research has shown paradoxical public attitudes towards risk and regulation. People endorse a strong ethos of personal responsibility but also want protections and back-ups in place. They want more choice but recognise they may struggle to understand complex information regarding the decisions facing them. They worry about the vulnerable yet attack regulation for being intrusive.²⁶ In legal services, however, public attitudes are more clear cut: consumers feel vulnerable, doubt their abilities to make informed choices and value the protections offered by regulation.
- 4.16. Indeed, our focus group evidence suggests asking consumers to accept more risk than they can reasonably manage would be counterproductive. When presented with the choice of using a more expensive lawyer carrying indemnity insurance or using a cheaper uninsured lawyer, participants in our research nearly always chose the first option. Consumers wouldn't take advantage of this wider choice, but instead use lawyers who offered insurance against mistakes and avoid those who did not. This is something they expect lawyers to take care of automatically and they would be suspicious about firms who were not insured. Therefore, removing mandatory protections could actually undermine consumer trust in the market.

²⁴ Optimisa Research, *Consumer use of legal services: Understanding consumers who don't use, don't choose or don't trust legal services providers*, Legal Services Board, May 2013.

²⁵ YouGov, *Consumer experience of complaint handling*, Legal Ombudsman and Legal Services Consumer Panel, October 2012.

²⁶ Peter Lunt, Sonia Livingstone and Sarita Malik, *Public Understanding of Regimes of Risk Regulation: A report on focus group discussions with citizens and consumers*, September 2008.

A proportionate approach

- 4.17. This is not a call for the blanket regulation of every activity to the highest degree. Some legal activities are riskier than others, and some consumers are more willing and better able to manage risk. We know that consumers value freedom of choice and resent silly or petty rules that restrict them. Over the years, the Panel has supported policy proposals that carry greater risk for consumers, as long as this is properly balanced. For example, in discussions on the Quality Assurance Scheme for Advocates, we said that consumers should be able to use a criminal advocate accredited one grade below their case level, as long as this is on the basis of informed consent. We suggested to the Solicitors Regulation Authority that rules preventing solicitors acting for buyer and seller in conveyancing transactions could be relaxed so that consumers may enjoy the benefits of speed and lower cost, but we proposed research to inform a decision on what safeguards were needed. The Panel has also said that self-completion online will-writing services should remain unregulated, partly out of recognition that it is reasonable to expect a lower duty of care when a consumer prepares a will assisted by some guidance, as compared to when a lawyer prepares a bespoke will in dialogue with their client.
- 4.18. We would also stress that the right risk equation will vary within the legal services market. In fact, the concept of differentiation was at the heart of the FSA's approach, with differing levels of responsibility falling on the consumer to reflect their relative capability and the nature of the service or product. For example, in motor insurance, the FSA considered that consumers are better placed to shop around and exercise a high degree of responsibility because this is a relatively frequent purchase of a comparatively simple product, price comparisons are readily available and there are few complex issues. By contrast, consumers are expected to exercise a much lower degree of responsibility for products which are complex and less frequently purchased, such as pensions and life assurance. Differentiation applied across the FSA's work: in how it set policy, supervised and enforced in different product markets and reflected the differing capabilities of consumers.

- 4.19. Yet, while it is important not to over-generalise about consumers and risk, these issues boil down to some fundamental questions about the volume and style of regulation in legal services. The Panel's attitude towards risk and responsibility explains why we think all legal activities should be regulated at least to the extent that all providers should fall within the Legal Ombudsman's jurisdiction. It seems unfair to push risk of choosing legal services on to consumers yet not give them a route to redress if something goes wrong. Likewise, consumers' inability to check the technical quality of work underpins the greater emphasis we place than some other stakeholders on the need to prevent detriment wherever possible through entry standards and periodic revalidation. However, we see no inconsistency between our wish for minimum consumer protections set at a high level and competition. The market should be open to all types of provider who can meet such standards rather than only the traditional professions as before. In fact, since consumers expect these protections to be in place, putting in place the level of regulation that consumers want to see should support a diverse market place.
- 4.20. Any transfer of risk to consumers should be a gradual process and only follow when there is evidence that consumers are more empowered. It should not be the case that regulation is taken away and consumers are left to fend for themselves based on a paternalistic view that people will only learn once they are allowed to fail. Consumers see legal services as deep waters and shouldn't be left to sink or swim. People are more likely to take greater responsibility when there are clear benefits from doing so and they are supported in making this choice. The Panel's work on empowering consumers highlighted research showing that consumers are most likely to have a satisfactory experience of a market if they believe that there are strong consumer protections in the market. Therefore, before expecting consumers to take greater risks and play an active role in shaping markets, it is first necessary to ensure the consumer protection framework is fit for purpose.

5 A final word

Forging a distinct path for legal services

- 5.1. It is desirable on many levels to encourage consumers to take more risks and accept greater personal responsibility for their decisions. This can result in better decision-making, less deference to professionals and more competitive markets. Many people are frustrated by what they see as the irresponsible behaviour of their fellow citizens and irritated by silly regulations that deny them freedom of choice.
- 5.2. However, fairness demands that consumers should only be invited to accept risks which they know about and can safely manage. This capacity may vary markedly depending on the features of the market and their own capabilities and situation. Finding the right share of risk between consumers and providers is a balancing act. What is a reasonable share of risk to ask consumers to accept in one market will be unrealistic in another. Indeed, there are variations within the legal services market. It follows that legal services regulators must work out what is the correct path to take in each case given the unique characteristics of this market. The financial crisis has demonstrated the consequences of getting this risk equation wrong.
- 5.3. Legal services can involve high stakes for individuals and third parties. Consumers justifiably feel very vulnerable when dealing with lawyers for a variety of reasons. They also lack the confidence, knowledge and tools to make informed decisions. They are subject to strong behavioural biases and providers may manipulate these. Participants in our focus groups saw legal services as a special case. They took reassurance from regulation and strongly resisted transferring more risk to them, which they said would only serve to undermine their trust in the market further. Regulators need to acknowledge these realities, but also work to break down the barriers that prevent consumers from taking a more active role in decisions about their case or driving competition through their purchasing behaviour. Using legal

services may never become easy, but it can and should be made far easier.

Providers should take responsibility for removing the mystique and practices that make legal services hard to deal with, not blame consumers for lacking capability.

- 5.4. While the arguments around risk and responsibility are quite subtle, they actually underpin some fundamental questions about the future direction of regulation in this market. Judgements about where risk should fall will inform decisions about specific rules, such as conflicts of interest, but also more strategic issues concerning the amount and style of regulation. Attitudes towards consumers and risk help explain stakeholders' diverging positions on, for example, the right balance between authorisation and supervision, or which activities should fall within the scope of regulation and which should remain outside. In our view, the current level of risk that consumers bear is about right, and it may even be too high in some respects. The attitude taken by the Panel towards consumer risk explains our wish to see access to redress extended across the whole market, and the greater emphasis we place than some others on entry standards and ongoing quality assurance.
- 5.5. We want regulators to support consumers to protect better their own interests. However, the correct sequencing of policy priorities is crucial to get right. It would be counterproductive to remove regulation and simply watch how consumers react. The research evidence clearly shows that consumers will have the confidence to drive competition only when they think that regulation will protect them. A strong safety net emboldens consumers to take a leap of faith, but they will not do so blindfolded. Thus there is also a challenge to unlock the information and tools that will enable informed choices. Any transfer of risk should then be a gradual process and only follow when consumers are empowered enough to navigate the market safely. Even then, the nature of the legal services market is likely to continue to justify a strong and preventative consumer protection framework.

6 Annex: Research on risk

Learning from research

- 6.1. Regulators should develop a sound understanding of consumer attitudes and behaviour in relation to risk, responsibility and regulation. This will help them to identify what risks matter most to people and thus aid prioritisation of resources. Research will allow regulators to take an informed view about when consumers are comfortable and able to accept a greater or lesser burden of risk, and how their behaviour might change in response to certain situations involving risk. Such an understanding underpins the legitimacy of regulation and enhances accountability since it enables judgements about whether risk is being appropriately shared.
- 6.2. The Panel has reviewed major research studies examining risk, responsibility and regulation in consumer markets to identify any common findings. In addition, we commissioned Vanilla Research²⁷ to conduct focus groups with individual consumers to explore these issues in a legal services context. This has proved invaluable since a key finding is that consumers' appetite for risks varies depending on the context. This is important because it might justify a different regulatory response in legal services compared to the overall economy.

What risks most concern people

- 6.3. Research commissioned by the National Consumer Council (NCC)²⁸ showed that the risk issues of most concern to consumers were those that most directly affected

²⁷ Vanilla Research, *Risk and the role of regulation*, Legal Services Consumer Panel, January 2013.

²⁸ National Consumer Council, *Running risks*, October 2002.

their lives and those of their families. These were personal security and safety; financial security now and in the future; and health and well-being. Reactions to risk were complex and diverse. Influencing factors included: the nature of the consumer; the nature of the risk; the risk's outcome; and external influences. Perceptions of risk were heightened if the consumer had no choice about dealing with risk, had no control, or the decision was a one-off. The potential outcome contributed to a heightened sense of risk if it was irreversible or potentially devastating, was felt immediately and affected others.

- 6.4. In the health arena, research commissioned by the Professional Standards Authority (PSA)²⁹ found spontaneous thoughts on risks around safety and harm generally did not emerge. Instead, the risks that spontaneously came to mind tended to be around financial concerns, waiting times for appointments and communication issues. When prompted, unsurprisingly the riskiest professions were seen as those carrying the highest physical risk – in effect, those involving the most physical contact or invasive treatment. Key overarching differences in perception of risk were between risks relating to the nature – i.e. the vulnerability – of the patient, and risks relating to the nature of the treatment and potential harm it could cause.
- 6.5. In legal services, as in health, spontaneous thoughts on risks centre on issues around fees and customer service, rather than the sorts of 'safety' problems that financial protection regimes are designed to address. These are visible risks, while problems such as fraud and insolvency are seen as rare or not associated with the legal profession, so they are not factors when people search for an advisor. Consumers consider they are vulnerable when using legal services, they recognise the potentially serious consequences for themselves and others if things should go wrong, and they are intimidated by the prospect of seeking redress. For example,

²⁹ Ipsos MORI, *Perceptions of Risk in Health and Care Settings*, Council for Healthcare Regulatory Excellence (now the Professional Standards Authority), April 2012.

participants in our research saw a washing machine breaking down as a far cry from an unfavourable divorce settlement or a house purchase falling through. This means that consumers do invest effort in finding a good advisor in order to avoid problems, but they find it difficult to find the right information on which to make informed decisions. This explains a reliance on personal recommendation or past experience in choice of provider as the main method of managing risk. This risk behaviour has policy implications in terms of barriers to entry since it suggests that consumers will be nervous about using unfamiliar providers.

Population differences

- 6.6. Risk attitudes and behaviour vary across the population. In the NCC study, lower income groups were more reactive in their approach to risk issues and felt unempowered to respond to risk. Women were more likely than men to agree that they tend to stop buying things or avoid situations where they feel there are risks involved. In research commissioned by the FSA³⁰, the lower the sophistication of the respondent, the more likely they were to focus on the potential benefits and push the downside of risk to the back of their minds. They often transferred responsibility to the financial advisor or thought the impact of risk was not something that would affect them. People who were most worried by risk actively sought to avoid being exposed to it. Attitudes towards investment risk were dependent on an individual's personality, their circumstances, their level of financial knowledge and experience, and the extent of their financial product portfolio. However, this could change at any point in time as needs alter and the capacity to afford to lose varies.
- 6.7. People are conscious of their own abilities to manage risks and show concern that some individuals are more vulnerable to risk. Research conducted by a team from

³⁰ Conquest Research, *Consumer understanding of financial risk*, Financial Services Authority, November 2004.

Brunel University and the London School of Economics³¹ identified the concern that ordinary people must negotiate regulation in an increasingly complex world. This raised questions of literacy or competence – whether financial, technical or other skills. Particular concerns were expressed regarding those considered to be vulnerable in the face of complex decisions, especially young people, the elderly and those in poverty. Other research has shown this isn't a constant and varies in different situations, for instance health literacy levels are different to standard literacy levels.³² Research commissioned by the Better Regulation Executive (BRE)³³ similarly found a view that regulations were primarily needed to minimise risk and afford protection, particularly to those who were vulnerable. Again, children and the elderly were two specific groups identified as requiring extra protection. These are, of course, perceptions; not everyone in a population group is vulnerable.

6.8. In our legal services research, perceptions of consumer protection varied by age. Confidence tended to be lower in the older age groups (socio-economic background did not make any difference) due to build up of negative experience over years of dealing with legal services. The Vanilla research included focus groups with low literacy participants to explore the role of information. Again the sense of being protected as a consumer was mixed: while some trusted legal services, others felt more vulnerable, partly based on poor recent experiences of using solicitors without really understanding what was going on. Overall, however, it was the uniform attitude towards levels of regulation that was striking in our research. The research sample included people who generally saw themselves as risk-accepting and risk-averse in their lives, but both groups were equally sure that levels of regulation should not be reduced in exchange for lower legal fees. Finally,

³¹ Peter Lunt, Sonia Livingstone and Sarita Malik, *Public Understanding of Regimes of Risk Regulation: A report on focus group discussions with citizens and consumers*, September 2008.

³² http://en.wikipedia.org.uk/wiki/Health_literacy

³³ Ipsos MORI, *Citizens Perceptions of Regulation*, Better Regulation Executive, January 2007.

participants worried that shifting risk on to consumers would disadvantage the most vulnerable, who could least afford to insure against potential problems.

Views on the benefits of regulation

- 6.9. People's views on the benefits and drawbacks of regulation vary across research studies, which suggests both the context and framing of research is important. Moreover, the Brunel/LSE study found that the public has strong and diverse views on the regulation of the risks they face in their daily lives. People's different positions and experiences in life gave them different vantage points, personal experiences often grounded general understandings of risk and regulators, and bad experiences tended to colour perceptions of regulation quite widely. Yet, although there was a fair amount of dissent across people of different backgrounds, there was also a shared agenda of dilemmas and concerns about risk, doubts about regulation, and familiarity with the arguments on all sides.
- 6.10. In the BRE study, regulations were seen as an imposition and impinging on personal choice and freedoms. They were also associated with bureaucracy and red tape. Much regulation was seen to be designed with revenue generation in mind. However, participants did accept that regulations were needed. Primarily, they were seen to minimise risk and afford protection, considering that without them there would be chaos. Similarly, in the Brunel/LSE study a common criticism was that many rules are silly, petty, twisted or nutty. People drew on personal experiences of risk and regulation and on popular media reporting and focused on topical issues such as immigration and asylum seeking, concerns about iniquitous effects of the human rights agenda and objections to European regulation. Even so, the research still identified widespread support for regulation. The criticism was around the *practice* of regulation: people considered there was too much regulation

in some areas while others were neglected, that regulators were insufficiently accountable and that regulation was too little grounded in common sense.

- 6.11. In a later quantitative survey commissioned by the BRE and others³⁴, 61% of people gave a positive score when asked to show, on scale, their agreement that 'I benefit from regulations in my everyday life'. However, follow-up interview research made it clear that perceptions are not always well-informed, as one third of respondents said they 'didn't know any ways in which regulation affected them'. Perceptions of regulation appeared to be often more grounded in emotion than rational thought. Some potential benefits of regulation were more appreciated than others. These benefits identified included rights and fairness, health, security and public order, safety, fair competition, income, staff productivity, and a green and pleasant environment. However, some benefits were overlooked, a case of 'out of sight is out of mind'. Benefits that none or few interviewees recognised included those which take a long time to show, those which reduce further the risk of low probability events happening and those regulations that are taken for granted.
- 6.12. In legal services, people assume regulation exists at a general level although there is low awareness of specific protections. When these are explained, consumers see them as positive, being reassured that they can enter the market with a degree of protection. Participants in the focus groups did not focus on the detail, but felt better as a result of knowing that someone is on their side. This sense is heightened since they feel vulnerable in the legal services market and have much less confidence to challenge lawyers than with other types of business. Consumers do recognise that the costs of regulation are passed on to them through higher legal fees, but this added cost is seen to represent good value for money given the small proportion of fees this amounts to overall and the high personal stakes involved in legal matters. While consumers didn't want the option of voluntarily purchasing such protections,

³⁴ FreshMinds, *The Benefits of Regulation: A public and business perceptions study*, Better Regulation Executive, Environment Agency, Food Standards Agency, Health and Safety Executive, October 2009.

seeing this as something that lawyers should continue to have to arrange, they said they would do so if confronted with this choice. In other words, if lawyers no longer had to be insured consumers would buy insurance, but they would rather this remained mandatory so it was not a choice they had to make.

Views on personal responsibility

- 6.13. Public opinion surveys show support for the principle of personal responsibility on a range of issues. For example, only 27% of people now believe that someone's behaviour and lifestyle ought to have no bearing whatsoever on their access to treatment on the NHS.³⁵ The principle of 'fair reciprocity' also underpins attitudes to welfare benefits: the largest group (45%) support welfare spending on the condition that those on benefits do what they can to contribute.³⁶
- 6.14. In the Brunel/LSE study, personal responsibility was seen as crucial, '*positioned as the hinge between risk and regulation*'. Though people understood that regulation balances self-regulation by firms and personal responsibility from the individual, welcoming the individual choice this brings, some were critical of the current situation and many were concerned that the individual burden of responsibility for risk was too great, especially but not only for the vulnerable. There were some paradoxes in how the public understood regulation and risk. People endorsed a strong ethos of personal responsibility but also wanted protections and backups in place. They wanted more choice but recognised that they may struggle to understand complex information regarding the decisions facing them. They worried about the vulnerable yet attacked regulation for being intrusive. They saw themselves as outside the regulatory decisions yet passed up opportunities to become engaged. To the researchers, the findings suggested there was a task for regulators in managing public expectations about risk and regulation.

³⁵ Demos, *Rebalancing risk and responsibility*, September 2012.

³⁶ Ipsos MORI, *21st Century Welfare: 70 years since the Beveridge Report*, December 2012.

- 6.15. In the PSA study, there was some appetite for patients to take some responsibility for mitigating risks, but with some important caveats. For example, if the patient was choosing to use the service they could be expected to take more responsibility, but this was not the case where the patient was particularly vulnerable. Being able to make informed, safe decisions was also seen to enable more responsibility, but without adequate and easily available information, some people's methods of assessing risk can be less safe and thorough. The research concluded that there is a case to be made for empowering patients to navigate the mass of information on the internet so they can make better decisions. Yet it is important to avoid the impression that the regulator is 'offloading' responsibility on to the public; rather that they are empowering people to take some responsibility (as there is some appetite for) by ensuring they can make safe and informed decisions. The regulator is still seen as key, however. The challenge identified was how to encourage people to think about their responsibilities for managing risk against a backdrop of ongoing expectation that the regulator is looking after all the safety and harm-related issues so that the patient does not have to worry about them.
- 6.16. In legal services, participants in our focus groups strongly resisted any suggestion of shifting a higher burden of risk on to consumers, for example by inviting them to purchase insurance rather than require lawyers to insure themselves. People see legal services as a special case, dealing with life-changing events, being a rare purchase, where consumer knowledge is limited and there is confusing jargon. Indeed, people said they would avoid using providers who did not self-insure as it would raise questions about the quality of the firm and undermine faith in the market as a whole. Moreover, people said they would lack the confidence to make informed decisions about how best to protect themselves in an environment where they already felt at a disadvantage of power and knowledge in relation to lawyers.

The Legal Services Consumer Panel was established under the Legal Services Act 2007 to provide independent advice to the Legal Services Board about the interests of consumers of legal services in England and Wales. We investigate issues that affect consumers and use this information to influence decisions about the regulation of legal services.

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