



2020 Legal Services

How regulators should prepare for the future

November 2014

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.

Other publications in the series:

- Legal Education and Training Review
- Third party complaints
- Empowering consumers – Phase One report to the Legal Services Board
- Risk and responsibility
- Breaking the maze: Simplifying legal services regulation
- The consumer interest
- Remapping consumer redress
- Recognising and responding to consumer vulnerability

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1 Summary

- 1.1. To inform the development of its next three-year strategy, on which it is due to consult shortly, the Legal Services Board asked the Panel to examine what developments in the period to 2020 are most likely to have an impact on the consumers of legal services and what should guide how the LSB and approved regulators respond to them.
- 1.2. Accurately forecasting change in legal services is especially difficult given the sheer range of factors in play and observers suggest the market will be unrecognisable from how it looks today. Yet, for all its uncertainty, the seeds of the future are likely to be found in the trends, innovations and policy changes happening right now. The Panel went about its task by examining the domestic and international literature on future developments in legal services and wider consumer affairs, referring to our unique Tracker Survey and previous work, and by talking to experts in the field.
- 1.3. Our report explores four broad interrelated areas that we consider will have the most profound impacts on consumers: self-lawyering; the influence of technology; changes in consumer behaviour; and market changes. To address the second element of the commission, we have identified five overarching themes to guide the regulatory response.

Key developments

Development 1: Self-lawyering

- 1.4. The core challenge ahead is to extend access to justice to those currently excluded from the market because they cannot afford legal services. This need and other forces, including government policy, consumer empowerment, technology and the effects of liberalisation, will combine to result in less involvement by lawyers in

many of the tasks that until now have made up their staple diet. Consumers will seek alternatives to lawyers or use them in different ways. In place of lawyers will be greater self-lawyering, online services, entry by unregulated businesses, and also by regulated providers, such as accountants and banks, who will diversify into the law. Calls will grow for more radical solutions that cut lawyers out, such as an inquisitorial style of justice and online dispute resolution, which are better suited to the new funding realities. The consumer interest will lie in resolving the tension between cost and quality, and determining when a lawyer is needed and when alternatives can safely suffice. Regulated lawyers should be viewed as a small part of an increasingly diverse ecosystem of legal services delivery; improving access will require looking at how the whole system will work in future around consumer need.

1.5. The LSB's next three-year strategy could help create a better market for consumers in 2020 by:

- Pushing for simplification of legal processes, where appropriate, to enable some consumers to complete common legal tasks without the need to engage a lawyer, or with minimal supervision by a lawyer
- Ensuring that regulation supports innovative developments like unbundling and is capable of managing the different risks which this practice creates
- Contributing thought leadership on the regulatory implications of developments such as the rise in litigants in person and online dispute resolution
- Maximising the evidence base by which performance of all types of legal services can be monitored and judged by regulators and consumers

Development 2: Influence of technology

1.6. Technology will go to the heart of all aspects of legal services in the future, changing how legal problems are identified, people and businesses resolve their disagreements, the way consumers choose providers, how legal services are

delivered and law firms run their businesses. Technology has the potential to greatly enhance access to justice, but it shouldn't be viewed as a panacea - those currently excluded from legal services are the least likely to be online, and it can't substitute for the human touch in every situation. Technology also promises to both transform how people consume legal services and create new markets. This innovation should mostly be beneficial, but will bring with it new 'digital detriments' for regulators to contend with. The market should be neither more nor less risky, but policymakers will need to reorient regulation and update skill sets to recognise and manage new risks that replace old ones.

1.7. The LSB's next three-year strategy could help create a better market for consumers in 2020 by:

- Informing policy on the opportunities and limitations of digital delivery as a solution to the access to justice challenge given the need to reconcile the affordability benefits with the reality that some of the key groups who are currently excluded from the justice system are not online
- Ensuring the approved regulators are alive to emerging digital detriments and develop the skills to police the digital marketplace effectively and support consumers to use it safely
- Assisting with efforts to unlock the potential of Big Data while exploring the ethical and information governance issues it creates
- Engaging with national digital markets/exclusion initiatives. As part of planned ongoing thinking on modernisation of the wider regulatory framework, ensuring reform options deal effectively with global digital markets that exist largely outside the boundaries of the Legal Services Act

Development 3: Consumer behaviour

1.8. Across the economy, bolstered by strengthened consumer rights, transparency on provider performance and greater access to redress, and aided by more sophisticated intermediaries which help people find better deals, the traditional

consumer-business relationship will be turned on its head. However, the extent to which these broader developments will impact on legal services is unclear. Our data shows consumers are becoming slightly more empowered and the sector will not be immune to broader societal changes. Yet, inherent features of the market militate against empowering consumers, so regulators should be realistic about the scope for this to enable the removal of sectoral regulation. Crucially, unless wide differences in experience between certain population groups are narrowed, vulnerable consumers could remain worse off. Narrowing inequalities must be a priority. Should the right performance data that could unleash consumer power be unlocked, new third party intermediary services could emerge to guide and manage choice. Although while these providers should empower consumers they may create new problems too. Regulators have an interest in maximising the potential of these services by removing barriers to their development while encouraging appropriate safeguards to protect consumers.

1.9. The LSB's next three-year strategy could help create a better market for consumers in 2020 by:

- Designing policy so that vulnerable consumers share fully in the gains of the market reforms and quantifying and monitoring evidence of exclusion
- Ensuring the collection and opening up of data by regulators about the performance of lawyers
- Facilitating the emergence of a healthy intermediaries market that could help consumers make better choices and ensuring this works in the consumer interest
- Fostering the development of information and public education to build consumer confidence and enable consumers to use the market effectively

Development 4: Market changes

1.10. Informed observers think the legal services market will be unrecognisable by 2020 as the pace of change accelerates following the ABS reforms. Current ABS

developments – including consolidation, specialisation, emerging brands, investment in marketing, technology and new delivery methods, hold clues to the future. The law will increasingly become a more business-like environment. This should deliver benefits to consumers and widen access, but it may also bring more sophisticated marketing and commercial practices seen in other markets that have caused consumer detriment. Regulators must acquire new skills and tools to deal with these new risks. Unregulated businesses will continue to grow as a major component of the market. It will be important to maintain and enhance consumer protection, and extend access to redress, so the public have confidence to engage in the market and can use it safely. This requires regulators to work closely with local and national enforcement partners who act as guardians of general consumer law. It also makes a review of the reserved activities and wider regulatory framework ever more urgent, but in the interim there will be a need to raise standards in unregulated markets. The loosening and stretching of regulatory boundaries as a result of present rule changes will continue to blur differences between branches of the legal profession. This process should benefit consumers and the LSB has a role to remove any artificial barriers that prevent the market responding to consumer demand. It will also need to ensure that competition between professional groups for the same work happens on fair terms.

1.11. The LSB's next three-year strategy could help create a better market for consumers in 2020 by:

- Unblocking artificial obstacles to convergence among professional groups, while ensuring competition between those groups for the same work happens on fair terms
- Ensuring the approved regulators are equipped to respond effectively to the new types of consumer detriment that result from law becoming a more business-like environment
- Actively encouraging and facilitating initiatives to raise standards and extend access to redress in unregulated markets

- Continuing to press for modernisation of the wider regulatory framework in the longer term. Meanwhile, where possible, move towards harmonising arrangements, such as rulebooks, disciplinary regimes and financial protection schemes, within the existing legislative structures

What should guide the regulatory response

Guiding point 1: Act to ensure the reforms benefit everyone

1.12. Overall, we are optimistic about the future; it promises innovative and cheaper services, wider access and more empowered consumers. However, there is also a risk that vulnerable consumers will be left behind and inequalities will widen, for example due to an overreliance on technology or people having no option but to handle their legal matter alone. In order to create fair markets that serve all, it will not be sufficient for regulators to sit back and let market forces unfold; instead they should tackle consumer vulnerability strategically, quantifying and monitoring exclusion, and embedding this throughout their work. Similarly, the balance of power between consumers and providers of legal services will be transformed only if regulators are proactive about empowerment, for example by unlocking access to reliable data about the quality of service provision and encouraging intermediaries to make it intelligible to a range of consumers, and having a clear strategy for empowering consumers more generally, for example through public education.

Guiding point 2: Adapt to the changing pattern of risks

1.13. The market will not become more or less risky, but the nature of the risks is likely to be different. Developments such as a more business-like environment, unbundled services, technology and third party intermediary services, promise to widen access and improve service delivery, but will also create new sorts of challenges for lawyers and give rise to new types of detriments that have caused headaches in other markets. Regulators will also need to move with the times, by updating their tools and regulatory criteria, acquiring new skills and forging strong partnerships with local and national agencies responsible for enforcing general consumer law.

Guiding point 3: Rethink consumer protections

1.14. Regulation shouldn't be seen a last resort, but as a vital safety net which protects the vulnerable, empowers consumers and enables growth. Consumer confidence that the rules protect them is the single most important factor that explains those markets that work for consumers and those that do not. Sometimes, as with convergence in the profession, there will be a need to remove regulation which inhibits competition. In other situations consumer protection will need to be strengthened, with options including extending the reach of regulation, expanding access to redress, updating regulatory criteria and tools, and exploring alternatives to traditional regulation. Often these decisions will involve a difficult balancing act between access to justice and consumer protection. Overall, though, rather than thinking about having more or less regulation in net terms, the focus should be on ensuring regulation is targeted in the right place and does the job it is designed for. Rethinking consumer protection also means a starting point which looks at the whole legal services ecosystem rather than the narrow boundaries of legal services regulation.

Guiding point 4: Work in different ways

1.15. There are opportunities for the LSB to work in different ways in order to bring about the better future for consumers in 2020 that the organisation and its partners will wish to strive for. Some developments, such as the steady rise in litigants in person and online dispute resolution, create novel and difficult policy issues where high quality thought leadership on the regulatory implications would contribute real value. In other areas, as with big data and intermediary markets, the LSB could play a direct role in facilitating innovation. Further, there is scope for the LSB to encourage and facilitate efforts to raise standards and extend access to redress in unregulated markets. Equally, our analysis should inform the development of some existing activities. For example, its regulatory standards work, which periodically assesses the performance of the approved regulators, needs to assess whether the regulators have acquired the new knowledge and skill sets we describe.

Guiding point 5: Maintain pressure for legislative reform

- 1.16. The overall regulatory framework will come under even greater strain than it is today and the LSB should continue to press for major legislative reform. For example, in a burgeoning digital market place, legal services will be delivered by businesses operating outside of the Legal Services Act boundaries enabling emerging providers of legal services to fall through the gaps. Multi-disciplinary one-stop shops will rub up against artificial sectoral silos. Regulators' tools will be inadequate to deliver effective regulation. The blurred professional boundaries will inhibit competition; limit workforce mobility; leave a titles-based regime seeming more redundant; and make the duplication of cost and effort required to maintain multiple rulebooks, disciplinary regimes and so on, even harder to justify. The current legislation was designed to liberalise the market, but with a new era being ushered in, so too the framework will need to be modernised. While legislative reform is not feasible within the lifetime of the LSB's next three-year strategy, it should be possible to set down quite precisely the change that is needed, seek to build consensus around this vision and secure political commitment on implementation.

2 Introduction

- 2.1. The Legal Services Board is developing its new three-year strategy covering the period 2015-18. To bring a strong consumer perspective to these emerging plans, it commissioned the Panel to answer the following question:

“What developments in the period to 2020 are most likely to have an impact on the consumers of legal services and what should guide how the LSB and approved regulators respond to them?”

- 2.2. It is, of course, impossible to predict the future with any certainty. The Panel has no more access to a crystal ball than anyone else. In carrying out this commission, we have kept in mind the work of the celebrated economist, Daniel Kahneman, who teaches that behavioural biases mean people are systematically misguided when they think about the future. Even so, these exercises are useful in enabling us all to help shape a better future and guard against risks we can reasonably foresee.
- 2.3. Accurately forecasting change in legal services is especially difficult given the sheer range of factors in play. We are still in the relatively early stages of the competition reforms with the legal press carrying stories of new innovations on an almost daily basis. There has been a tremendous amount of policy change outside the regulatory framework of the Legal Services Act – legal aid and litigation funding reforms, the push for mediation, changes to substantive law, courts reform and much else besides – which are still working their way through. Added to this is an evolving economic picture and in six months a General Election that could usher in further policy change.
- 2.4. Historically, lawyers have been a conservative profession which has successfully resisted change. However, if anything is certain about the future, it’s surely that lawyers can no longer withstand the major forces that are reshaping all markets. In the past, lawyers served local communities, disliked technology and there were

boundaries between the practice of law and other things. They were protected from competition and clients were passive recipients of their advice. Today's markets are global, technology goes to the heart of all legal work and the problems lawyers are asked to solve are multi-disciplinary and require them to interact with experts in other fields. Competition is being fully unleashed and the consumer/business relationship is getting turned on its head.

- 2.5. What follows is not a comprehensive look at the future. The Panel had limited time to complete this commission and we did not have a budget to commission original research to inform our analysis. Nevertheless we are fortunate that other individuals and organisations, both at home and abroad, have invested significant resources in looking at the future. In addition to learning from this work, we have been able to draw on our unique Tracker Survey and other research evidence to unpick consumer trends. We were also able to access the views of experts through a thought-provoking stakeholder event facilitated for us by the leading journalist and commentator, Joshua Rozenberg.
- 2.6. The legal services market will be different in 2020 than today. Yet, for all its uncertainty, the seeds of the future are likely to be found in the trends, innovations and policy reforms happening right now. This report explores four broad interrelated areas that we consider will have the most profound impacts on consumers: self-lawyering; the influence of technology; changes in consumer behaviour; and market changes. To address the second element of the commission, we have identified five overarching themes to guide the regulatory response.
- 2.7. The Panel is unashamedly focused on the consumer perspective. This is what Parliament created us for and we make no apology for this. There are, of course, other interests that regulators must take into account when deciding their future priorities. However, it is right that the LSB starts with the consumer since ultimately lawyers are here to serve consumers and the wider public interest. Just as many of the changes we describe in this report are being driven by consumers, so any successful regulatory strategy in the future must also be shaped around consumer needs.

3 Self-lawyering

SUMMARY

The core challenge ahead is to extend access to justice to those currently excluded from the market because they cannot afford legal services. This need and other forces, including government policy, consumer empowerment, technology and the effects of liberalisation, will combine to result in less involvement by lawyers in many of the tasks that until now have made up their staple diet. Consumers will seek alternatives to lawyers or use them in different ways. In place of lawyers will be greater self-lawyering, online services, entry by unregulated businesses, and also by regulated providers, such as accountants and banks, who will diversify into the law. Calls will grow for more radical solutions that cut lawyers out, such as an inquisitorial style of justice and online dispute resolution, which are better suited to the new funding realities. The consumer interest will lie in resolving the tension between cost and quality, and determining when a lawyer is needed and when alternatives can safely suffice. Regulated lawyers should be viewed as a small part of an increasingly diverse ecosystem of legal services delivery; improving access will require looking at how the whole system will work in future around consumer need.

Enabling self-lawyering

- 3.1. In 2020, when we look back over what has been achieved during the previous five years, success should largely be judged by whether access to justice has been extended to those who currently are excluded from the market because they cannot afford legal services. The environment in which the LSB and its stakeholders will go about meeting this objective is challenging. Research shows that the cost of legal services, among other factors, has created large unmet need in households, small-sized businesses and charities. The state is pulling back from funding legal advice through cuts to legal aid, while the free advice sector is contracting due to severe financial pressures. At present, insurance has not developed to fill this gap and anyway poorer consumers are perhaps the least likely to take out cover to pay for future possible legal needs. More widely, the economy is growing again, but as yet the gains are not being evenly distributed – there remain substantial economic and social inequalities to tackle.
- 3.2. Within this challenging context, the perception that lawyers are expensive, and a feeling that lawyers often represent poor value for money, is leading some people to either avoid lawyers, seek out alternatives or use lawyers as a last resort or in different ways.
- 3.3. Access to justice will be enhanced if consumers are empowered to handle more of their legal affairs by themselves. Some legal services, such as administering an estate, have been carried out perfectly adequately by large numbers of individuals acting without the support of a lawyer for many years. In this vein, reforms to modernise public services through technology are taking lawyers out of some tasks. For example, Money Claim Online allows county court claims to be issued for fixed sums up to £100,000 by individuals and organisations over the internet. This

'Cyber-Court' issues more claims than any other county court.¹ Further, 15,000 people registered a lasting power of attorney through the Office of the Public Guardian's new digital tool in its first year. Interestingly, this is only a partially online service as the forms must still be printed, hand-signed and posted off.² The Ministry of Justice recently postponed plans to introduce an all-digital system after feedback that it gave greater scope for fraud and financial abuse, and would not be suitable for elderly clients. The Law Society had emphasised the need to retain face-to-face contact.³

3.4. Professor Richard Susskind has identified a trend towards the commoditisation of legal services.⁴ By this, it is often meant that legal work, which used to require hand-crafting by legal specialists, has now, in some way, been standardised or systematised so that the service of the traditional lawyer is scarcely needed. As a result some, if not many, areas of legal practice can be routinised and so provided to clients at far lower cost. In the following section we explore technological developments, such as automated documents, which are either removing lawyers from some legal processes altogether, or at least changing their roles. For example, at its heart a will is a collection of legal precedents, which intelligent technology enables providers to customise to the client's individual needs. Often the service includes a stage where a lawyer checks the document, but some products make this step optional. Automated documents are now available for a vast range of legal situations. However, as Richard Susskind points out, not all work can be commoditised, and the real challenge for the future is to disentangle those parts of legal work that can be commoditised, those that require human crafting, and all points in between.

¹ www.justice.gov.uk

² Office of the Public Guardian, Annual Report 2013-14

³ Law Society Gazette, Digital plan for powers of attorney shelved, 21 August 2014.

⁴ Richard Susskind, *Tomorrow's Lawyers: An Introduction to Your Future*, Oxford University Press, 2013.

Making a power of attorney online

It is the Government's ambition that every citizen makes a power of attorney in order to prepare for the future. The Panel's research suggests that currently 9% of people have done so.

The Office of the Public Guardian has built a digital tool which will make the process of creating and registering a Lasting Power of Attorney (LPA) simpler, clearer and faster. It offers:

- Step by step guidance: it breaks the process down into small, logical steps
- Fewer errors: it checks for errors and prevents users from going further until mistakes are corrected
- Help where it's needed: it provides relevant guidance at the point of need - with further help available at the click of a mouse
- Fewer forms to complete: it automatically chooses and fills in all the forms the user needs with the information they provide. All the user has to do is print and sign them
- Online secure payment: there's an application fee for each LPA registered and the OPG's online payment partner will ensure payments are safe and secure
- Secure personal information: all the information users enter is safeguarded on protected government servers

Making an LPA online costs £110.

3.5. One of the points in between is unbundled delivery. In its simplest terms, unbundling separates a package of legal services into parts, and the client and lawyer agree to what parts of the package the lawyer will provide.⁵ Unbundling is nothing new. Conveyancers, probate practitioners and others have for years invited cost-conscious clients to do some of the heavy lifting administrative tasks themselves. Our Tracker Survey suggests around one in five transactions already involve some form of unbundling, most commonly in probate, employment and

⁵ Australian Productivity Commission, Draft report on access to justice arrangements, 2013.

immigration work. However, there is particular policy interest in unbundling as part of the solution to the rise in litigants in person on the grounds that 'some lawyer is better than none at all'. As consumers feel forced by financial circumstances to take on some of the legal work themselves, or alternatively, they grow the confidence to become more closely involved in dealing with aspects of the work alone, unbundling may become a popular option for consumers.

- 3.6. When providing an unbundled service lawyers may be fearful of breaching their code of conduct or being made the scapegoat if something goes wrong. There is fierce debate in the US on the ethics of unbundling, with some denouncing the practice as being incompatible with the duties of competence, diligence and zeal.⁶ In England and Wales, the Law Society has been encouraging of unbundled services, but its practice guidance note identifies a series of risks.⁷ Risks for consumers include being unable to assess which tasks they can handle alone, the on-off nature of the service leading to oversights and a lack of clarity about the agreement between the lawyer and client. Risks for lawyers include negligence claims and unwittingly implying a full retainer.
- 3.7. The consumer experience of unbundling is under-researched, however the initial evidence is encouraging: our Tracker Survey suggests service satisfaction for unbundled work is almost as high as work where a lawyer provides a full service in the traditional way. However, if unbundling is going to take off, we need an appropriate regulatory system which gives lawyers the confidence to unbundle their services and consumers the information and confidence to use them effectively. Regulators can initially contribute through thought leadership and growing the evidence base.

⁶ Jessica K Steinberg, In Pursuit of Justice? Case Outcomes and the Delivery of Unbundled Legal Services, George Washington University Law School, 2011.

⁷ Law Society, Practice note: Unbundling family legal services, May 2013.

Resolving disputes

- 3.8. A major shift in recent years has been the removal of lawyers from the process of resolving disputes of various kinds. Often this has been the direct result of government policy. Many years ago the small claims court was created as a forum to resolve low value consumer disputes without the need for legal representation (although lawyers are now often to be found in the small claims court). The Government has recently increased the small claims limit for consumer disputes and is under pressure from insurers to do the same for personal injury cases. However, the biggest shift has been to take certain disputes out of the courts altogether. This can be seen in the growth of tribunals, the push for mediation and spread of ombudsmen and other ADR mechanisms. In respect of the latter, ombudsmen have expanded beyond consumer disputes to cover all sorts of situations, including farmers' disagreements with supermarkets and press self-regulation.
- 3.9. It is extraordinary that since 2000, the annual number of small claims hearings has halved from approximately 60,000 to 30,000⁸ while over the same period the Financial Ombudsman Service's annual caseload has risen from 30,000 to over 500,000.⁹ In July 2015 the UK will be required to implement EU legislation which will give consumers the right to access ADR for all transactions (although it will be optional for traders to participate unless mandated otherwise). This is set to expand the use of ADR still further, and by extension, mean less dispute resolution work for lawyers. Alternatively it will mean lawyers are deployed in different roles - lawyers are becoming mediators and the Financial Ombudsman is reputedly the UK's largest employer of law graduates.

⁸ Court statistics quarterly reports

⁹ Financial Ombudsman Service, various annual reports

- 3.10. The ongoing shift from the courts to ADR will open further avenues for claims management companies and other unregulated firms to assist consumers in bringing complaints against businesses across a wider field of economic activity. In some areas these businesses account for a high proportion of cases – 72% of PPI complaints made to the Financial Ombudsman in 2013-14 were brought through claims management companies.¹⁰ The Civil Aviation Authority has also reported increased numbers of complaints made via claims managers. This trend may be beneficial to the extent it could break down barriers to making complaints and help consumers secure the outcomes they want. However, there have been concerns that such businesses exaggerate the complexity of making a complaint and take fees which unnecessarily eat into the compensation consumers are due. Claims management companies do not have locus to represent consumers in court so a further issue is that they may persuade the consumer to use an ombudsman when it would be in their best interests to litigate (perhaps due to value of the dispute exceeding the maximum compensation the ADR body may award).
- 3.11. However, the impressive statistics on the scale of ADR are dwarfed by online dispute resolution (ODR) providers. For example, Modria resolves 60 million disputes a year for Amazon customers using automated processes. There are a vast range of techniques including some which eliminate human intervention entirely. One model growing in popularity is automated negotiation, which allows the users to analyse their bargaining positions; this is done by evaluating and prioritising their bids, which are kept hidden during the negotiation. Normally, there is an algorithm that evaluates bids from the parties and settles the case if the offers are within a prescribed range set by the users at the outset. Where this happens the technology automatically settles the dispute in the mid-point of the two offers. Another type of software helps divorcing couples to divide their assets by using a

¹⁰ Financial Ombudsman Service, Annual Report 2013-14.

scoring system to prioritise what they value most.¹¹ The software has been adapted so that it can even be used to agree disputes over the custody of children.

3.12. The Civil Justice Council has established a working group to consider developments in ODR. This work needs to carefully consider the consumer implications of these solutions. Certainly ODR can deal with large volumes of disputes and reduce cost. However, there would appear risks when the parties do not contest on an equal footing, for example traders as repeat players could game the system compared to consumers who are inexperienced users. In certain situations an inquisitorial approach will be still needed to get to the bottom of disputes and ensure fair outcomes. The use of ODR is likely to extend to the processes used by existing offline dispute resolution processes as they seek to gain efficiencies and reduce their costs. Some ombudsmen already use technology to automatically filter out complaints which fall outside of their jurisdictions. The extent to which these tools should be used to aid decision-making on individual cases requires more debate.

Litigants in person – and the wider ‘ecosystem’

3.13. The processes described above are largely voluntary on the consumer’s part, although as in the case of mediation, government policy can create powerful incentives to try them before granting access to the courts. The growth of litigants in person involves a different dynamic because the withdrawal of legal aid has forced people to represent themselves since they cannot afford the services of a lawyer. The Civil Justice Council’s prediction¹² that litigants in person will become the rule rather than the exception has already materialised for some case types. Around three-quarters of all civil and family claims, including just over half of divorce cases

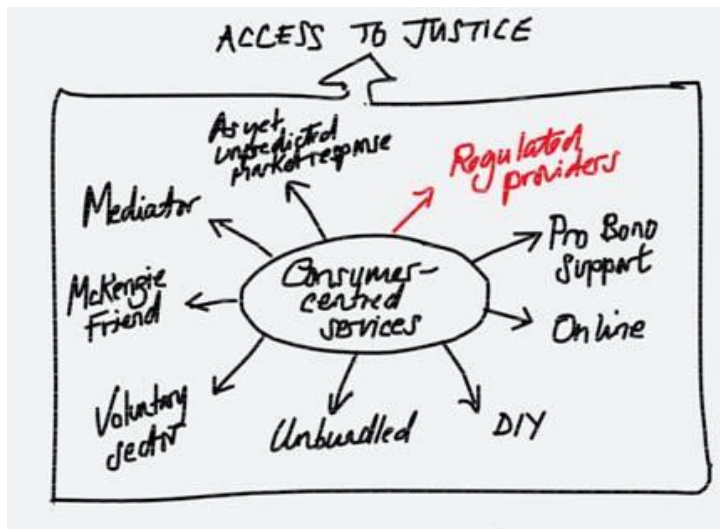
¹¹ Family Winner. Watch a demo <https://www.youtube.com/watch?v=YOZczuvrou4>

¹² Civil Justice Council, Access to Justice for Litigants in Person (or self-represented litigants). A Report and Series of Recommendations to the Lord Chancellor and to the Lord Chief Justice, November 2011.

involving financial remedies, already involve at least one litigant in person. There is no sign of this trend reversing.

- 3.14. The Civil Justice Council's report makes the important point that litigants in person 'are users of the civil justice system, and the system exists for its users'. On the basis that litigants in person will represent the majority of court users, this is leading stakeholders to think about radical solutions. Moving to an inquisitorial system of justice and making uncontested divorce an administrative matter that does not need courts to get involved, are two such proposals.
- 3.15. The regulatory implications of this development include the need for better consumer information and advice, the role of opposing lawyers and entry by unregulated businesses. The ability of new entrants, partly because they are unregulated, to provide some legal services for a fee much lower than lawyers charge, may be very attractive to consumers for whom cost concerns are paramount. In some scenarios, as was the case in the Panel's recent report on fee-charging McKenzie Friends, this support may be the only affordable option available to consumers. Our report exposed the difficult choices facing policymakers in terms of balancing access to justice and consumer protection. While the natural inclination is to regulate to protect consumers, and there were certainly a range of courtroom and commercial practices that caused us concern, in our analysis this would have led to reduced access and other tools could be tried to raise standards.
- 3.16. The pattern of McKenzie Friends emerging to fill a gap in demand which lawyers cannot serve may repeat itself in other sections of the market. Each decision on whether to regulate will need to be taken on its merits. However, it is increasingly clear to us that the regulators can no longer only consider the regulated market. Fee-charging McKenzie Friends are one example of the likely evolution of legal services that will call for imaginative approaches by regulators in the near future. To make serious inroads into the access to justice challenge regulators need to look at the how the whole system is working, and will work in the future, around the consumer. As the graphic below illustrates, lawyers form one part of an ecosystem

which is getting more and more diverse and the right regulatory response requires a full understanding the whole.



Key steps

3.17. The LSB's next three-year strategy could help create a better market for consumers in 2020 by:

- Pushing for simplification of legal processes, where appropriate, to enable some consumers to complete common legal tasks without the need to engage a lawyer, or with minimal supervision by a lawyer
- Ensuring that regulation supports innovative developments like unbundling and is capable of managing the different set of risks which this practice creates
- Contributing thought leadership on the regulatory implications of developments such as the rise in litigants in person and usage of online dispute resolution
- Maximising the evidence base by which performance of all types of legal services can be monitored and judged by regulators and consumers

4 Influence of technology

SUMMARY

Technology will go to the heart of all aspects of legal services in the future, changing how legal problems are identified, people and businesses resolve their disagreements, the way consumers choose providers, how legal services are delivered and law firms run their businesses. Technology has the potential to greatly enhance access to justice, but it shouldn't be viewed as a panacea - those currently excluded from legal services are the least likely to be online, and it can't substitute for the human touch in every situation. Technology also promises to both transform how people consume legal services and create new markets. This innovation should mostly be beneficial, but will bring with it new 'digital detriments' for regulators to contend with. The market should be neither more nor less risky, but policymakers will need to reorient regulation and update skill sets to recognise and manage new risks that replace old ones.

Enhancing access to justice

- 4.1. Technology analysts suggest we are at the start of a third age of computing which will disrupt information-intensive industries like legal services. Rather than use deterministic programming where the computer is instructed to perform a specific task, the future is probabilistic and cognitive - systems that learn and can reason based on information provided in natural language. Computers will be able to digest, correlate and analyse vast amounts of information and a new set of advisory tools will enable human and machine to work together to resolve complex problems. Such technology is predicted to augment advice provided by humans, not replace it.¹³ IBM's Watson - an Artificial Intelligence computer system - is already being widely used in healthcare. By looking at a patient's medical records it can say with 95% accuracy that one type of chemotherapy is better than other options. Over 90% of nurses who use Watson in the field follow its guidance.¹⁴
- 4.2. A popular maxim among proponents of public legal education, is that it is better to build a fence at the top of the cliff rather than park an ambulance at the bottom. Leading commentators, such as Richard Susskind, are excited by the potential for technological advances, such as those described above, to enable prevention of legal problems, or at least help people diagnose their problem and be signposted to the right support. The Rechtwijzer website, funded by the Dutch Legal Aid Board, uses relatively simple technology to good effect. It provides an online 'dispute roadmap' that, on the basis of a number of choices, guides users step by step along all the legal aspects of their conflict.¹⁵ There have been calls for the UK Government to emulate this model.

¹³ Mike Rhodin, Senior Vice President, IBM Watson, speaking at the Harvard Law School Conference on Disruptive Innovation in the Market for Legal Services, March 2014.

¹⁴ <http://www.bbc.co.uk/news/technology-26366888>

¹⁵ www.rechtwijzer.nl

- 4.3. As technology makes legal services simpler to use, involve less effort and cheaper to buy, more people are likely to carry out the sorts of tasks - like writing a will or arranging a power of attorney - which currently they either prefer to put off or cannot afford to do. Therefore, technology is closely linked to the self-lawyering trend described in the previous chapter. For example, major financial brands have relatively recently started to heavily market tools which enable customers to automatically generate draft legal documents based on their answers to a series of questions, supported by context sensitive help and advice to guide them through the more complex aspects. The documents appear before their eyes and enable consumers to 'try before they buy'.
- 4.4. Such automated documents are a classic example of what Clay Christensen calls 'disruptive innovations' since they allow a whole new population of consumers at the bottom of a market access to a product or service that was historically only accessible to consumers with a lot of money or a lot of skill.¹⁶ Legal Zoom, a pioneer of such services, became the most recognised legal brand in the United States within a decade of forming. Before this technology was introduced, only 30% of US citizens had made a will; today the figure is around 50%.¹⁷ The Panel's Tracker Survey suggests that 35% of the public in England and Wales has made their will. Thus technology has a key role in meeting the affordability challenge that we wish the reforms be judged against.
- 4.5. 21 million households have internet access, UK consumers are the most prolific online shoppers in the EU and mobile commerce is mushrooming. These conditions suggest this country is a ripe environment for technology to radically enhance access to legal services. However, we also have a digital divide - only 51% of those aged over 65, 74% of C2DEs and 65% of disabled people are online. Digital literacy is low among those not in education, employment or training (NEETs). As Smith

¹⁶ www.claytonchristensen.com

¹⁷ John Suh, CEO of Legal Zoom, Speaking at the Harvard Law School Conference on Disruptive Innovation in the Market for Legal Services, March 2014.

and Paterson conclude, for all its benefits, the delivery of legal services cannot be wholly digital in future if in excess of 20% of the target population would be excluded.¹⁸ The Oxford Internet Institute has identified progress on narrowing digital divides with a rise in Internet access for lower income groups, people with no formal educational qualifications, retired people, and individuals with disabilities, but also says a persistent core of non-users – the large majority of whom do not intend to get connected – will present a problem for digital by default services.¹⁹

4.6. The digital divide, though, is not a reason to inhibit the development of digital services, rather it provides an imperative to tailor services to need. The potential of digital technologies to increase the availability of face-to face help for those who need it by providing other options for those who don't, and in this way potentially reducing the overall costs of service provision, will become more apparent over time. Regulators aren't in the business of backing digital solutions over other options, or vice versa. However, they are in the risk business and vulnerable consumers can often miss out if industry thinks they are too expensive or difficult to serve. The regulatory objectives will not be met if certain consumers are excluded from the market because they are not online. Regulators have to tread carefully, but do have a legitimate interest in how this issue evolves.

4.7. Finally, legal problems are often highly personal, emotive or stressful, while people's circumstances can be complex and multi-faceted. There may be a risk that policymakers attracted by the cost benefits of technology become too zealous in seeing it as a panacea and forget that the human touch is core to the effective resolution of legal issues. While, of course, many people already successfully resolve all sorts of problems without face-to-face advice, and technology can deliver highly personalised services, there is something uncomfortable in the thought that all legal issues can be reduced to computer code where most

¹⁸ All references in paragraph: Professor Alan Paterson and Roger Smith, *Face to Face Legal Services and their Alternatives: global lessons from the digital revolution*, 2014.

¹⁹ Oxford Internet Institute, *Cultures of the Internet: The Internet in Britain* 2013.

communication happens through an avatar. Good lawyers are counsellors and creative problem solvers, not just experts in the law. Knowing how hard to push, and when to pull back, will be a key challenge.

What about Watson?

Watson is an Artificial Intelligence (AI) computer system capable of answering questions posed in natural language. It is famed for winning the TV quiz show, Jeopardy, against past human winners. Watson learns by reading books, articles and other information. It can make reasoned judgements even with conflicting information. Watson is being used in healthcare, where it has been taught to recognise different types of cancer and treatments. By looking at a patient's medical records it can say with 95% accuracy that one type of chemotherapy is better than other options. Over 90% of nurses who use Watson in the field follow its guidance.

There are dozens of versions of Watson which IBM can tailor to specific industries. IBM has recently launched a partnership, the Watson Group, with \$100 million set aside to fund start ups that launch creative uses for Watson - these uses will grow and grow.

Digital markets

- 4.8. According to our survey data, around half of legal services are already delivered remotely - online or by telephone or post. Surveys show strong consumer demand for online services: in one, 47% of consumers polled said online delivery is important to them.²⁰ Law firms are responding to this demand: the same survey found that 23% of law firms currently offer 24/7 interactive online legal services and a further 26% plan to within a year. Technologies such as online case tracking, familiar in conveyancing, are designed to improve the customer experience and cut

²⁰ <http://www.pepperminttechnology.co.uk/peppermint-channel/legal-customer-research-infographics>

costs for the law firm. Here technology is enhancing, not replacing, the existing delivery of legal services.

- 4.9. Technological solutions are also being used to attract, and in some cases filter, new customers. For example, Bott & Co's Car Incident Assistant app enables users to take photographs of the accident scene using the iPhone's integrated camera, record their current location using its GPS capabilities, store relevant information in relation to their accident and submit these details via email to the firm. Alternatively, roadtrafficrepresentation.com is a fully online service which can be used to provide a diagnosis of likely penalties, prospects of a defence, and services such as letters and telephone advice. The service can also be used to automatically instruct a lawyer.
- 4.10. As highlighted above, automated documents is an example of where technology is changing the shape of existing markets. One leading provider, Epoq, produces over 300 legal document templates encompassing areas of law such as family, wills and probate, landlord and tenant, and business and employment. Quite possibly this technology will expand the pie, or see lawyers use their time more efficiently or occupy different roles, rather than remove the lawyer altogether. Most products involve a lawyer checking the document's accuracy or refer consumers to professional advice where it would be better to consult an expert. Many law firms use the same technology to assist in writing bespoke documents for their clients.
- 4.11. The internet is also creating new types of legal services. An example is 'ask an expert' services where consumers post questions concerning a legal issue and someone provides an answer. Different business models offer either a one-off payment or regular subscription payments. Some provide answers for free, in the hope that this will generate referral business on the same or a separate matter. For example, the 10,000 experts on JustAnswer.com - which connects people to doctors, lawyers, vets, mechanics, tech support advisors and others - claims to have helped over eight million people in 196 countries and provide answers in an average time of 7.5 minutes.

4.12. These various online services offer many benefits. For some consumers they may be less intimidating, cheaper, quicker and more convenient. They can remove the capacity for human error and enhance transparency. However, as with all innovations there are risks for consumers too. A report by Ctrl-Shift for Consumer Focus²¹ identified approximately 50 types of 'digital detriments' ranging from new web monopolies and online reputation management to unfair terms of data sharing and behavioural pricing. The authors concluded that some detriments, such as the role and exploitation of personal data in modern commerce, are still new. People are struggling to understand their implications; they involve conflicting interests, values and agendas which can only be resolved by society-wide debate. Others, such as sharp practice in e-commerce, are simply old tricks reinvented for new times and contexts, a by-product of a still immature market. Nevertheless, they still need identifying and addressing.

4.13. Some of these detriments have already been seen in legal services. There are online wills where consumer choice is manipulated through defaults that select the law firm as executor of the will. There have been concerns about system failure in will-writing software that could mean multiple wills do not have their intended effect, which would not be discovered until it is too late.²² There are concerns about the accuracy of legal information websites.²³ The Information Commissioner recently warned about a spate of data protection breaches involving lawyers, who are entrusted with holding safely highly sensitive and personal data.²⁴ The Panel's work on comparison websites found weaknesses around the selling on of personal information and price transparency.²⁵

²¹ Ctrl-Shift, Defining and defending consumer interests in the digital age, December 2011.

²² Legal Services Consumer Panel, Regulating will-writing, July 2011.

²³ Professor Alan Paterson and Roger Smith, Face to Face Legal Services and their Alternatives: global lessons from the digital revolution, 2014.

²⁴ Legal Futures, Information Commissioner sounds alarm over lawyers' handling of personal data, 6 August 2014.

²⁵ Legal Services Consumer Panel, Comparison websites, February 2012.

- 4.14. The Government is updating consumer rights for the digital age through the Consumer Rights Bill. Digital detriments are not unique to legal services, of course, but legal regulators will wish to make sure that market wide solutions designed by government and enforced by national agencies are informed by, and cater adequately for, the particular issues in this sector. The approved regulators need to respond to the new challenges created by the digital market place as well, where appropriate, for example by updating codes of conduct. This is the essence of risk-based regulation: as the risks change, so regulators must also refocus.
- 4.15. These challenges also impact on the overall regulatory framework. For example, it's possible that sales of legal products will outstrip sales of legal services - product regulation is a very different kettle of fish and it won't; regulators must disentangle when a service morphs into a product and vice versa. When buying online it's not always obvious where the seller is based or what legal jurisdiction they operate under. Two recent entrants to the UK legal services market, Rocket Lawyer and Legal Zoom, are US companies with no need to be authorised by a licensing authority for their principal activities. In short, the growth of the digital market place is confounding the existing boundaries of legal services regulation. This would appear to make a review of the reserved activities and wider regulatory framework in the Legal Services Act ever more urgent.

Big Data

- 4.16. Big Data is an all-encompassing term for any collection of data sets so large and complex that it becomes difficult to process using traditional database and software techniques. The consumer interest is in the potential of Big Data to enhance access and counter any risks of detriment.

- 4.17. In *Tomorrow's Lawyers*, Professor Richard Susskind explores some of the potential uses for Big Data.²⁶ For example, it would be possible to aggregate internet search engine data to predict legal need in local communities, in the same way that Google knows before health professionals do when there will be a flu epidemic due to a spike in search words. Alternatively, it should be possible to predict case outcomes by analysing databases of judicial decisions. Similarly, analysis of commercial contracts and emails could help clients to identify and manage common risks.
- 4.18. In February 2014 the Government announced £73 million of new funding to help the public and academics unlock the potential of Big Data. It is estimated that the Big Data market will benefit the UK economy by £216 billion and create 58,000 new jobs before 2017.²⁷ The National Archives has received £500,000 funding to transform how we understand and use current legislation.²⁸
- 4.19. These developments rely on access to large public datasets and the UK Government has identified Open Data as a key tool for unlocking growth. The BIS mi-data initiative²⁹ shows the potential uses in a consumer context. This is a programme of work to give consumers access to their personal data in a portable and electronic format, which applications can use to help them find better deals. Energy consumption and mobile phone usage are two early examples. The LSB's and Panel's joint efforts to open up basic core regulatory datasets for use by comparison websites and others builds on this agenda, albeit this constitutes baby steps compared to developments in other markets. Unblocking public data on the performance of lawyers, therefore, should remain a priority.
- 4.20. Similarly, the Hague Institute for the Internationalisation of Law (HiIL) has noted the potential of Big Data in courts to overcome common procedural issues such as

²⁶ Richard Susskind, *Tomorrow's Lawyers: An Introduction to Your Future*, Oxford University Press, 2013.

²⁷ <https://www.gov.uk/government/news/73-million-to-improve-access-to-data-and-drive-innovation>

²⁸ <http://www.nationalarchives.gov.uk/news/908.htm>

²⁹ <https://www.gov.uk/government/policies/providing-better-information-and-protection-for-consumers/supporting-pages/personal-data>

delays, backlogs, costs, and unequal access to justice, but suggests existing court IT and organisational tools and mechanisms have limited capacity to extract valuable knowledge and insights from massive data sets.³⁰ We have no doubt this is true in England and Wales. They contrast this to how other sectors have exploited the potential of Big Data. They note, for example, how insurers have utilised Big Data platforms to overcome common problems such as insurance fraud and improving customer retention. In healthcare, medical researchers have been able to better understand health issues, earlier detect and find solutions to illnesses. The police have benefited from Big Data due to its capacity to make connections and detect patterns to prevent and solve crime.

4.21. One major reservation about Big Data focuses on privacy issues. It is perhaps one thing to collect data about our energy usage but quite another to collect, harvest and potentially sell on the sorts of highly personal and sensitive information about clients and third parties which lawyers deal with. Big Data might enable a Freemium model of legal services which enhances greater access to justice, but would that be at an acceptable cost? Is it right that accident victims receive marketing messages from health insurers in the same way that information collected via supermarket loyalty cards generates personalised advertising based on customers' shopping habits? Further, law firms will potentially have access to more information about the lives of their clients based on their data footprints. This could have implications in proceedings where this information is relevant to the matter (e.g. divorce or fraud) and have consequences for the lawyer-client relationship.

4.22. There are also ethical concerns. One potential benefit of Big Data is that it makes the outcome of legal work more predictable. Consumers might one day be able to calculate their odds of success in winning a particular type of case and choose the lawyer with the best track record. However, as with any situation where there is an imbalance of information and power, those who have the least information - and

³⁰ HiiL, Trend Report, Trialogue: Releasing the value of courts, The Future of Courts, 2013.

this normally will be the consumer - could be exploited. For example, law firms could reject cases with borderline prospects of success or deliberately under-settle a claim.

- 4.23. If these scenarios seem far-fetched, developments in the US could be a sign of the future. One business, Juristat, claims that its statistical modelling capabilities allow its users to visually plot their chance of success in every aspect of the patent application process using algorithms based on a dataset of 5 million applications and one billion calculations.³¹ Separately, legal scholars have developed an algorithm that can predict, with 70% accuracy, whether the US Supreme Court will uphold or reverse the lower-court decision before it.³²

Predicting court decisions

In 2009, for a bit of fun, Josh Blackman created FantasySCOTUS - a fantasy football-style prediction league where players make predictions about how Supreme Court Justices will decide cases. It now has over 20,000 players and the best hit a 75% accuracy mark.

Mr Blackman, and his colleagues, Daniel Katz and Michael Bommarito II, have now developed an algorithm that can predict any case decided by the Supreme Court, since 1953, using only information available at the time of the cert grant. The model correctly identifies 69.7% of the Court's overall affirm and reverse decisions and correctly forecasts 70.9% of the votes of individual justices across 7,700 cases and more than 68,000 justice votes.

The algorithm works by generating many randomised decision trees that try to predict the outcome of the cases, with 90 plus different variables receiving different weights. Then, the model compares the predictions of the trees to what actually happened, and learns what works, and what doesn't. This process is repeated process many, many times, to calculate the weights that should be afforded to different variables. In the end, the model creates a general model to predict all cases across all courts.

Later this year the authors will be hosting a tournament where the players of FantasySCOTUS will compete against their algorithm.

³¹ <https://juristat.com>

³² Daniel Katz, Michael Bommarito II, Josh Blackman, Predicting the Behavior of the Supreme Court of the United States: A General Approach, July 2014.

Key steps

4.24. The LSB's next three-year strategy could help create a better market for consumers in 2020 by:

- Informing policy on the opportunities and limitations of digital delivery as a solution to the access to justice challenge given the need to reconcile the affordability benefits with the reality that some of the key groups who are currently excluded from the justice system are not online
- Ensuring the approved regulators are alive to emerging digital detriments and develop the skills to police the digital market place effectively and support consumers to use it safely
- Assisting with efforts to unlock the potential of Big Data while exploring the information governance and ethical issues it creates
- Engaging with national digital markets/inclusion initiatives. As part of planned ongoing thinking on modernisation of the wider regulatory framework, ensuring reform options deal effectively with global digital markets that exist largely outside the boundaries of the Legal Services Act

5 Consumer behaviour

SUMMARY

Across the economy, bolstered by strengthened consumer rights, transparency on provider performance and greater access to redress, and aided by more sophisticated intermediaries which help people find better deals, the traditional consumer-business relationship will be turned on its head. However, the extent to which these broader developments will impact on legal services is unclear. Our data shows consumers are becoming slightly more empowered and the sector will not be immune to broader societal changes. Yet, inherent features of the market militate against empowering consumers, so regulators should be realistic about the scope for this to enable the removal of sectoral regulation. Crucially, unless wide differences in experience between certain population groups are narrowed, vulnerable consumers could remain worse off. Narrowing inequalities must be a priority. Should the right performance data that could unleash consumer power be unlocked, new third party intermediary services could emerge to guide and manage choice. Although while these providers should empower consumers they may create new problems too. Regulators have an interest in maximising the potential of these services by removing barriers to their development while encouraging appropriate safeguards to protect consumers.

Prospects for empowered consumers

- 5.1. In March 2013, the Panel provided advice on how regulators can help consumers to play a more active, empowered role in the legal services market.³³ We suggested consumer empowerment involves two broad elements which interact to create the conditions for consumers to thrive. Firstly, the resources consumers have at their disposal to make better choices. This includes a certain state of mind (confidence and willingness to play an active role), decision-making tools such as good information, and the skills to use these tools to make effective decisions that secure positive outcomes. Secondly, the institutions – for example, the competition regime, consumer protections and regulatory organisations – that support consumers to shape markets.
- 5.2. It's quite easy to write a vision for what an empowered legal services consumer would look like in 2020. The ideal is consumers would identify when they have a legal need and take the right action to resolve it. This might mean using a lawyer, or it might not. When expert help is required, consumers would shop around and have reliable information to compare the price and quality of competing services offered by a diverse provider base. They would be able to research information about the law and expect close involvement in decisions about their case, having a sound understanding of the risks and likely outcomes. Legal services would be delivered in the way consumers want them to be and lawyers would match the high standards of quality and service that consumers demand of other types of businesses. Where service does fall short, consumers would have the confidence to complain. And irrespective of who had provided the service they would have access to redress through the Legal Ombudsman.

³³ Legal Services Consumer Panel, Empowering Consumers: Phase One Report, March 2013.

5.3. The Panel's advice, based on a range of survey data relating to public confidence and the consumer journey in legal services, revealed the scale of the challenge. This revealed problems of low trust in providers and little faith in regulators, knowledge gaps about consumer rights and of what lawyers do, inaction in response to some serious legal issues, lack of shopping around and minimal use of choice tools, and some serious barriers to complaining. We highlighted the importance of robust consumer protection regimes by pointing to research evidence demonstrating 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.³⁴ Based on this evidence, we concluded that before expecting consumers to take risks and play an active role in shaping markets, it is necessary first to ensure that the consumer protection framework is fit for purpose.

Cause for optimism, but a need for realism

- 5.4. Developments outlined elsewhere in this report give some cause for optimism about the future. Technology is enabling consumers to break down commoditised legal work into discrete tasks and decide which to do themselves and which to use a lawyer for. They should more easily access information to research their legal rights and duties in the same way people can learn now about possible health treatments before taking a decision about what to do in consultation with their practitioner. Liberalisation should continue to create wider choice and more generally an enhanced competitive environment in which providers of all types have to compete harder to win custom.
- 5.5. Economy-wide data suggests consumers are becoming more assertive in their dealings with UK businesses. For example, Ombudsman Service's Consumer

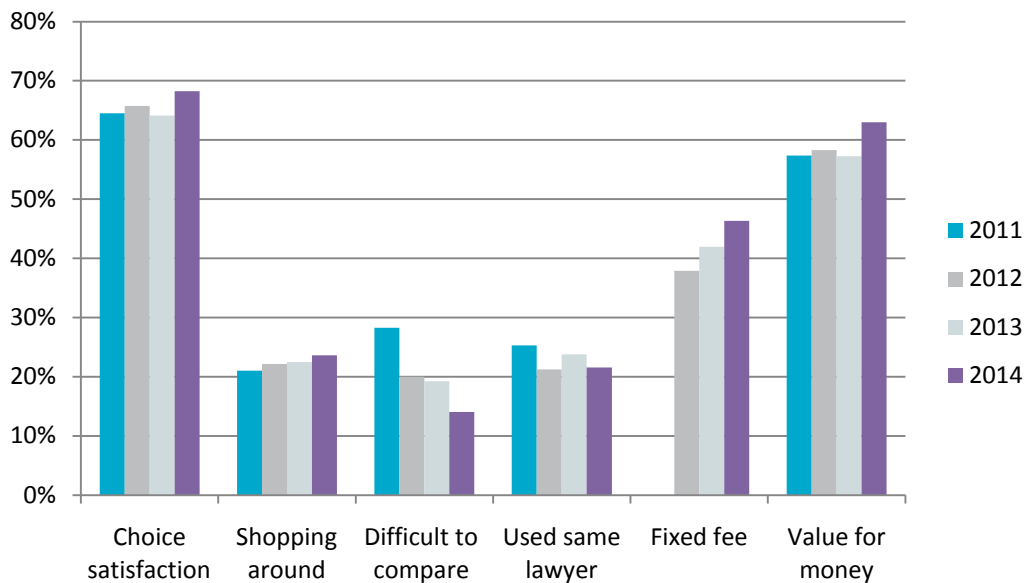
³⁴ Consumer Focus, Consumer Conditions in the UK 2011: Analysis of EU Market Monitoring Survey Results, 2012.

Action Monitor³⁵ estimates there were 38 million complaints in 2013 with nearly a third (32%) more people likely to complain about poor service now than they were a year ago. 27% of people report frequently using social media to gain companies' attention compared to 9% using traditional media. Indeed, technology is a key driver helping to rebalance the scales between consumers and businesses - opening up information, aggregating it, making recommendations, enabling consumers to self-organise and use their collective bargaining power, facilitating direct dialogue with between customers and companies - and always instantly accessible. But will this consumer activism translate to legal services?

- 5.6. The Panel's Tracker Survey shows evidence of consumers becoming more empowered over time. Since 2011 consumers are happier with the choice available to them, shop around more and are more satisfied with value for money. They find it less difficult to compare lawyers and are less likely to go back to the lawyer they used for their previous transaction. The rise of fixed fees has been a notable feature; nearly half of transactions are priced this way, while the hourly rate is now used in only 10% of work. In family work, which has seen a major ABS entrant, use of fixed fees has almost quadrupled in the space of three years – from 12% to 45%. Fixed fees are a response to consumer empowerment providing transparency and predictability in the price of legal services.

³⁵ Ombudsman Services, Consumer Action Monitor, January 2014.

Chart – Consumers becoming more empowered



Source: Legal Services Consumer Panel, Tracker Surveys 2011-14

5.7. However, that optimism is tempered by conditions which limit consumer empowerment. Some of these are core characteristics of the market. For example, gaps in knowledge and power between consumers and lawyers will remain, even if these are narrowed. The public will continue to use legal services rarely and often in distressed circumstances. Our research suggests consumers are risk averse in this market because they worry about the potentially serious consequences for their lives and those of loved ones should mistakes happen. Natural behavioural biases also militate against consumer empowerment, although there are techniques that regulators can take to help overcome these (see box).³⁶ So while it is possible to chip away at barriers which prevent consumers playing the active role they do in other situations, inherent features of this market work to limit consumer empowerment.

³⁶ Ctrl-Shift, The Changing Consumer Empowerment Landscape, A report prepared for Ofgem, April 2014.

Future developments in behavioural economics

A report by Ctrl-Shift commissioned by Ofgem argues traditional approaches to consumer empowerment, with their focus on consumer rights, consumers' understanding of these rights, and consumer education have had limited effect, in part because they have been based on flawed assumptions about the drivers of consumer behaviour and behaviour change.

Traditionally authorities have looked for ways to act as external influencers trying to change consumers' behaviours. More recently, influenced by the insights and findings of behavioural economics, attention has switched to designing different 'choice architectures', 'nudges' and triggers that cause consumers to change their behaviours in one way or another. An alternative – 'consumer empowering' – perspective on behaviour change is to find ways to help consumers steer their own behaviour. The goal of 'steering' is to help individuals better appraise situations, and make judgements about when they should trust, or be wary of, their gut instincts, rational judgements, or environmental influences. For example, if it's pointed out to you, that you are prone to inertia and often 'can't be bothered' to do things you 'should', the advisor could suggest you use a service that does the checking proactively for you. Some early research suggests that individuals who gain deeper insights into their own behaviours are better able to change these behaviours than purely external attempts to influence their behaviour.

Ctrl-Shift conclude that the very possibility of 'behaviour change as a consumer service' could transform the regulator's agenda and the regulatory environment, leading to less regulation in some areas as consumers are 'empowered to empower themselves' and more regulation in other areas, as these empowering services themselves need regulating.

Consumer vulnerability

- 5.8. There is an important consumer vulnerability dimension to this. Survey evidence indicates that poor living conditions, low educational levels, age and lack of internet access are good predictors of empowerment.³⁷ These factors affect significant

³⁷ European Commission and JRC, The Consumer Empowerment Index: A measure of skills, awareness and engagement of European consumers, 2011.

proportions of the population. Until very recently income inequalities have been increasing with the poorest falling further behind the average and the richest moving further ahead. One in six people in the UK struggle to read³⁸ and four in five adults have a low level of numeracy.³⁹ It is estimated that one in four people in the UK will experience a mental health issue during the course of a year.⁴⁰

- 5.9. The Panel's Tracker Survey illustrates the differences in experience of legal services across population groups. The C2DE group are less trusting of lawyers, feel less protected, less likely to complain, less empowered and less satisfied with outcomes, service and value for money. The same pattern emerges when comparing ratings between White and BME groups, with the exception that BME respondents were more likely than White respondents to shop around. This pattern repeats for disabled and non-disabled users – in all measures except shopping around, disabled users of legal services state they are less satisfied.
- 5.10. For the ABC1/C2DE and White/BME categories, we are able to measure whether the differences have widened or narrowed over time. The data shows a mixed picture, although on most measures the gap has narrowed a little. This is important to monitor as the competition reforms cannot be judged a success if they benefit the better off and leave more vulnerable groups behind. While the overall direction of travel is encouraging, there is much more to do to close these gaps.
- 5.11. A recognised challenge for consumer empowerment policy is that various initiatives serve only to widen inequalities, empowering the already empowered even more while vulnerable consumers do not benefit. The hope is that all consumers benefit from a trickle-down effect, but it is recognised that vulnerable consumers may need additional support to ensure their needs are addressed. These issues need more detailed consideration by legal regulators.

³⁸ www.literacytrust.org.uk

³⁹ www.nationalnumeracy.org.uk

⁴⁰ www.mind.org.uk

Towards greater transparency

- 5.12. Two interconnected developments should boost consumer empowerment in future: the use of transparency as a regulatory tool and the growth of the electronic market place.
- 5.13. A current trend is towards greater transparency as a tool to inform consumer decision-making and influence the behaviour of providers. A recent paper by the UK Regulators Network commented: *“There is a powerful agenda in the UK and internationally towards greater transparency and a recognition of the ‘power of information’. Regulators are increasingly using their information powers to publish comparable data on the performance of regulated businesses... This is to create pressure to improve performance, drive compliance with regulation and allow consumers to choose between companies on the basis of service as well as price”*.⁴¹
- 5.14. The current Government’s Consumer Empowerment Strategy has promoted an open by default policy: *“to support access to... data that empowers consumers and holds public service providers and regulated businesses to account, the Government will... set an expectation that regulators, Government departments, regulated businesses, and public service providers to be open as a default position. They should continue to free the complaint and performance data (in particular on individual businesses) they already own unless they have a good reason to do otherwise”*.⁴²
- 5.15. The Financial Conduct Authority has perhaps gone furthest and shows where legal regulators should set their sights. It pointedly chose to make ‘transparency as a

⁴¹ Philip Cullum, The use of data publication to enable reputational regulation, A UK Regulators Network Consumer Working Group discussion paper, July 2014.

⁴² BIS and Cabinet Office, Better Choices: Better Deals. Consumer Powering Growth, April 2011.

regulatory tool' the subject of its very first discussion paper.⁴³ The FCA already publishes some performance data that it routinely collects about financial services businesses, notably volumes of first-tier complaints. It is now considering what additional data it could require firms to publish themselves, one suggestion being claims data on insurance products.

5.16. The successful deployment of 'reputational regulation' in legal services could help to address the shortfall in information about the quality of lawyers' work that inhibits demand led competition. If, as is anticipated, familiar faces from other sectors enter the legal services market, new legal brands develop and high visibility marketing becomes more common place, publication of performance data could become a really powerful regulatory tool. This happens only to a limited extent now, for example the Legal Ombudsman names providers subject to complaints which lead to ombudsman decisions. We see three barriers standing in the way. First, although our joint efforts with the LSB to persuade the approved regulators to publish core regulatory data in a machine readable format are starting to pay off, questions remain around the range of data that will eventually emerge. A second barrier is that the regulators collect limited data in the first place, for example about the quality of work, that consumers would find useful. And increasing demands on firms to supply such data could be said to run contrary to a deregulation agenda which seeks to reduce administrative burdens. Third, is genuine policy issues to work through on issues, such as publication of success rates, where it is possible to see arguments for and against publication of some types of data.

Electronic market place

5.17. Comparison websites can empower consumers by marshalling the sorts of data described above, together with other information, such as price and direct customer feedback, to help people shop around and find suitable providers. Currently these

⁴³ Financial Conduct Authority, Discussion Paper DP13/1: Transparency, March 2013.

'choice tools' are little used in legal services – our Tracker Survey suggests just 1% of the public has used a price comparison website and 2% a customer review website. However, our research also suggests that 10% of people go online to find a lawyer - this suggests that public demand for comparison websites is there but the right tools have yet to emerge. This looks like changing though. During the last 24 months the press has reported serious external investment in legal services comparison websites, many new ventures and the entry of some well-established websites from other sectors - vouchedfor.com and checkaprofessional.com.

5.18. A Panel report in 2012 explored the possible reasons why comparison websites had yet to take off and why this might change.⁴⁴ The most common explanation was the perception that comparison websites and legal services are simply not a good fit - they are too remote for emotional purchases and legal services are not uniform so cannot be standardised and reliably priced by providers. Other factors suggested to us included issues around market structure: for example, it is too fragmented, consumers require legal services too infrequently and they do not shop around. It was also said that the profession is culturally averse to marketing. The lack of access to professional registers was a practical barrier for comparison websites to offer good coverage of the market.

5.19. However, we also suggested that developments including ABS reforms, technological advances and rising consumer power were likely to erode these barriers away. This includes more legal services being delivered in standardised packages which facilitate easy online comparisons, market consolidation, more consumers shopping around, the emergence of familiar legal brands and fixed fee services for a wide range of legal advice. All these trends are being seen. Comparison websites are unlikely to be used in every or even most areas of law, but may in areas, such as conveyancing, personal injury and wills, which have among the highest consumer spend.

⁴⁴ Legal Services Consumer Panel, Comparison websites, February 2012.

- 5.20. Comparison websites will bring risks as well as benefits. As intermediaries between providers and consumers, comparison websites have to balance the interests of both sides; there are risks of consumers being exploited by gaming tactics and other practices, such as invasion of privacy, which can be hard for them to spot or to do anything about. This can actually reduce transparency and create the risk of consumers making poor choices. Research shows that consumers adopt a relatively savvy approach to using these sites that recognises the advantages and drawbacks.⁴⁵ Despite this, a series of regulatory and self-regulatory interventions have been seen in the communications, energy and financial services sectors in an attempt to tackle consumer detriment.
- 5.21. There are signs that elements in the legal profession may seek to resist customer review websites. The legal press has reported that the Law Society is exploring the implications of the Google 'right to be forgotten' case to enable lawyers to expunge negative comments left on such sites.⁴⁶ The Evening Standard reported that Mishcon de Reya sought a court order for Pimlico Plumbers founder Charlie Mullins to uncover the name of customers whom, he claimed, made libellous comments on reviews website Yelp.⁴⁷ However, while legal action may be attempted in extreme cases, lawyers are unlikely to be immune from a social force which is changing the balance of power between consumers and businesses in nearly all parts of the economy. As Paul Polman, CEO of Unilever, said in 2011: "*If they [consumers] can bring down the Egyptian regime in weeks they can bring us down in nanoseconds*".⁴⁸
- 5.22. Technology is enabling other sorts of intermediaries. A paper by Consumer Futures suggests a new breed of Next Generation Intermediaries (NGIs) may in future offer

⁴⁵ Office of Fair Trading, Advertising of Prices, December 2010.

⁴⁶ Legal Futures, Law Society targets anti-solicitor websites as it turns up heat over Wonga's fake firms, 27 June 2014.

⁴⁷ Evening Standard, Interview: Kevin Gold, Mishcon de Reya - 'From princesses to oligarchs, we can navigate your legal minefield, 15 August 2014.

⁴⁸ <http://blogs.ft.com/tech-blog/2011/06/havas-chief-backs-twitter-over-facebook-for-ads/>

smarter ways to find good deals and take the effort out of searching and switching.⁴⁹ NGIs are designed to overcome consumer inertia that limits switching. They use algorithms to search the market for the best deal based on parameters set by the user, actively manage the switching process and maintain an ongoing relationship that alerts consumers when better offers emerge. Today, NGIs could feel far removed from legal services. However, the kernel of the concept - a personalised service using technology and datasets to connect people to the right provider - is attractive and would help break the information asymmetries that persist in this market. The paper suggests regulators could positively encourage these new services given they could address the root causes of many of the issues and problems they contend with, including by addressing supplier practices and policies, such as around access to data, that hinder them. However, it also warns that close regulation of intermediaries themselves is another possible role; although NGIs could help markets work better, they could also create new market problems.

5.23. Another type service, which is just taking off, assists the consumer in making a complaint about poor service. This could be particularly useful in legal services since our research tells us that dissatisfied consumers are less likely to complain to lawyers (44% do nothing) than in other service industries (27%). For example, resolver.co.uk, which is free to the consumer, has a five step system based on knowledge of company complaint procedures and second-tier redress options: it explains consumers' rights; uses automated technology to draft letters and emails; records communications between the consumer and trader; creates a case file which the consumer can refer back to; and advises on the escalation process. It is partnering with the Accesssolicitor.com comparison website so that its algorithms take account of a law firm's membership of Resolver. Similarly, youjustice.com sells subscription plans to retailers who wish to use its online complaints platform to resolve disputes with their customers. Consumers can reach an agreement with a

⁴⁹ Richard Bates, Next generation intermediaries – Examining a new approach to market engagement that offers consumers better outcomes for less effort, *Consumer Focus*, January 2014.

seller or, if unsuccessful, escalate the issue and request a decision from an independent neutral - a trained professional assigned by an online dispute resolution provider.

Key steps

5.24. The LSB's next three-year strategy could help create a better market for consumers in 2020 by:

- Designing policy so that vulnerable consumers share fully in the gains of the market reforms and quantifying and monitoring evidence of exclusion
- Ensuring the collection and opening up of data by regulators about the performance of lawyers
- Facilitating the emergence of a healthy intermediaries market that could help consumers make better choices and ensuring this works in the consumer interest
- Fostering the development of information and public education to build consumer confidence and enable consumers to use the market effectively

6 Market changes

SUMMARY

Informed observers think the legal services market will be unrecognisable by 2020 as the pace of change accelerates following the ABS reforms. Current ABS developments – including consolidation, specialisation, emerging brands, investment in marketing, technology and new delivery methods, hold clues to the future. The law will increasingly become a more business-like environment. This should deliver benefits to consumers and widen access, but it may also bring more sophisticated marketing and commercial practices seen in other markets that have caused consumer detriment. Regulators must acquire new skills and tools to deal with these new risks. Unregulated businesses will continue to grow as a major component of the market. It will be important to maintain and enhance consumer protection, and extend access to redress, so the public have confidence to engage in the market and can use it safely. This requires regulators to work closely with local and national enforcement partners who act as guardians of general consumer law. It also makes a review of the reserved activities and wider regulatory framework ever more urgent, but in the interim there will be a need to raise standards in unregulated markets. The loosening and stretching of regulatory boundaries as a result of present rule changes will continue to blur differences between branches of the legal profession. This process should benefit consumers and the LSB has a role to remove any artificial barriers that prevent the market responding to consumer demand. It will also need to ensure that competition between professional groups for the same work happens on fair terms.

Changing shape of the market

- 6.1. It would be foolish for us to pretend to know what the structure of the legal services market in 2020 will be. When the first ABS licences were issued in October 2012, the Panel was not among those expecting the equivalent of the Big Bang in financial services; instead we saw the potential for radical change over a longer-term horizon. Mindful of the famous Bill Gates quote that people tend to overestimate the change that will occur in the next two years and underestimate the change that will occur in the next ten, informed observers think the pace of change in legal services will accelerate in the period up to 2020 and beyond.

“If the changes that have occurred in the legal market in England and Wales in the past two years are anything to go by, then by 2020 it will be unrecognisable.”

(Foreword by George Bull, Baker Tilly report, Legal Innovation 2013, June 2013).

- 6.2. Developments since the introduction of ABS to date might offer clues about the future. Incumbents have adapted in part by making themselves bigger. This has included obtaining injections of capital, mergers and acquisitions, and entering into marketing collectives or forming networks of law firms operating under a common brand. Carrying out white labelled work for large retail brands has been another popular move. As well as consolidation, specialisation seems another response – over a quarter of firms report conducting at least 90% of their work in a single category of work.⁵⁰
- 6.3. It is often said that most of the innovation has come from new entrants. Established retail brands have entered the market. There has been a large amount of external investment and aggressive buying up of legal practices. A keen interest in our market from overseas has been a key feature. SRA data suggests ABS have made significant inroads in certain areas, for example they account for a third of turnover

⁵⁰ Pascoe Pleasence, Nigel J. Balmer and Richard Moorhead, A Time of Change: Solicitors' Firms in England and Wales. A report prepared for the Law Society, Legal Services Board and Ministry of Justice, July 2012.

in the personal injury market.⁵¹ Contrary to fears about cherry picking work, ABSs have captured a significant percentage of turnover in mental health and social welfare.⁵² This bodes well for securing access to justice in areas of legal work often considered unprofitable.

- 6.4. If there has been one disappointment, it is perhaps in the low number of MDPs – the poster child of the reforms – although surely these will take off. Some novel combinations of legal and non-legal expertise have emerged, though, such as estate agents and conveyancing practices, and firms which have integrated public relations with defamation work. In particular, big accountancy firms are expected to make an impact. The SME market, where the LSB’s research⁵³ suggests there is high latent demand, may be a particularly fruitful area for accountancy practices more widely given their existing relationships with this customer group. In addition, DIY online services and fixed-fee subscription services have recently emerged to cater for this previously underserved market.

Implications for consumers

- 6.5. The ABSs report the most common areas of investment being technology, marketing and changes to the way legal services are delivered.⁵⁴ This is where changes to business structures and financing start to deliver visible changes on the ground. Familiar high-street names are marketing legal services, slick advertising is appearing in our living rooms and low-cost automated documents are offering alternatives to bespoke services. In addition, fixed fees, longer opening hours and a commitment to removing jargon are all developments making legal services more accessible.

⁵¹ Legal Services Board, Evaluation: Changes in competition in different legal markets, October 2013.

⁵² Ibid.

⁵³ Professor Pascoe Pleasence and Dr Nigel J. Balmer, In Need of Advice? Findings of a Small Business Legal Needs Benchmarking Survey. A report prepared for the Legal Services Board, April 2013.

⁵⁴ Solicitors Regulation Authority, Research on alternative business structures (ABSs): Findings from surveys with ABSs and applicants that withdrew from the licensing process, May 2014.

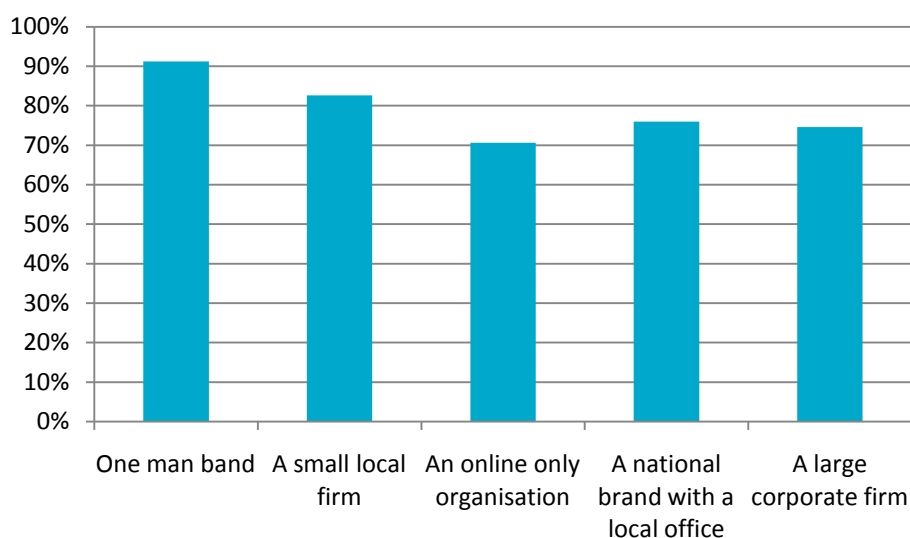
- 6.6. However, we shouldn't convince ourselves that every structural change in the market will be good news for consumers. The Panel's Tracker Survey indicates that service satisfaction is highest with the smallest law firms and falls away as the entity gets larger. The Legal Ombudsman has reported that traditional high street law firms are evolving into or being displaced by conveyancing factories. While a high-volume, commoditised and automated delivery set up enables these companies to offer services for as little as £90, there have been complaints about the poor quality of work, shoddy service and supposedly fixed fee deals where the final bill ends up being higher. The Chief Ombudsman expressed a worry that these services may be too geared towards simple transactions. Where there are complexities, such as when more detailed searches are needed, the rigid business models used by factory firms may come unstuck.⁵⁵ Of course, consumers make trade-offs between price and quality, but regulation must at the very least ensure that standards stay above an adequate minimum floor.
- 6.7. The competition reforms, in particular new entrants and injection of external investment, also mean that the law is becoming a more business-like environment. The tighter disciplines and greater efficiencies this brings is good news for consumers. However, it will also bring more sophisticated marketing and commercial practices seen in other markets that have caused consumer detriment. One-stop shop services offer the benefits of convenience, but other markets have seen bundled packages and unfair terms which are difficult for consumers to disentangle. Subscription packages are familiar in other markets and offer certainty and convenience, but problems occur if they come with long tie-ins and exit penalties. Technology enables a more personalised service delivery, but the personal data which consumers provide to enable this is itself a valuable commodity that is sold on, with problems elsewhere around consent and information security. Heavy marketing of services improves awareness and choice,

⁵⁵ Legal Ombudsman, Losing the plot: Residential conveyancing complaints and their causes, undated.

but creates scope for misleading advertising practices such as attractive headline prices that mask hidden costs later on. This sort of market becomes more appealing to intermediaries, such as comparison websites, which aid consumer choice, but some have been found to manipulate choice and work too far in the interests of their subscribers.

- 6.8. In many ways, this is the price of progress – a more commercial environment creates new benefits for consumers, but new risks also. Consumers can expect to gain in net terms so the answer is not to turn back the clock, which would be impossible. However, all this emphasises the importance of maintaining and enhancing a strong safety net to protect consumers. The approved regulators, who are on a journey from self-regulated professional bodies to independent market regulators, must acquire new skills and tools to deal with these new risks. They will also need to engage with specialist enforcement bodies who are guardians of general consumer law, such as the Advertising Standards Authority, the Information Commissioner and trading standards. These bodies need to be aware of issues that are particular to our market so they can target their efforts effectively. However, as we discussed in the previous section, their limited resources mean legal regulators cannot rely on them alone to tackle problems in this sector.

Chart – Service satisfaction by size of firm



Source: Legal Services Consumer Panel, Tracker Survey 2014

Blurring of professional boundaries

- 6.9. In 2020 the loosening and stretching of regulatory boundaries occurring as a result of rule changes happening at present will continue to blur differences between branches of the legal profession. This is most visible at the Bar, where the restrictions on direct access to barristers, conducting litigation and handling client money are being lifted. But it can be seen elsewhere too. The Council for Licensed Conveyancers is expanding the range of legal activities that it regulates and chartered legal executives will shortly have the opportunity to form independent businesses. ICAEW is expected soon to seek to expand its horizons beyond the narrow probate activities which it currently has rights to authorise. Added to this is entry by non-law firms carrying out legal work as ABS entities, and initiatives to professionalise the paralegal workforce.
- 6.10. Consumers stand to benefit from the more diverse market place that should result from these changes. Most obviously there will be wider choice as consumers can pick between different types of professional for the same work. It should increase scope for seamless service provision as it no longer becomes necessary to use combinations of legal and other professionals to undertake different elements of what, in the eyes of the consumer, is a single matter. By streamlining the delivery of legal services and cutting out unnecessary links in the chain, we can also expect the cost of legal services to reduce. Also, as different types of lawyer essentially do the same thing, the visibility of titles can be expected to reduce and be replaced by a greater focus on the activity. This process of convergence is thus a good thing for consumers and it is in their interests for the LSB to remove any artificial barriers that prevent the market responding to consumer demand.
- 6.11. One consequence of different types of lawyers working in the same arenas is more intense competition for work. Although each type of lawyer may have similar access

to the same potential pool of consumers, differences in regulatory regimes may inhibit competition from operating fairly. The issues identified in the Jeffrey Review on Independent Criminal Advocacy may foreshadow the sorts of situations that could arise more often in future.⁵⁶ The Legal Aid Agency awards contracts to a single entity which is expected to provide an end-to-end service and sub-contract elements of the work as necessary. However, since it is unable to award contracts to self-employed barristers because they are not entities, this was seen to give an unfair advantage to solicitors who have first contact with potential clients through the duty solicitor scheme operating in police stations and further a strong incentive to keep the advocacy element of this work in house rather than refer to barristers as they traditionally have done. The Cab Rank Rule, which binds barristers but is not replicated in the SRA Handbook, is another example where controversy has arisen. Consumers benefit the most when competition operates fairly so we do not view these as battles for the profession alone to resolve among themselves.

6.12. In addition to competition, other issues will need to be tackled so the market can respond freely to consumer demand while maintaining standards at the right level. One is avoiding regulatory arbitrage - the risk of a downward spiral if lawyers choose the regulator operating the most lax regulatory regime. Ensuring consistent implementation of the Legal Education and Training Review recommendations aimed at producing a more mobile and flexible workforce is another important element. Finally, echoing our submission to the Simplification Review, as differences between lawyers fall away, it becomes harder to justify maintaining multiple different rulebooks, disciplinary regimes, financial protection arrangements, and, indeed, regulators. The duplication of effort and cost this entails are unnecessary costs which consumers ultimately foot the bill for.⁵⁷

⁵⁶ Sir Bill Jeffrey, Independent criminal advocacy in England and Wales. Review for the Ministry of Justice, May 2014.

⁵⁷ Legal Services Consumer Panel, Breaking the maze: Simplifying legal services regulation, September 2013.

6.13. In short, by 2020 the current system of multiple regulators will seem increasingly burdensome, but there is scope for the LSB to improve competition through harmonising rules and removing duplicative processes. It will need to resolve the apparent contradiction in growing the number and reach of regulators with the desire to simplify and harmonise the overall regulatory system. Further, although regulatory structures will largely be invisible to most consumers, cracks appear when consumers seek to use the system to remedy problems they experience. So there is a need in the shorter term to make the complex regulatory landscape easier to navigate for consumers.

Unregulated markets

6.14. The LSB estimates that unregulated businesses already account for some 20-30% of turnover in the UK legal services sector.⁵⁸ The Institute of Economic Research has projected growth in the 'associate legal professionals' category of 19.6% between 2010 and 2020, which translates to an extra 7,000 jobs (this covers regulated and the unregulated workforce).⁵⁹ The unregulated sector has not been comprehensively mapped, but includes HR consultants, will-writers and estate administrators, software companies selling online legal services and various providers of general legal advice. Claims managers and immigration advisers could also be described as paralegals, although these providers are subject to alternative regulatory regimes.

6.15. The LSB's blueprint document⁶⁰ suggests the core protections for legal services consumers should lie in general consumer law and by enhanced access to redress, rather than via a panoply of sector specific rules. It states this would allow the removal of much sector-specific regulation. By 2020 new legislation will have

⁵⁸ Legal Services Board, Regulatory Information Review, September 2011

⁵⁹ Data provided by IER for Legal Education and Training Review, 2013.

⁶⁰ Legal Services Board, A blueprint for reforming legal services regulation, September 2013.

strengthened the consumer's hand. The Consumer Rights Bill, which is currently going through Parliament, is designed to clarify and simplify consumer rights. The Bill aims to make consumers better informed and better protected when they're buying and update the law for the digital market place. The Consumer Protection (Amendment) Regulations will allow consumers to seek redress for misleading and aggressive unfair commercial practices from traders by bringing their own private actions in the civil courts. The ADR Directive and ODR Regulations have the potential to extend access to ombudsmen and similar mechanisms.

6.16. However, other factors may limit the effectiveness of these measures. For example, the new private rights of action do not extend to all breaches of consumer protection law. Further, one factor why consumers are less likely to complain to lawyers than other service industries is being intimidated by the prospect of 'taking lawyers on at their own game'.⁶¹ The idea of taking a lawyer to court would seem even more daunting. Therefore, there will continue to be a reliance on public enforcement, yet trading standards services have been cut by 40% since 2010 and legal services is not a national enforcement priority, nor is it likely to become one. Another limitation is that the Government has chosen to implement the ADR Directive so that it is voluntary for traders to participate (see box). Unregulated businesses will need to be convinced that it makes commercial good sense for them to voluntarily subscribe to one of the recognised ADR bodies. Swift progress on making available a viable voluntary jurisdiction under the Legal Ombudsman would aid this.

6.17. We suggest the significant and growing scale of unregulated delivery of legal services means this cannot be viewed as a peripheral issue, especially given the arbitrary nature of the reserved activities. The long-term answer is to review which activities should be reserved, but the outcome of the Simplification Review means

⁶¹ YouGov, Consumer experiences of complaint handling in the legal services market. Report prepared for the Legal Ombudsman and Legal Services Consumer Panel, August 2012.

this work is not imminent. While the case for a review should continue to be pushed, facing the reality that the regulatory net is unlikely to be much expanded before 2020, there is a need to safeguard standards in the unregulated areas. In this context, the CILEx enquiry on whether paralegals can meet the market needs of the future is timely. The enquiry will address how the paralegal workforce can best serve the future needs of consumers and the ethical and consumer issues which arise from the increased use of paralegals. The joint initiative by the Institute of Paralegals and National Association of Licensed Paralegals to create a Professional Paralegal Register is another notable development.

6.18. Self-regulation has a tarnished track record in this sector; failures among the professional bodies were a prompt for the Legal Services Act. Certainly we do not advocate it as a long-term solution to a review of the reserved activities, but it would be irresponsible to be fatalistic about this and sit back and do nothing while consumers suffer loss at the hands of unregulated businesses with no means of seeking redress. There is a spectrum of options that could improve market outcomes including promoting better consumer information, standards-setting, developing codes of practice and co-regulation solutions. There are some limits on the extent to which the LSB can look at areas outside the regulated market. However, Section 163 of the Legal Services Act foresees a role for the LSB to give advice on codes of practice or other voluntary arrangements. The ADR Directive, due to come into force in 2015, will create other opportunities to promote access to redress (see box). We submit that these solutions are unlikely to emerge by themselves; the LSB potentially has a valuable role to encourage and facilitate efforts led by industry to raise standards in the unregulated market.

The ADR Directive

The Directive will require ADR to be available for any dispute regarding contractual obligations that a consumer has with a legal services business. The Government considers that introducing a residual ADR scheme which would operate alongside existing schemes and deal with any dispute not currently covered would be the simplest way of fulfilling this objective. Legal services businesses could opt to subscribe to the residual scheme or to any voluntary scheme which the Legal Ombudsman elects to create.

However, the Directive makes it optional for traders to participate in ADR, unless it is already required by sectoral legislation or mandated by member states. The UK has decided to make participation voluntary, but BIS is exploring incentives to encourage participation. The Directive contains one powerful incentive as it will be compulsory for traders to alert consumers to the availability of ADR whether or not they subscribe to a scheme.

Key steps

6.19. The LSB's next three-year strategy could help create a better market for consumers in 2020 by:

- Unblocking artificial obstacles to convergence among professional groups, while ensuring competition between those groups for the same work happens on fair terms
- Ensuring the approved regulators are equipped to respond effectively to the new types of consumer detriment that result from law becoming a more business-like environment
- Actively encouraging and facilitating initiatives to raise standards and extend access to redress in unregulated markets
- Continuing to press for modernisation of the wider regulatory framework in the longer term. Meanwhile, where possible, move towards harmonising arrangements, such as rulebooks, disciplinary regimes and financial protection schemes, within the existing legislative structures

7 What should guide the regulatory response

7.1. To address the second element of the LSB's commission, in this final section, we have briefly identified five overarching themes that we consider should guide the regulators in responding to the future developments described in previous sections.

Act to ensure the reforms benefit everyone

7.2. Firstly, in overall terms, there would seem good grounds for being optimistic about the future. Market liberalisation, technology and other forces should produce innovative and cheaper services that can benefit all consumers and widen access to groups currently excluded from the market. Consumers should have better access to knowledge and tools to diagnose their legal needs and take greater control over how these are resolved, with access to a more diverse provider base and DIY options. We can expect consumers to be more demanding, by using intermediaries to shop around, make informed comparisons and complain. However, unavoidably, legal services will remain an inherently difficult market in which to exercise consumer power and much will depend on unlocking the raw data that underpins informed choice, encouraging intermediaries to make it intelligible to a range of consumers, and having a clear strategy for empowering consumers more generally, for example through public education. There is also a risk that vulnerable consumers will be left behind and inequalities will widen, for example due to an overreliance on technology or people having no option but to handle their legal matter alone. In order to create fair markets that serve all, it will not be sufficient for regulators to sit back and let market forces unfold; instead they should tackle consumer vulnerability proactively, by thinking about this strategically, quantifying and monitoring exclusion, and embedding it throughout their work.

Adapt to the changing pattern of risks

7.3. A second thread running through our analysis is the changing pattern of risk. It is not that the market will become more or less risky overall, but the nature of the risks is likely to be different. Unbundled service provision will widen access and empower consumers, but also place more responsibility into their hands and create new challenges for lawyers. Technology may transform the delivery of legal services in a range of beneficial ways, but a series of digital detriments have to be contended with, such as data protection breaches. Third party intermediary services should help to connect consumers to suitable providers, but in other markets they have manipulated consumer choice and raised privacy issues. Greater competition and new entrants promise to widen choice and innovation in service delivery, but as the law becomes a more business-like environment, so also we can expect to see problems related to the sophisticated marketing and commercial practices seen in other markets. Regulators will also need to move with the times, updating their tools and regulatory criteria, acquiring new skills and forging strong partnerships with local and national agencies responsible for enforcing general consumer law.

Rethink consumer protection

7.4. Our third overarching theme follows from the first two. Regulation shouldn't be seen a last resort, but as a vital safety net which protects the vulnerable, empowers consumers and enables growth. Research analysis suggests that consumer confidence that the rules protect them is the single most important factor that explains those markets that work for consumers and those that do not. An ideological approach to strip away regulation risks undermining public confidence and efforts to empower consumers. Sometimes, as with convergence in the profession, there will be a need to remove regulation which inhibits competition. In other situations consumer protection will need to be strengthened, with options including extending the reach of regulation, expanding access to redress, updating regulatory criteria and tools, and exploring alternatives to traditional regulation. Often these decisions will involve a difficult balancing act between access to justice and consumer protection. Overall, though, rather than thinking about

having more or less regulation in net terms, the focus should be on ensuring regulation is targeted in the right place and does the job it is designed for. Rethinking consumer protection also means a starting point which looks at the whole legal services ecosystem rather than the narrow boundaries of legal services regulation.

Work in different ways

- 7.5. Fourth, there are opportunities for the LSB to work in different ways in order to bring about the better future for consumers in 2020 that the organisation and its partners will wish to strive for. Some developments, such as the steady rise in litigants in person and online dispute resolution, create novel and difficult policy issues where high quality thought leadership on the regulatory implications would contribute real value. In other areas, as with big data and intermediary markets, the LSB could play a direct role in facilitating innovation. Further, there is scope for the LSB to encourage and facilitate efforts to raise standards and extend access to redress in unregulated markets. Equally, our analysis should inform the development of some existing activities. For example, its regulatory standards work, which periodically assesses the performance of the approved regulators, needs to assess whether the regulators are acquiring the new knowledge and skill sets we describe.

Maintain pressure for legislative reform

- 7.6. Finally, developments in the period to 2020 will put the overall regulatory framework under even greater strain than it is today and the LSB should continue to press for major legislative reform. Increasingly, especially given a burgeoning digital market place, legal services will be delivered by businesses operating outside of the Legal Services Act boundaries, leaving consumers without the core protections they need. Businesses working horizontally by offering combinations of legal and other services in one-stop shops will rub up against individual sectoral regulatory and redress systems organised in artificial vertical silos. Frontline regulators will need access to an updated armoury of tools to deliver effective regulation. The continued blurring of professional boundaries will reduce even further the narrow differences between groups of lawyers, with

inconsistent regulatory regimes inhibiting competition and limiting workforce mobility. The system would still be based on titles that have lost their old meaning, when it would be better to build regulation around the activity. And when lawyers are essentially doing the same work and running businesses in partnership together, the duplication of cost and effort required to maintain multiple rulebooks, disciplinary regimes and so on, becomes even harder to justify.

- 7.7. This is not the fault of the current legislation, which was designed to liberalise the market. But with a new era being ushered in, so too the framework will need to be modernised. While legislative reform is not feasible within the lifetime of the LSB's next three-year strategy, it should be possible to set down quite precisely the change that is needed, seek to build consensus around this vision and secure political commitment on implementation.

Annex 1

The following people and organisations attended the Panel's stakeholder event, chaired by Joshua Rozenberg, to inform this exercise. We are grateful to the Law Society for presenting their scenarios work at this event to help us build on existing work.

Adam Sampson, Legal Ombudsman

Caroline Wallace, Legal Services Board

Crispin Passmore, Solicitors Regulation Authority

Duncan Rudkin, General Pharmaceutical Council

Elisabeth Davies, Legal Services Consumer Panel

Kate Wellington, Which?

Louise Restell, Consultant

Mark Stobbs, Law Society

Mary McAnally, National Consumer Federation

Matthew Smerdon, Legal Education Foundation

Peter Farr, Civil Justice Council and Judicial Office

Peter James, Institute of Chartered Accountants in England and Wales

Philip Marsden, Legal Services Consumer Panel

Professor Richard Moorhead, UCL

Sandra Barton, ILEX Professional Standards

Sheila Kumar, Council for Licensed Conveyancers

Stephen Crowne, Bar Council

Steve Brooker, Legal Services Consumer Panel

Steve Hynes, Low Commission and Legal Action Group

Sue Lewis, Financial Services Consumer Panel

Vanessa Davies, Bar Standards Board

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.

Consumer Panel Members

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