



# Breaking the maze

Simplifying legal services regulation

September 2013

# Consumer challenge



# About Consumer Challenge

This is our submission to the Ministry of Justice simplification review.

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

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# 1 Executive summary

## The need for change

- 1.1. Overly complex and costly regulation harms consumers by limiting competition, increasing legal bills and making it harder for consumers to navigate the market, make good choices and access redress. Therefore, the consumer interest lies in having the right amount of regulation and no more. However, regulation at some level is vital to maintain public confidence in the legal system, uphold quality standards and ensure fair treatment of consumers and third parties by providers. The Ministry of Justice's review should simplify regulation whilst retaining necessary protections.
- 1.2. Four years of evidence of the consumer experience has demonstrated to the Panel that the existing regulatory framework does not provide a sustainable model in the long term to offer consumers the best system of consumer protection or support a competitive market place:
  - Consumers have to find their way around a labyrinthine maze, which has an in-built mechanism to add further twists and turns over time. Even the regulators and ombudsman can be unsure what regulation actually covers.
  - The reserved activities are narrowly drawn and not based on a consumer protection rationale. The unregulated sector is growing in influence and new markets are emerging, yet consumers are unaware they are unprotected when using these providers.
  - The Legal Ombudsman has to turn away consumers who have suffered detriment at the hands of unregulated providers, including those who seek to hide behind complex business structures exploiting loopholes in the Act.

The wider redress landscape has overlapping responsibilities and does not make sense from a consumer journey perspective.

- A regulatory system based on professional title frustrates a more risk-based and targeted regulatory regime focused on legal activities and entities.
  - There is much duplication of responsibilities and many lawyers are subject to multiple regulatory regimes – adding complexity and cost for consumers.
  - Regulatory competition risks a race to the bottom and inhibits effective cooperation between the approved regulators.
  - The smaller regulators lack the capacity and capability to deliver adequate consumer protection. In particular, they lack the resources to understand consumers and to facilitate effective demand-side competition.
  - Regulation is more independent from the profession on paper than it used to be. However, there is a lack of cultural independence; serious allegations have been made about representative arms meddling in regulatory matters.
- 1.3. The timing of change is a more difficult question than whether change is needed as the market is still taking shape following the ABS reforms. However, the Panel thinks it is the right time to *start* designing a new blueprint. The cost and complexity of the current system, uncertainty due to the prospect of future major change, and the smaller regulators' lack of critical mass, all suggest the need to act now.

## An agenda for the future

- 1.4. The Ministry of Justice should task the LSB with making recommendations on the right way forward. Rather than set out a detailed blueprint for change, the Panel suggests some success criteria to inform options for a future system:
- Access to the Legal Ombudsman for all legal services transactions
  - Regulation which is fully independent of the profession

- Consumer focused regulatory objectives
  - A simple system that starts from a consumer journey perspective
  - A flexible regime better targeted at the risks facing consumers; one focused on the activity rather than the person doing the work
  - Strong and effective consumer representation
  - A strong emphasis on evidence-based policy making including direct engagement with consumers and robust datasets
  - Works transparently and is accountable for its performance
  - Avoids duplication of processes yet respects the diversity of providers
  - Sustainably resourced and capable of delivering effective regulation with a level of investment that reflects the contribution which the sector makes to GDP and its importance to wider societal objectives
- 1.5. Various models are possible, but any suggestion of a return to self-regulation based around the professional bodies would not meet the success criteria outlined above and should be immediately ruled out. This option would not command public confidence and could produce a regulatory system which is even less reflective of the changing and increasingly integrated legal services market. The history of legal services suggests that self-regulation erects unnecessarily high entry barriers and would undo progress made to create a more diverse and competitive market place that works in the interests of consumers.
- 1.6. Our lead candidate for a future regulatory model is a single regulator for the legal services market. The Panel considers it would be possible to design this while respecting differences between branches of the profession. It would not automatically lead to the fusion of the profession or undermine an independent bar, as some may claim. Instead, it would better reflect the changing professional boundaries happening now, as seen in rule changes designed to allow different types of lawyer to compete with each other for the same business and in new

business structures that combine disciplines. A single regulator is arguably the solution that would best enable the most diverse market – one made up of traditional and new providers.

- 1.7. A further strength of the single regulator model is that it would offer full independence from the profession, giving consumers confidence that regulation is protecting them, not lawyers. This option could produce the simplest system to navigate for consumers, making it easier for them to know their rights and make informed choices. It could also have the critical mass to make a real impact and be the most cost-effective model to operate by reaping economies of scale and removing the existing multiple codes of practice and duplicative systems for the likes of discipline and financial protection.
- 1.8. On the basis of the evidence available to date, a single regulator is the solution that is most likely to deliver an outcome where consumers are put at the heart of legal services regulation.

## 2 Introduction

### Time for change?

- 2.1. This document is the Legal Services Consumer Panel's submission to the Ministry of Justice's call for evidence on simplifying the legal services regulatory framework.
- 2.2. Overly complex and costly regulation harms consumers. Complex regulation makes it harder for consumers to navigate the market, make good choices and access redress. It also limits choice and erects barriers to innovation that prevent providers from designing better services. Costly regulation leads to higher legal bills and so makes legal services less affordable for consumers who already perceive lawyers as expensive. This is especially relevant in these cash-strapped times and when less funding for legal services is being met by the public purse.
- 2.3. It is therefore in the interests of consumers to have the right amount of regulation and no more and we are keen to remove regulation that serves no useful purpose. However, at the same time, legal services are needed at critical times in people's lives and underpin the rule of law. Regulation at some level is vital to maintain public confidence in the legal system, uphold quality standards and ensure fair treatment of consumers and third parties by providers. These consumers include small businesses and charities, as well as individuals. So while the Panel's submission will point to examples of bad regulation, we will also be keen to ensure that necessary consumer protections are retained.

*"De-regulation is the Wild West, basically."*

*"On the whole I'd rather pay a little bit extra in order to not get shafted later on."  
(Research on risk and the role of regulation)*

- 2.4. The Legal Services Act 2007 is still a relatively new piece of legislation. Even so, the legislative process left some big questions unanswered and it has always been acknowledged that the current regulatory framework is a transitional arrangement. Most obviously, the reserved activities were passported into the current system. It is widely accepted that this list is a historical accident and not based on any consumer protection rationale. Likewise, the professional bodies were passported in as the frontline regulators, albeit with measures designed to achieve more independence from the profession and provide greater consumer input to decision-making. These structures are coming under increasing strain as the market is changing following the liberalisation reforms and it is good idea to re-examine them. However, the new market is still taking shape and so the right timing for further changes is uncertain. Moreover, these are also complex issues and we see the call for evidence as the start of a reform process rather than the time to settle on definitive answers.
- 2.5. In order for the following chapters to have value we have been open, honest and evidence-based in our criticism of the current regime, concluding that ultimately consumers would be better served by a different set of arrangements. This approach has been reflected by the Panel in all of our work. Our annual consumer tracker survey and bi-annual Consumer Impact Report enable us to assess and monitor developments, acknowledging the hard work and progress made by many since the Act. They also shine a sharp light on where there has been a lack of progress and this has informed this submission. Our criticisms reflect the flaws of the system and resources within which many of the regulators work. In the best spirit of professionalism, it is important for everyone to put the public interest first; this will not have occurred if the existing regulators all suggest change is needed, but at the same time seek to achieve self-preservation.
- 2.6. The Legal Services Consumer Panel often finds itself as a lone voice representing consumers in this market. Other consumer bodies, often openly acknowledge that, given difficult decisions on priorities with diminishing resources at their disposal, they leave legal services regulation to the Panel, feeling it is safe in our hands. As the department reviews the submissions, the majority of which are likely to

represent the views of the legal profession, we urge it to remember that the ultimate purpose of regulation is to benefit the end users of services. Further, it is consumers through their purchasing behaviour who will fuel economic growth and regulation gives them the confidence to carry out this role effectively.

2.7. The Panel's submission will add value by offering a consumer journey perspective on the current legal services framework. Throughout the text, there are quotes from various pieces of consumer research we have been involved with over the years, in order to help bring the regulatory theory to life. It is structured as follows:

- Chapter 3 goes back to basics and asks why it is necessary to regulate legal services. It also discusses the role of alternatives to regulation.
- Chapters 4 to 8 identify examples of complexity and duplication in the current arrangements which make things difficult for consumers. We have framed this around five consumer-facing objectives for regulation: knowing your rights; a strong safety net; getting redress; effective regulators; and independent regulators acting in the consumer interest.
- Chapter 9 discusses issues around timing, success criteria which should influence the design of a new regime and areas for further work.

# 3 Why regulate?

## The underlying rationale for regulation

- 3.1. The rationale for regulating legal services varies depending on the nature of the situation where the law comes into play and the parties involved. However, below we offer some general statements about the benefits of regulation in this sector. These statements are divided into three broad groups: public interest benefits; reducing consumer detriment; and public attitudes towards regulation.
- 3.2. We do not consider here where the regulatory net should be cast or the best style of regulation, which would be premature given the lack of evidence to inform such an analysis and since the new market is still taking shape.

### Public interest benefits

- 3.3. One group of benefits relates to society's reliance on a fair and well-functioning legal system. This system facilitates reliable economic and social relationships, provides a vehicle for resolving disputes, allows citizens to uphold their rights and discharge their responsibilities, and enables governments to be held to account. Therefore an effective legal system underpins the rule of law, which in turn depends on the independence, integrity and quality of the professionals who engage in it on behalf of citizens and the state. Likewise legal services supports the administration of justice as the performance of lawyers contributes to the fairness and efficiency of the judicial process. Regulation supports the legal system by offering the public assurance about the credentials and behaviour of these actors.
- 3.4. Regulation focuses on citizens and consumers as well as on providers and thus helps promote access to the legal system. Legal services can be described in economic terms as a 'merit good', in other words something everyone should be

able to benefit from regardless of their ability to pay for it. Furthermore, using legal services is often involuntary; it can be necessary to achieve something (e.g. buying a house) or may result from an unwelcome event (e.g. being unfairly sacked). Regulation cannot secure such objectives on its own, as some decisions that influence people's ability to access justice, such as eligibility for public funding, are not made by regulators. However, regulation makes an important contribution, for example by promoting public understanding of the legal system and facilitating competition (which helps to keep legal services affordable).

- 3.5. The assurance that regulation offers about the integrity of lawyers is important due to the position of trust they hold. In the adversarial context of the courtroom, we rely on lawyers to put the interests of justice ahead of those of their clients, for example by disclosing information that is harmful to their case. We need to trust lawyers to deprive themselves of income by declining to act when there is a conflict of interest. The concept of legal professional privilege depends on clients being able to discuss their legal rights and duties in confidence with a trusted advisor. Life changing sums of money are entrusted to lawyers when moving home or administering an estate. More generally, the public expects lawyers to act responsibly when chasing a debt, investigating someone's affairs or advising their client on complying with the law. Nobody can assume that all lawyers will honour this position of trust all of the time. However, when this trust is breached, regulation provides access to redress for those harmed and prevents future victims through the disciplinary system.

*“There’s a power sort of imbalance because solicitors have a knowledge base that most of us don’t have. It’s like going to your GP. Most of us don’t understand what our GPs do or medicine. We have to put our trust in people. That can be abused sometimes.”*

*(Research on risk and the role of regulation)*

### Reducing consumer detriment

- 3.6. The consequences of unethical or poor quality legal services can be very serious and this is another reason for investing in proper regulatory safeguards. Individuals may, for example, suffer imprisonment if poor representation leads to a miscarriage

of justice, deportation due to poor immigration advice, financial loss if compensation for personal injury is inadequate, damaged family relationships following a defective will, or breach of privacy if confidential information is wrongly disclosed in a divorce. Legal services are also not simply a transaction between a lawyer and their client, but may involve other parties who may be vulnerable or have no say in how their matter is being handled. This might be a victim of crime, a child subject to a custody battle, an elderly person signing over power of attorney, or someone with a learning disability in dispute with their local council over schooling. Business and charities might also massively lose out if they get the wrong legal advice, as could third parties who rely on them, such as their employees, customers and beneficiaries.

*“Solicitors are a bit like doctors, they have so much time allotted to a client and they have quite a lot of clients and all I am saying is where they would normally give somebody say half an hour to three quarters of an hour they should give us an hour because sometimes it’s very hard for us, we stammer over some of the words that we want to say, some of the words don’t come out the way we want them to come out, and I think if they gave us just that little bit more time we would eventually be able to say what we want to say without having to rely on our support.”*  
(Learning disabilities research, with LSB and Mencap)

- 3.7. A report by the Regulatory Policy Institute concluded that: *“The most compelling economic rationale for some form of oversight of legal services relates to issues regarding ‘quality of service’ (in a broad sense), and, in particular, to issues associated with information asymmetries between suppliers and consumers, which can affect the ability of consumers to assess quality”*.<sup>1</sup> Most people know very little about the law and purchase legal services quite rarely. It is difficult to learn from experience as knowledge gained from, for example, buying a new home is of little use when fighting eviction from the same property some years later. Consumers

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<sup>1</sup> Regulatory Policy Institute, *Understanding the economic rationale for legal services regulation: A report for the LSB prepared by Dr Christopher Decker and Professor George Yarrow*, October 2010.

may also need to make a series of decisions as their case progresses and these in turn may involve difficult decisions about trade-offs, for example during litigation or a divorce settlement; each decision may carry its own risks and potential for error. Decisions may also need to be made in an emotionally charged context, for example during bereavement or in relationship breakdown. The stressful and high stakes nature of legal services means this can be a challenging environment even for consumers who are demanding of businesses in other areas of life.

- 3.8. Behavioural economics suggests these factors make consumer decisions particularly prone to errors and that firms can exploit these traits in ways that harm consumers.<sup>2</sup> Kahneman introduces two forms of thinking: System 1 thinking which is quick, intuitive, requires little mental effort and is often based on how options make people feel, and System 2 which is analytical, deliberative and requires a good deal of mental effort to implement. Which system is adopted not only determines how people make a decision but also which decision is actually taken and how effective it is.<sup>3</sup> Research on this subject for the LSB demonstrates that decisions to use or not use legal services are more likely to be taken on instinct and previous personal experience than on detailed analysis. Despite this speed of decision making and imbalance in information, however, the decisions are very often sensible in practice.<sup>4</sup>
- 3.9. On the surface, surveys indicate generally good levels of consumer satisfaction with legal services. Research also shows that many consumers identify the right help and use legal services successfully, while others are choosing DIY solutions enabling them to resolve legal issues without using a lawyer. However, there's no escaping that legal services are inherently difficult for consumers and there is

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<sup>2</sup> Kristine Ertz, Stefan Hunt, Zanna Iscenko, Will Brambley, *Applying behavioural economics at the Financial Conduct Authority*, Financial Conduct Authority, Occasional Paper No.1, April 2013.

<sup>3</sup> Daniel Kahneman, *Thinking, Fast and Slow*, 2011.

<sup>4</sup> Linstock Communications, *Understanding Decision Making in Legal Services: Lessons from Behavioural Economics*, Legal Services Board, July 2013.

strong and consistent evidence of consumer detriment, in both the regulated and unregulated sectors, that needs to be tackled. For example:

- The OFT has reported a relatively high level of consumer dissatisfaction with legal services. In its survey, 15% of respondents indicated they were dissatisfied with legal services on the last occasion they used them. Moreover, only about 13% of these dissatisfied consumers complained.<sup>5</sup>
- Research by the Panel suggests that service satisfaction is lower among certain demographic groups including those from a BME group and C2DEs, indicating levels of detriment depend on socio-economic background.<sup>6</sup>
- In relation to legal capability more widely, the Legal Services Research Centre has found an extensive lack of knowledge of legal rights with around two-thirds of respondents with a civil justice problem suggesting that they did not know their rights. Again, there is a social divide: disadvantaged groups were most likely to not obtain advice, to lack knowledge of rights, and to suffer adverse consequences.<sup>7</sup>
- Studies have found problems with the technical quality of work in the fields of criminal advocacy, certain areas of legal aid, will-writing and probate.<sup>8</sup>
- Only 42% of the public trust lawyers and 30% think they are well regulated.

## Public attitudes towards regulation

3.10. It is also important to listen to what the public has to say about the need for regulation. Market research generally shows paradoxical public attitudes towards

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<sup>5</sup> Europe Economics, *Economic Research into Regulatory Restrictions in the Legal Profession: A report for the Office of Fair Trading*, January 2013.

<sup>6</sup> Legal Services Consumer Panel, Briefing note 3: Satisfaction with legal services, June 2013.

<sup>7</sup> Legal Services Research Centre and Plenet, *Knowledge, capability and the experience of rights problems: Research report*, March 2010

<sup>8</sup> For details see Legal Services Consumer Panel, *Legal education and training*, May 2012.

regulation, for example people endorse a strong ethos of personal responsibility but also want protections in place. However, attitudes towards legal services are clearer: consumers feel vulnerable, doubt their abilities to make informed choices and value the protections offered by regulation. People see legal services as very different to other consumer situations, feeling powerless in face of the legal system and unable to deal effectively with lawyers.<sup>9</sup> Research on barriers to complaining highlights that consumers feel especially intimidated by lawyers.<sup>10</sup> Indeed, research also reveals that the public assumes all legal services are regulated and quite intensively so. Consumers are generally surprised and concerned to learn that some legal services are not regulated. They are not aware of how to tell the difference between an unregulated and regulated provider.<sup>11</sup> It is clear that the current regulatory landscape is inconsistent with public expectations about what is needed to protect them.

3.11. Finally, the confidence that the public takes from regulation means this can support competitive markets. Rather than imposing burdens, regulation targeted in the right areas can actually help empower consumers to shape markets through their purchasing behaviour by rewarding the best businesses. The Government has recognised the role that active consumers can make to power growth in this way.<sup>12</sup> Research evidence demonstrates that consumers are most likely to have a satisfactory experience of a market if they believe that there are strong consumer protections in the market. Therefore, before expecting consumers to take risks and play an active role in shaping markets, it is necessary first to ensure the consumer

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<sup>9</sup> Legal Services Consumer Panel, *Risk and responsibility: Implications for regulating legal services*, May 2013.

<sup>10</sup> YouGov, *Consumer experiences of complaint-handling in the legal services market – first-tier complainants*, prepared for Legal Ombudsman and Legal Services Consumer Panel, August 2012.

<sup>11</sup> Vanilla Research, *Quality in legal services – consumer research*, prepared for Legal Services Consumer Panel, November 2010; GFK NoP, *Consumer attitudes towards the purchase of legal services*, prepared for the Solicitors Regulation Authority, 2010.

<sup>12</sup> Department for Business, *Better choices: better deals. Consumers powering growth*, April 2011.

protection framework is fit for purpose. Only when consumers perceive effective regulation is in place, will they have sufficient confidence to vote with their feet.<sup>13</sup>

*“How would you know whether they were incompetent? I don’t know where the law goes or where the law stops or how they begin or what to do, so if they do something how do you know if they’ve messed up? What they tell me, is gospel.”*

*(Research on risk and the role of regulation)*

## Alternatives to regulation

3.12. Government requires policy makers to consider alternatives to regulation before it will intervene. Alternatives include options that are less prescriptive than classic regulation techniques and which can implement policy proposals. These options include consumer information, reliance on general law and self-regulation. Below we review these alternatives to consider whether regulation is necessary to deliver adequate protection for consumers in this market. We conclude each has a role to play, but they should be complementary to regulation, not a substitute for it.

### Consumer information

3.13. A range of consumer information solutions are used across the economy including educational campaigns, rating schemes, kitemarks and disclosure rules (requiring businesses to provide certain information to consumers). The idea is that informed and skilled consumers can discipline markets through their purchasing behaviour and thus the need for prescriptive regulation is reduced.

3.14. The Panel has asked the regulators to do more to empower consumers as we recognise this would both benefit individuals and lead to more competitive markets. We have identified the need for leadership and coordination of activities and made

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

a series of recommendations about this, which have been accepted by the LSB.<sup>14</sup> These measures include joining up information provision, facilitating credible choice tools and reviewing the effectiveness of information remedies. Another suggestion is to scope the feasibility of an NHS Direct style service for law – using intelligent technology to provide a form of early diagnosis which people are most likely to use when experiencing a problem in order to work out what to do next.

3.15. Nevertheless, we have cautioned against an overreliance on policies to empower consumers due to limits to what these can achieve on their own. The inherent features of the market – gaps in knowledge, infrequent usage, emotional context – are difficult to overcome. Moreover, consumers exhibit a lower appetite for risk in legal services than in other settings since they find it difficult to make informed decisions and worry about the consequences of making mistakes. Also, as we stressed above, a strong consumer protection framework is necessary before consumers will have sufficient confidence to play an active role in markets. The predominance of System 1 (quick, intuitive decision-making) approaches by consumers suggests there are real limitations on what greater information provision can achieve. Research also suggests that consumers reject much information required by disclosure rules because it is not helpful or is presented in a complex or unappealing format. Further, providers may comply in ways designed to protect them from litigation rather than genuinely to aid consumers, while remedies that run counter to business interests lead to creative or minimum compliance responses.<sup>15</sup>

3.16. In short, consumer empowerment initiatives will help the legal services market to function better. However, this is a tough market for consumers and these remedies are likely to have a limited effect. It is necessary to do more in this area, but these approaches should complement a strong and preventative regulatory regime.

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<sup>14</sup> Legal Services Consumer Panel, *Empowering consumers – phase one report to the LSB*, March 2013.

<sup>15</sup> Better Regulation Executive and National Consumer Council, *Warning! Too Much Information Can Harm*, 2007.

## General law

- 3.17. Lawyers are subject to general consumer law just like any other type of business. There have been advances in consumer protection in recent decades and the proposed Consumer Bill of Rights will make it easier for consumers to understand and enforce their rights. The Competition and Markets Authority offers a strengthened competition and consumer protection regime nationally, while at a local level trading standards are being given extra powers and access to the courts. There is much overlap between codes of practice and general law. This has invited some to consider whether sector-specific regulation remains necessary.
- 3.18. The general law should serve as a deterrent to illegal trading practices, but it is not an effective substitute for sectoral regulation. A key consideration is the extent to which trading standards services would treat legal services as a priority given their very wide responsibilities and the decreasing resources at their disposal in the current economic climate. Local authorities are quite rightly free to determine their own priorities but since many legal businesses operate at a very local level, there is no guarantee that action would be targeted in locations of greatest need. The Panel's work on will-writing did not get a high level of response from trading standards services and our call for a targeted enforcement initiative, which was supported by the LSB, has not come to fruition. Another issue is the capability of trading standards services to deal with the complexities of the legal services market and to secure a successful prosecution. The Government is proposing to use the Consumer Bill of Rights to give more flexibility for trading standards or other public enforcement authorities to seek redress for consumers who have been victims of breaches of consumer law.<sup>16</sup> However, even where trading standards do act, compensation for individual consumers would not be guaranteed, particularly where the offender has no realisable assets.

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<sup>16</sup> Department for Business, *Draft Consumer Rights Bill: Government response to Consultations on Consumer Rights*, June 2013.

3.19. It is good news that individual consumers may soon be given a private right of action for certain breaches of the Consumer Protection Regulations (CPRs) as currently they must rely instead on public enforcement. Of course, it remains to be seen whether the Government's plans survive the legislative process intact. However, even if they do, we note that a private right of action would not extend to all prohibited practices, such as misleading omissions, as the Government considers such areas to be too uncertain in scope.<sup>17</sup> Furthermore, our research on complaints suggests that many people would be intimidated by 'taking on lawyers at the law' and would hesitate to use court processes. A better solution is for consumers to have access to the Legal Ombudsman for all legal services disputes, so that there is no need for them to resort to the courts. We note that ombudsman schemes may take account of general law in deciding what is fair and reasonable behaviour by a provider.

3.20. In short, private and public enforcement should work in tandem. Extending access to redress in both realms would be desirable. However, trading standards services lack the capacity and in some cases expertise to substitute for statutory regulation. The size and challenges of this sector call for a dedicated supervisory approach to regulation which looks at the systems and controls of business models, rather than the external and periodic inspection model operated by trading standards services.

### Self-regulation

3.21. The failure of self-regulation by lawyers was a driver of the legal services reforms and led to the system of co-regulation that we have today. In a later section, we set out why regulation needs to be more independent of the profession than it is now and why a return to self-regulation should be explicitly ruled out by Government as

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<sup>17</sup> Department for Business, *Government Response to the Recommendations of the Law Commission and Scottish Law Commission on Misleading and Aggressive Commercial Practices and the Consultation on Implementing the Consumer Rights Directive*, August 2013.

an option. Here we are concerned with the potential for self-regulation to address consumer detriment in the unregulated part of the market.

- 3.22. The Office of Fair Trading defines self-regulation as initiatives by groups of businesses within an industry to modify their behaviour in order to improve quality standards. Such initiatives may aim either to achieve compliance with consumer law or to go beyond what the law requires. There is a very wide range of possible self-regulatory mechanisms and structures.<sup>18</sup> The Trading Standards Institute has now assumed responsibility for the Consumer Codes Approval Scheme (CCAS). The Legal Services Act gives the LSB powers to facilitate self-regulation.
- 3.23. The Panel supports the CCAS and recognises that self-regulation can offer benefits to consumers and industry, including making use of industry expertise, getting industry buy-in to raise standards, flexibility to adapt to fast-changing markets, speed of implementation and lower costs. This sector exhibits some features where self-regulation is suitable, such as its technical nature, the changing legal services landscape and the desire to establish the credibility of unregulated companies in order to better compete with solicitors. However, the will-writing sector provides an example of where self-regulation has been given repeated opportunities to succeed but failed to do so. Although the sector has an approved CCAS code, it applies to only a minority of unregulated businesses in this area and the trade associations have themselves called for reservation because they feel self-regulation won't work. A further issue in this sector is the absence of identifiable trade associations for some unregulated activities, e.g. employment advisers, estate administration firms, heir hunters or automated document providers. Self-regulation faces the perennial problem that only the better quality providers are motivated to participate and relies on consumers to choose accredited firms. However, consumers are sceptical of quality marks generally and falsely assume that all legal services are regulated.

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<sup>18</sup> Office of Fair Trading, *Policy statement: The role of self-regulation in the OFT's consumer protection work*, September 2009.

3.24. In short, facilitated self-regulation such as CCAS has advantages over statutory regulation and offers a potential remedy in some parts of the non-reserved market. There is the possibility to extend coverage of recognised codes to new areas, but self-regulation isn't suitable in every situation and doesn't have a track record of success in this or other sectors. Encouraging credible self-regulation such as that offered by CCAS, rather than accept any self-regulation, would be key. We see a role for regulators to encourage such self-regulatory initiatives in the unregulated market, but this needs to be carefully targeted and should supplement a strong statutory framework covering the large majority of legal services transactions.

## A more targeted approach

3.25. Consumer spending on legal services has been estimated at £23 billion a year and contributes 1.6% of GDP. In our view, the size of the sector and the risks facing consumers and the wider public interest objectives, clearly justifies a dedicated external regulatory focus in the legal services market. As now, there may be certain activities where regulation beyond general law is not needed to protect consumers. However, a strong and preventative system of regulation should be kept in place for existing regulated activities and it is likely that an objective review would conclude that such a system should be extended into new areas rather than contracted. Regulators should certainly harness the alternatives discussed above, where appropriate, but they are complementary to, not substitutes for, their role.

3.26. The problem is that the current framework promotes an 'all or nothing approach': authorised persons are regulated for everything they do and for all the clients they serve, while other parts of the market are not subject to any sectoral regulation. This means regulation does not reflect the varied risks that consumers face, leading to over-regulation in some areas and under-regulation in other areas.

3.27. We suggest that a more targeted approach is needed:

- Consider whether all types of consumer should be protected by regulation or whether some, e.g. large corporate clients, can be excluded from scope

- Deliver minimum baseline protections for all those consumers within scope, including guaranteed access to the Legal Ombudsman
- Determine which legal activities should be brought within sectoral regulation and those for which alternatives to regulation are sufficient
- Create a more flexible framework so that the right tools can be applied depending on the nature of the risks; and focus regulatory effort on the activity rather than who provides the service
- Strike the right balance between individual and entity regulation
- Design a simple and coherent system so that consumers can understand where and how they are protected

3.28. It would be premature to specify the details of such a system at this stage, which would need careful thought and evidence. However, at a level of principle, it seems possible to identify areas of higher and lower risk to consumers. The former might include the presence of a series of factors, e.g. wide asymmetries of information; difficult legal skills (e.g. advocacy) severe consequences (e.g. to liberty, financial loss); vulnerable clients and/or third parties affected; irreversibility of detriment; scope for dishonesty/impact on public confidence. In such situations, a preventative system of sectoral regulation and low reliance on alternatives might be appropriate. By contrast, where these factors are not present, for example providing general advice on consumer rights, a system based around remedial measures and greater reliance on alternatives (e.g. consumer information) could be sufficient.

3.29. This would build on the regulatory menu work previously developed by the LSB.<sup>19</sup> Such an approach also acknowledges that different tools are needed to address the different risks facing consumers. For example, qualifications might be required in

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<sup>19</sup> LSB, *Enhancing consumer protection, reducing regulatory restrictions: A discussion document about how the LSB will assess the boundaries of legal services regulation and connected regulatory decisions*, 2011.

areas of law where the quality risks are highest. As recommended by the Legal Education and Training Review, this might include specialist qualifications and reaccreditation requirements in specific areas. Moreover, financial protection should be adequate to the nature of the work being undertaken and the risk involved. The challenge of a menu-based system, though, is to retain flexibility without introducing unnecessary complexity.

**Table 1 – Simplified regulatory menu**

	<b>Internal controls</b>	<b>External influences</b>
<b>Preventative</b>	Qualifications Suitability checks Designated roles, e.g. HoLP/HoFA Conduct of business rules Financial protection arrangements	Consumer information Quasi-regulators, e.g. LAA
<b>Ongoing</b>	Supervision CPD/reaccreditation Transparency Update rules	Choice tools, e.g. quality marks General law
<b>Remedial</b>	Legal Ombudsman Disciplinary system Compensation Fund	CMA and trading standards Private action in courts

3.30. We do think that access to redress should be guaranteed across the market for all those consumers within the scope of regulation. There is an opportunity to use the ADR Directive to bring all legal services providers within the Legal Ombudsman's jurisdiction. Delivering complete access to redress would give consumers greater confidence in the market and act as a powerful deterrent to poor standards. We are keen for the Legal Ombudsman to pursue plans to establish a voluntary scheme, but this will have limited benefits because it will only attract the better performing providers. Therefore, the scheme should have universal coverage of legal services.

# 4 Knowing your rights

## Lost in translation

- 4.1. Approved regulators' codes of conduct are as much a set of consumer rights as they are a rulebook for providers. Since each of the legal services regulators has its own code of conduct, however, consumers' rights will vary depending on who the regulator is. The same transaction can involve two different sets of rules, for example a home buyer using a solicitor will have different rights than a seller who uses a licensed conveyancer, even though the activity is identical. Someone going through a divorce is entitled to expect one set of behaviours from their solicitor, but another from their barrister. Regulatory competition, when seen from the client's perspective, means that two sets of rules are in place at the same time – a barrister is still subject to the BSB's code for their individual conduct, even if the law firm they work for falls under the SRA's code. For some legal activities, such as probate, where multiple regulators exist and others are seeking authorisation rights, there is scope for wide variation. And different approaches by the regulators to regulating non-reserved activities conducted by authorised persons will determine whether or not consumers are protected by their rulebooks at all.
- 4.2. The Draft Bill of Consumer Rights is the result of a major simplification programme designed to make it easier for people to understand their consumer rights by streamlining overlapping and complicated areas from eight pieces of legislation into one law. Evidence shows that consumers currently struggle to enforce their rights, in part because UK consumer law is unnecessarily complex. Government expects

that by simplifying and clarifying the law, consumers should spend less time trying to understand their rights, less time and resource applying them, and no longer waste time when they have misunderstood their rights.<sup>20</sup> Research commissioned by BIS for its review supports the hypothesis that simplified consumer law can lead to improvements in consumer and economic outcomes, especially when reinforced with consumer campaigns to raise awareness of those rights, as empowered and engaged consumers improve the functioning of markets.<sup>21</sup> It seems possible that rationalising lawyers' codes of conduct could achieve similar benefits.

- 4.3. The legal services market is very diverse, as seen in the broad range of activities and business structures. Increasingly, though, there is growing fusion between the separate branches of the profession. As a result of competitive pressures, Parliament and regulators are gradually removing restrictions that have previously set branches of the profession apart. So, for example, barristers no longer hold a monopoly on rights of audience and face competition from solicitor advocates and others, while consumers now may instruct barristers directly, can hand over money to barristers to be held securely in escrow accounts, and will soon be able to buy litigation services from barristers. And, as a result of market liberalisation, different branches of the profession are working together within new structures. As divisions between branches of the profession fall away, the need to retain different codes becomes harder to maintain and may even inhibit them from working together.
- 4.4. In reality, there is already considerable overlap across codes of conduct – as there should be given the similarity of risks facing consumers and the growing fusion of lawyers' activities. Even so, there are differences which are hard to justify on the basis of professional background alone. An example is dealing with vulnerable clients, where each code defines vulnerability in different ways. These differences

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<sup>20</sup> Department for Business, Innovation and Skills, *Draft Consumer Rights Bill: Government Response to Consultations on Consumer Rights*, June 2013.

<sup>21</sup> ICF GHK, *Consumer rights and economic growth*, January 2013.

are the result of organic evolution of each code over time. However, this matters to vulnerable consumers who may find themselves protected by a code covering one set of lawyers, but not by a code applying to another group. The Panel has encouraged a more uniform approach by encouraging each regulator to use a British Standard (BS18477). Other examples of inconsistency in rule books include treatment of referral fees and information remedies. As well as being confusing for consumers, this gives a competitive advantage to certain parts of the profession.

- 4.5. Quality Assurance Scheme for Advocates represents the first attempt to develop a common set of standards for different professionals engaged in the same activity. However, while agreement on a common set of standards was eventually reached, the three regulators involved are each responsible for implementing the scheme within their regulated community. The rule change application to the LSB states that the *'scheme will be applied consistently by each regulator, however, each regulated community is different'*.<sup>22</sup> In practice, there could be variations in approach, especially where there is scope for interpretation of broadly worded principles which then defer to each regulator's code of conduct, for example: *'Each regulator will ensure that they have in place clear and appropriate regulatory arrangements to ensure proper communication with and disclosure to individual clients about how far the individual advocate will be able to progress their case'*.<sup>23</sup> The situation facing consumers is the same, but advocates will be treated differently – this is unhelpful.
- 4.6. No-one has yet, as far as we know, done a systematic comparison across codes that would identify the extent of duplication.<sup>24</sup> However, we suggest that the move towards outcomes-focused regimes, which focus providers on achieving high-level

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<sup>22</sup> *Application made by the Solicitors Regulation Authority Board, Bar Standards Board and ILEX Professional Standards to the Legal Services Board under Part 3 of Schedule 4 to the Legal Services Act 2007, for the approval of the Quality Assurance Scheme for Advocates (QASA), May 2013.*

<sup>23</sup> *Ibid.*

<sup>24</sup> One study has distilled the Act's professional principles, plus the SRA and BSB codes, into six core ethics concepts. See: Professor Richard Moorhead et al, *Designing Ethics Indicators for Legal Services Provision*, prepared for the Legal Services Board, September 2012.

principles, is further narrowing the differences between codes. Outcomes-focused regulation has been encouraged partly because it is better suited to a diverse market. Given this trend, and, indeed, wider shifts towards regulation centred on entities and the legal activity (rather than professional title), there would appear to be less need to have different codes. Of course, there will remain differences in what practitioners do and the types of consumer they serve, which may justify differences in rules. However, we can see a scenario where there is a single core code to which all providers are subject, supplemented by additional rules, where necessary, for different market segments. For example, the Financial Conduct Authority's Handbook contains High Level Standards and Business Standards that apply to all firms and then separate Conduct of Business Rules for different types of business, such as insurers, mortgage lenders and bankers. The Health and Care Professions Council has a single short document setting out standards of conduct, performance and ethics covering 16 different professions.

- 4.7. Crucially, rationalising codes of conduct would not amount to fusion of the legal profession or end the independent bar. It would just mean working from the same basic set of rules, except where genuine differences justify separate approaches.

# 5 A strong safety net

## The reserved activities: an accident of history

- 5.1. The reserved activities are important because they define the boundaries of legal services regulation. They limit the practise of certain areas of law to authorised persons and control access to firms wishing to become alternative business structures. Anyone can set up in business to provide other legal services, being subject only to general law. However, this is only a partial picture. Some legal activities, most notably immigration advice and services and claims management services, are otherwise regulated by statute. Authorised persons are generally regulated for all their legal activities regardless of whether these are reserved. Immediately, this multi-layered approach is a source of potential confusion.
- 5.2. The current list of reserved activities was passported into the Legal Services Act. Historical analysis of the origins of this list shows it has developed over centuries and is not grounded in consumer protection considerations. Indeed, in some cases regulation came about to protect professional interests. For example, Pitt granted the legal profession a monopoly on conveyancing in the Stamp Act 1804, as a tactic to appease lawyers protesting against proposals to extend taxes on articles and practising certificates.<sup>25</sup>
- 5.3. There is confusion about what the list of reserved activities actually covers given some are narrowly defined and/or obtuse given their historical origins. Examples include probate and conveyancing – two of the most commonly used legal services. The Act defines the activity and it is the responsibility of the provider and the

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<sup>25</sup> Legal Services Institute, *Reserved Legal Activities: History and Rationale*, July 2010.

regulatory body, with their own legal advice if needed, to decide whether work in a particular set of circumstances is likely to fall within that definition. Since it is a criminal offence for an unauthorised person to carry out a reserved legal activity it will ultimately be up to the Court to interpret whether a firm has strayed into illegitimate areas. This creates a situation where unregulated firms may unintentionally be trespassing into reserved areas without their knowledge and not probably that of the regulators. Alternatively, there is an opportunity for unauthorised providers to walk as close to the line as possible while avoiding regulation, for example by creating complex business structures. The approved regulators have limited resources to police this fuzzy perimeter. This confusing picture is likely to dissuade new entrants who could widen choice. And if providers and regulators aren't sure what is regulated, what hope does the consumer have?

- 5.4. A further dimension is that the reserved activity is often linked to specific processes within a wider legal area. For example, probate refers to the process of preparing papers to found or oppose a grant of probate or letters of administration. Unregulated providers may carry out all other work involved in dealing with probate, but an authorised person is required for the narrow reserved element. This will be confusing for consumers who will only see a single front door (online or offline) and not appreciate they are unprotected for part of the work. The narrow reservation may have other harmful effects, such as stifling new entrants and poor quality controls by the unregulated business over the lawyer doing the reserved work.
- 5.5. If regulation was truly stripped back to the reserved activities only a sliver of the legal services market would be regulated. It is important to remember that the reserved activities include both types of work (e.g. conducting litigation) and areas of work (e.g. probate). In relation to the former, research data suggests that a great deal of the work of lawyers falls outside of the reserved activities. For example, 73% of services provided by solicitors to individual consumers is providing

information, 53% practical support and only 8% representation in a court or tribunal.<sup>26</sup> With respect to the latter, while the regulated sector dominates turnover, far more unauthorised persons offer legal services than authorised persons. The LSB estimates that when people seek advice about legal problems, they approach reserved providers only 20% of the time.<sup>27</sup> In some sectors, such as will-writing, commercial unregulated providers have gained quite a significant market share.

5.6. All this conflicts with a public expectation that all legal services are regulated now.<sup>28</sup>

This does not in itself justify regulating all activities, as doing so might not be in the public interest. However, it is concerning that consumers have false impressions of the protections they enjoy when using legal services. It will always be necessary to have some sort of boundaries and thus uncertainty about which activities fall within scope is inevitable. Nevertheless, since the regulatory boundaries in legal services are unnecessarily complex and not grounded in a consumer protection rationale, this makes it even harder to explain to consumers what protections they have. This has become a more pressing issue in the post-ABS world as non legal businesses have woken up to the possibility that they can provide many types of legal services without needing to be regulated. Technology has also created new markets, such as websites where consumers can subscribe or pay a one-off fee to find answers to queries about their rights and obligations.

*“I would have thought it was quite a protected industry but I don’t know that for a fact.”*

*(Research on risk and the role of regulation)*

*“I’m astonished at how little is covered at the moment.”*

*(Quality in legal services)*

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<sup>26</sup> LSB, *Market impacts of the Legal Services Act 2007 – Baseline Report (Final) 2012*, October 2012.

<sup>27</sup> LSB, *Market impacts of the Legal Services Act 2007 – Baseline Report (Final) 2012*, October 2012.

<sup>28</sup> Legal Services Consumer Panel, *Quality in Legal Services*, November 2010.

5.7. In the regulated market, the potential for consumer confusion is allayed by the prohibition on solicitors establishing separate businesses to provide unreserved legal activities. Clients could be confused if some activities offered by the individual lawyer they deal with are regulated but other activities are not. The separate business rule (SBR) has attracted criticism with some genuine concerns about it deterring firms who offer a mixture of non legal and unreserved legal activities from becoming ABS. As pointed out in a recent report, if the boundary of reserved activities is appropriately drawn then consumers should not need regulatory protection in unreserved areas.<sup>29</sup> However, as we have seen, the current boundaries are narrow and not grounded in logic or evidence. If the SBR was abandoned, only a fraction of legal work might be regulated in future.

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<sup>29</sup> Kyla Malcolm, *The proportionality of legal services regulation: A report for the LSB*, June 2013.

# 6 Getting redress

## Gaps in redress

- 6.1. An effective system of redress provides a range of benefits. It reduces consumer detriment by delivering justice for individuals who have experienced poor service. Knowing there is an impartial body to turn to if things go wrong gives consumers the confidence to engage in markets, including a willingness to try innovative services and providers. An ability to complain marginalises the minority of poor firms who might otherwise undercut providers who are committed to high standards of customer service. The learning from complaints can be used by providers to raise standards and by regulators to correct market problems. Therefore, giving consumers access to redress promotes fairer and more competitive markets.

*“I was quite happy with the service and the advice I got. I mean, I actually felt quite reassured and quite comfortable, then, going and complaining to the legal services provider knowing that there was actually someone in my corner.”*

*“The important factor is that if you have a complaint against a legal services provider, when you get the Legal Ombudsman involved the legal services provider actually takes notice, starts to think, ‘Ah.’ They don’t want their reputation tarnished.”*  
(First-tier complaints handling research, with Legal Ombudsman)

- 6.2. These benefits are lost where there are gaps in redress. The previous chapter illustrated the potential for a large unregulated market where redress might not be available, including common areas of law like will-writing where these providers

already have a significant market share<sup>30</sup> and new services facilitated by technological advances. Redress is absent in segments of the market that fall outside the framework of the Legal Services Act, for example the Office of the Immigration Services Commissioner (OISC) can recommend that a provider award compensation, but it cannot require this. Similarly, firms operating in self-regulated professional services markets who offer legal advice as part of their business, such as architects advising on planning law or accountants advising on inheritance planning, do not have redress schemes in their own sectors nor do they fall within the Legal Ombudsman's scope. Finally, some types of complaints about authorised persons are not considered by the Legal Ombudsman. These include third party complaints (when the complainant is not the lawyer's client) and disputes alleging negligent advice (which the service does not have the expertise to handle).

- 6.3. The Legal Services Act includes provision for a voluntary scheme. This has yet to be established, although the Legal Ombudsman has issued a discussion paper ahead of a formal consultation in early 2014. This offers the possibility to close gaps in redress, although the obvious limitation is that participation is voluntary; only the better performing providers are likely to subscribe, leaving those firms that cause proportionately most of the consumer detriment outside of scope. Another issue is affordability due to the Legal Ombudsman's high unit cost and action is needed to bring this down to a level that the unregulated sector can sustain. Partly this is explained by the dispute resolution process that the scheme uses, about which the Act is prescriptive. A simplification review might wish to re-examine this,

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<sup>30</sup> Institute of Professional Willwriters members voluntarily subscribe to an independent ADR mechanism as a condition of the Consumer Codes Approval Scheme.

but we note that the Legal Ombudsman has considerable flexibility about the design of a voluntary scheme and has shown an appetite to rethink its model.<sup>31</sup>

### A confusing picture

- 6.4. All this creates a very confusing picture for consumers, and these barriers are likely to undermine people's confidence to complain even about those services which do fall within scope. The redress system is not designed with the consumer in mind as people's ability to access redress depends on the type of provider they use and the nature of their regulatory arrangements, rather than the legal activity. Moreover, there is scope for this confusion to grow further: as consumers get used to seeing non-legal ABS brands, they are even less likely to think twice about the implications for getting redress from unregulated providers.
- 6.5. The Legal Ombudsman has said it is sometimes unclear even to them whether they can accept a case.<sup>32</sup> The boundaries of regulation are blurring, for example access to redress on a DIY product may hang on whether an authorised person reviewed the document. It may be unclear when a service constitutes 'legal' advice; this will gain greater urgency if ICAEW become a licensing authority, as accountancy firms doing probate will be within the Legal Ombudsman's scope for **all** their legal work. Services may fall outside of regulation due to creative delivery models, for example where firms sub-contract the narrow reserved part of an activity to an authorised person. Services provided under a single brand name (or website) may in fact be provided by different entities within a group structure; these may be regulated by different regulators and covered by different bodies providing ADR, or none at all. The complexities of regulation create opportunities to escape the scheme's reach

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<sup>31</sup> In its submission to the Public Administration Select Committee enquiry on 'Complaints – do they make a difference?': *"There may be innovations which may allow ways of meeting the Ombudsman Association principles that give consumers better access to redress at less cost and better levels of efficiency."*

<sup>32</sup> Legal Ombudsman, Annual Report 2011/12.

and (especially virtual) firms can morph into new incarnations when challenged.<sup>33</sup> It is surely unsatisfactory when Legal Ombudsman staff have to agonise about whether a complaint falls within their jurisdiction. And this being the case, what hope does the consumer have to find their way through the maze?

- 6.6. Our concerns are shared by the Legal Ombudsman. They have said: *‘We have significant concerns about the impact that these innovations are having on consumers with regards to their rights to access redress. Consumers require clarity about when and why they are able to access redress – they have this for some of these business models and service providers but not for others.’*<sup>34</sup> In addition, both authorised persons and unregulated providers argue this fragmented complaints system unlevels the playing field: the former face regulatory costs which their rivals do not, whereas the latter lack the credibility that membership of a redress scheme can offer. Therefore, the current system could be distorting competition.
- 6.7. This confusion extends to the non-commercial sector, which currently remains excluded from regulation. Someone can complain to the Legal Ombudsman about poor service provided by a solicitor employed by a law centre, but not do so if they received the same advice from a law centre not employing authorised persons on the other side of town. Consumers will be unaware of the different protections in place and may only find out they cannot access redress until it is too late.
- 6.8. Finally, the Act specified that service complaints would be handled by the Legal Ombudsman and misconduct complaints by the approved regulators. However, it was always intended for the Legal Ombudsman to act as a single post box so that consumers wouldn’t have to differentiate between poor service and misconduct. Despite this, some of the regulators’ websites continue to emphasise the distinction

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<sup>33</sup> Legal Ombudsman, *Discussion paper: Access to redress for legal and other professional services*, July 2013.

<sup>34</sup> Legal Ombudsman, *Response to Public Administration Committee enquiry – ‘Complaints: do they make a difference?’* 2013.

between service and misconduct issues rather than 'keep things simple'. This is an example of dispersed functions and multiple regimes creating needless confusion.

### Overlaps in redress

- 6.9. As well as situations where consumers cannot access redress, scenarios also arise where there are overlapping responsibilities across ombudsman schemes. The Legal Ombudsman has noted that consumers seeking to complain about legal expenses insurance might either need the assistance of the Financial Ombudsman Service or themselves depending on whether the complaint was about the sale of the insurance or the legal advice gained after the insurance had been activated to inform a claim.<sup>35</sup> For a consumer arranging a will through their bank, the correct scheme depends on whether the legal work was done in house or contracted out, and if the latter, whether this was to an authorised person or unregulated provider.
- 6.10. These jurisdictional issues arise due to differences in regulatory approach in the two sectors: the Legal Ombudsman deals with complaints against a category of people regardless of the activity they are undertaking, while the Financial Ombudsman deals with an activity which can be carried out by a variety of people, some of whom fall within the Legal Ombudsman's jurisdiction.<sup>36</sup> However, this isn't just an issue of confusion, but could produce different complaint outcomes as each scheme will have its own rules, procedures and compensation limits etc. There have been moves to harmonise approaches, but key differences remain and are often embedded within legislative structures and therefore not easily changed. While this is frustrating for consumers it must also be inconvenient for businesses to deal with multiple and different schemes – simplification offers a win-win.

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<sup>35</sup> Ibid.

<sup>36</sup> Centre for Consumers and Essential Services, University of Leicester, *Mapping potential consumer confusion in a changing market – report for the Legal Ombudsman*, October 2011.

6.11. In an increasingly converged economy, providers are appealing to the consumer's desire for convenience by bundling different services in one-stop shops. Buying a house illustrates this well. Estate agents commonly offer the full range of services needed to complete this transaction, for example arranging mortgages, insurance, energy performance certificates, conveyancing, surveys and even removals. However, while it's now possible for consumers to arrange all these services with a single provider, they may encounter six separate redress schemes.<sup>37</sup> The services may be sold as a single package with all the convenience benefits this involves, but complaining very much remains an unbundled affair. This situation is especially odd given the multi-disciplinary business models which the ABS reforms were designed to foster. Non-legal businesses are owning law firms and other professionals, such as accountants, are looking to diversify into legal services. Sectoral boundaries are collapsing as businesses take advantage of liberalisation reforms, yet regulatory and redress structures are still organised along traditional vertical lines.

6.12. The ADR Directive will give consumers the right to access ADR for a dispute with any trader, although whether it will be mandatory for traders to participate depends on how the Government decides to implement the legislation. This provides an opportunity in the short-term for the Government to extend redress across the legal services market. But it also creates a longer-term opportunity to think strategically and potentially re-engineer the wider redress landscape so that it makes sense from a consumer journey perspective. While it is possible to mask the complexities through cooperation between schemes and making use of technology to create a single entry point for consumers, this may only achieve so much. We note there

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<sup>37</sup> Estate agency (Property Ombudsman or Ombudsman Services: Property); mortgages and insurance (Financial Ombudsman); energy performance certificate (Ombudsman Services: Green Deal); conveyancing (Legal Ombudsman); surveying (Ombudsman Services: Property, or Financial Ombudsman if the lender's in-house surveyor is used); removals (Removals Industry Ombudsman, but membership is voluntary).

was a consensus at the last Ombudsman Association conference about the need to simplify and rationalise the sector.<sup>38</sup>

6.13. We have noted the Legal Ombudsman's discussion paper on access to redress for legal and other professional services.<sup>39</sup> We will respond to this in due course and urge the Ministry of Justice to consider the findings of this exercise. This area suffers from a diffusion of responsibilities across government departments. Leadership and joined-up thinking is needed and we encourage the Ministry of Justice to work jointly with colleagues in BIS and the Cabinet Office on this.

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<sup>38</sup> Legal Ombudsman, *Discussion paper: Access to redress for legal and other professional services*, July 2013.

<sup>39</sup> *Ibid.*

# 7 Effective regulators

## The mutating maze

- 7.1. The landscape of regulatory organisations is largely invisible to consumers who focus on the individual lawyer or firm they deal with, at least until something goes wrong when they may need to navigate through the system. Minimising confusion is important, but in this section the Panel is interested in the efficiency of the system. This matters to us since consumers ultimately pay for the costs of regulation. Consumers also need assurance that these institutions are protecting their interests well, so we have a legitimate interest in knowing that the regulators have the capacity and capability to do an effective job.
- 7.2. As a result of the Legal Services Act, the LSB sits at the apex of a framework of nine approved regulators and seven ‘regulatory boards’ who carry out day-to-day regulation. Table 1, overleaf, provides a summary profile of these organisations.
- 7.3. Two organisations – ACCA and ICAS – are authorised to regulate probate activities but currently have no regulatory arrangements. They are not discussed further, although we argue this situation contributes to the complexity of the landscape.

**Table 1 – Summary of regulators’ responsibilities**

Regulatory body	Approved regulator status	Licensing authority status	Exercise of rights of audience	The conduct of litigation	Reserved instrument activities	Probate activities	Administration of Oaths	Notarial activities	No. authorised persons	No. entities	FTE staff (including shared services)	Budget (excluding representational activities)
SRA									134,447	10,202	591	£84,939,840
BSB									15,355	n/a	87	£6,010,321
Faculty Office									858	n/a	4	£291,000
IPS			N1	N1					7,947	n/a	12.2	£985,796
CLC			N2	N2					1,177	215	20	£2,922,000
IPReg								N3	2,809	Unknown	12.6	£508,000
CLSB									563	n/a	1	£124,899
ICAEW												
ACCA												
ICAS												

N1 – Applies to Associate Prosecutors only

N2 – Withdrew application in July 2011

N3 – Applies to patent attorneys only

**Code**

	Had status when Act switched on		Application pending
	Assumed status at a later date		None

## Confusion and duplication

- 7.4. One of the objectives of the Act was to simplify the 'regulatory maze' which the then Government concluded was '*outdated, inflexible, over-complex and nor accountable or transparent enough*'. However, it has been argued that the new landscape has simply replaced one regulatory maze with another. Baroness Deech, chair of the Bar Standards Board, commented: '*Clementi said he would sort out the regulatory maze, instead of which we have a maze more maze-like than ever and a very expensive system*'.<sup>40</sup>
- 7.5. In fact, the maze has an in-built capacity to mutate since the LSB has powers to authorise new bodies to regulate their members offering reserved activities and allow existing approved regulators to take on new practising rights. It is natural that approved regulators want to provide opportunities for their members to grow their businesses. Likewise, it is understandable that regulators want to protect themselves by making sure they have a wide suite of practising rights. The table shows how some of the regulators have expanded in scope since the Act, with other applications pending, to the extent that the reach of these bodies is increasingly similar. Duplication of responsibilities is inherent in this system and this is defeating consumer objectives of simplicity and cost-effectiveness. For example, when it looked likely that will-writing would be made an reserved activity, three existing approved regulators, ICAEW and the Institute of Professional Willwriters all signalled their intentions to authorise currently unregulated will-writers, in addition to their own members. In real terms, this would have amounted to five bodies competing over less than 1,000 firms, or 2% of the market.<sup>41</sup>
- 7.6. Another example of duplication is that many lawyers fall within two regulatory regimes at the same time. For example, the majority of licensed conveyancers,

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<sup>40</sup> Speaking at the Legal Futures Conference in April 2011.  
<http://www.legalfutures.co.uk/regulation/solicitors/plant-lays-bare-sralaw-society-tensions-caused-by-defective-legal-services-act>

<sup>41</sup> Figures for unregulated market based on LSB Impact Assessment.

chartered legal executives and notaries work in solicitors practices. The Faculty Office estimates that at least 80% of notaries are also regulated by the SRA.<sup>42</sup> Although the entity is regulated by the SRA, individual practitioners are still answerable for their conduct to the body which authorised them. Rules are necessary to deal with cases where there is conflict of rules between two regimes. This seems odd at a time when there is a shift in regulatory focus away from individual practitioners to the entity. This situation is confusing for consumers, but it might also dampen competition by deterring business models involving different types of lawyers. It may also help to explain why the ability for firms to switch regulator has been little used.

7.7. Of course, each of the regulators has their own rulebooks, financial protection arrangements, disciplinary systems and so on. Is it really necessary to maintain separate systems that carry out essentially the same function? Based on data collected by the LSB, we estimate that the total cost of the approved regulators is nearly £96million.<sup>43</sup> Economies of scale would be achievable by rationalising these separate arrangements and it should be possible to achieve this within a system of independent regulation that respects differences between types of practitioner and enables expert input by professional bodies. For example, the Panel has separately recommended scoping centralised financial protection arrangements in a scheme that would set minimum terms and conditions for professional indemnity insurance and operate a single compensation fund.<sup>44</sup> Whilst acknowledging the potential disadvantages, we have suggested this could have a range of possible benefits, including easier access for consumers, lower costs for lawyers, risk-based pricing unaffected by professional title, and a single point for data collection and analysis. Experience in other sectors shows it is possible to amalgamate regulatory functions

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<sup>42</sup> Data provided to the Panel by the LSB.

<sup>43</sup> Calculated based on the budgets of the approved regulators minus representation activities – see Table 1. The LSB's budget is almost £4.5million on top of this.

<sup>44</sup> Legal Services Consumer Panel, *Financial protection arrangements*, June 2013.

across similar professionals. For example, the Financial Reporting Council operates a single set of disciplinary arrangements for accountants, actuaries and accountancy firms.

## Regulatory competition

- 7.8. The Panel is uneasy with the principle of regulatory competition. There are some possible benefits in this model which should be acknowledged, including innovation in regulatory approaches and the ability to reward regulators who provide modern and efficient regimes that support competitive markets. However, while some regulators have embraced the challenge to modernise their regimes along better regulation principles, others have resisted change. The main risk for consumers is that regulatory competition leads to a race to the bottom in standards. The logical business response is to choose the cheapest or lightest touch regulator. Although the LSB can help by maintaining a minimum floor of consumer protection through the rule approvals process, its powers to decline applications are quite limited. The problems of providers choosing their regime is being seen now in the communications sector where two redress schemes operate. Ombudsman Services has decided to publish the names of companies in its energy scheme, but not in its communications scheme since there is a rival redress provider that does not do so. The scheme explained this would be unfair to participating companies and: *'It would also be detrimental to our business as companies may choose to leave us and join a scheme that does not publish data.'*<sup>45</sup>
- 7.9. There are other risks too. Law firms on their regulator's radar for bad behaviour have an opportunity to deflect attention by switching regimes; our impression is that data sharing between the regulators is an area for improvement. Even if consumer protections are maintained, regulators could be tempted to squeeze costs on other activities, such as research or diversity initiatives, which support the regulatory

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<sup>45</sup>. See [http://www.ombudsman-services.org/downloads/data\\_publishingconsultation2012.pdf](http://www.ombudsman-services.org/downloads/data_publishingconsultation2012.pdf)

objectives. Regulatory competition may also inhibit cooperation between regulators when it would be better to work together than apart. Finally, it is unrealistic to expect consumers to choose providers based on the strength of their regulatory regimes as the public will rightly think that all lawyers are properly regulated. Indeed, competition on higher quality grounds risks the gold-plating of regulation.

### Capacity and capability

- 7.10. We have ongoing serious doubts about whether some of the smaller regulators have the capacity and capability to be effective and consumer-focused regulators. Some regulators are small, for example five employ 50 FTE staff between them; the CLSB employs just one person. Regardless of size, every regulator should have the ability to protect consumers and to deliver the wider regulatory objectives in their market segments. The question must be asked: How is it possible for the very smallest regulators to achieve this based on their available resources?
- 7.11. In 2011, Dr Nick Smedley produced a report for the LSB assessing the smaller regulators' capacity and capability to meet the requirements of the Act. His conclusion was stark: *"The capacity and capability of the Smaller Approved Regulators (SAR) varies to some degree as things currently stand. There are information deficits to at least some degree right across the sector; there is not always sufficient understanding and experience of risk management and the need to segment the regulated community and their clients by risk; there is fairly widespread examples of inadequate data on consumers, and little or no evidence of proper programmes to undertake consumer engagement; some of the regulators are so small that there must exist serious concerns about their resource base and sustainability under pressure; and, there are gaps in regulatory knowledge, skills and experience in some areas"*. He went on to say: *"The risk of any consumer detriment which may be posed by these gaps in the SARs' capacity and capability is not so pressing as to cause immediate grave concerns but, given the fast-moving changes to the market, the risks are likely to multiply. There is a serious question about whether the current complicated, multiple-regulator arrangements will prove sustainable in the coming years. It is possible, though perhaps not inevitable, that*

*there will have to be some consolidation in this sector and some pooling of knowledge and resources. There is a chance that not all the current regulators will survive in their present form”.*<sup>46</sup>

7.12. The LSB has conducted a performance review of the approved regulators. It noted the quality of submissions varied dramatically, but, overall, there were ‘*significant shortcomings*’. This is evidenced by the summary in Table 2, below. Noting that the regulators had told the LSB that they were up for the challenges of modern regulation and wished to forge their own identities following the Smedley Report, the LSB concluded: “*With some notable exceptions, we are not sure that the regulators covered by this report have grasped what this requires – let alone what the Act stipulates... Improvements are required across the board if regulators are indeed to show that they can meet successfully the challenges that they face*”.<sup>47</sup>

**Table 2 – Summary of LSB regulatory standards findings**

	CLSB	IPS	IPReg	CLC	Faculty Office
Outcomes focused regulation	4	3	3	3	5
Risk assessment	4	4	4	4	5
Proportionate supervision	5	4	5	3	5
Appropriate enforcement	3	1	4	3	5
Capacity and capability	4	3	3	3	5

Scoring: 1=good; 2=satisfactory; 3=undertaking improvement and work is well underway; 4=needs improvement and work has started recently; 5=recognise this needs to be done but work has not yet started

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<sup>46</sup> Nick Smedley, *The smaller approved regulators: An assessment of their capacity and capability to meet the requirements of the Legal Services Act 2007, with analysis and recommendations*, April 2011.

<sup>47</sup> Legal Services Board, *Developing Regulatory Standards, An assessment of the legal services regulators: the Costs Lawyer Standards Board; ILEX Professional Standards; the Intellectual Property Regulation Board; the Council for Licensed Conveyancers; and the Master of the Faculties*, December 2012.

# 8 Acting in your interests

## Independence matters

- 8.1. Sir David Clementi diagnosed a regulatory framework that lacked independence from the profession and failed to take sufficient account of consumers' interests. The Legal Services Act reached a compromise where the professional bodies retained formal responsibility for regulation, but had to achieve clear separation between regulation and representation functions. This was designed to make best use of professional expertise and continue to give lawyers buy-in to the success of the regulatory regime, while giving the public confidence that decisions would be taken in their interests, rather than in those of the profession. It is timely to ask whether this complex arrangement has actually delivered independent regulation.

*“They [solicitors] stick together. The one is going to back the other to the hilt all the way, it’s like a big clique. ...They know the laws better than you so they’re always going to come up and bite you on the bum.”*

*(Publishing names of law firms subject to complaints, with Legal Ombudsman)*

## Independent on paper

- 8.2. The LSB made a set of rules to ensure this clear separation of functions, which included a requirement for all regulatory boards to have lay majorities. This was only delivered in full from the start of 2013. Concerns that lay majorities would lead to poorer decisions due to loss of expertise, have not materialised. Instead, lay members are widely regarded as having added value to their boards and arguably have influenced some approved regulators to progress modernisation reforms more swiftly than might otherwise have been the case. However, only half of the boards have lay chairs, a proportion which is unchanged since the new regime began. The

chair has a key influence on the regulator's tone and strategic direction, and shapes external perceptions of the organisation.

- 8.3. The need to achieve clear separation between regulatory and representation functions has led to some elaborate governance devices. This is epitomised by the SRA/Law Society Business and Oversight Board introduced in 2012 following protracted wrangling between the two bodies.<sup>48</sup> More widely, each of the regulators has their own boards and various sub-committees carrying out much the same functions. The LSB has noted the '*extraordinarily large number*' of posts at the BSB, which at the time of their performance review had 131 different individuals involved in eight different committees.<sup>49</sup>
- 8.4. These complex structures mask the fact that the professional bodies ultimately remain responsible for regulation even if this is delegated to arms-length bodies on a daily basis. The professional bodies retain responsibility for the performance of the regulatory arms and this is used to justify a degree of oversight. For example, the Law Society Council has the nuclear option of changing the SRA board or redesigning its regulatory arrangements. Even though such powers are unlikely ever to be used they define the power relationship and this casts a shadow over the regulatory arm. The Law Society has not been reluctant to remind the SRA or the wider world of this and this has led to numerous comments on both sides. The SRA's application to become a licensing authority brought these tensions to the fore when the SRA Chair complained that the process had produced '*a significant divergence of view as to what the Law Society as the approved regulator may properly seek to do*'.<sup>50</sup> In addition to considering the practical effect of this structure, the impact of these structures on public perception is also an important factor.

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<sup>48</sup> See [http://www.legalservicesboard.org.uk/Projects/pdf/letter\\_to\\_chris\\_kenny\\_21\\_11\\_2011.pdf](http://www.legalservicesboard.org.uk/Projects/pdf/letter_to_chris_kenny_21_11_2011.pdf)

<sup>49</sup> LSB, *Developing Regulatory Standards: An assessment of the Bar Standards Board*, May 2013.

<sup>50</sup> <http://www.legalfutures.co.uk/blog/is-it-time-to-split-the-law-society-and-the-sra>

## Independent in culture

- 8.5. While the governance arrangements have been signed off by the LSB as being independent on paper, there are concerns about whether regulation is truly independent in practice. This includes some serious allegations. Referring to its relationship with the Law Society, the SRA complained that “*many of the risks to independence arising from the complexity of the arrangements between the two organisations had in fact materialised*”.<sup>51</sup> The LSB decided to require monthly monitoring reports for a period to make sure the new governance arrangements were working satisfactorily. The LSB’s regulatory standards assessment of the BSB concluded: “*Over 2012/13, our general observation is that the BSB has sought to maintain its independence from the Bar Council. However there have been incidents where the LSB has been concerned about the Bar Council’s attempts to fetter this independence*”.<sup>52</sup> The LSB has since started a formal investigation after receipt of information which “*suggested potentially significant Bar Council involvement*” in a BSB rule change application.<sup>53</sup>
- 8.6. One hallmark of a professional body is that it puts the public interest ahead of the interests of its members. One consequence of the new governance arrangements is that the representative arms now have unfettered discretion to lobby on behalf of their members. They have done so energetically, as they are entitled to, but this has included situations where self-interest has come before the public interest. The opposition to the Quality Assurance Scheme for Advocates, including the threat of industrial action and boycotts, is one example from the criminal bar. The changes made by the Lord Chancellor to the Legal Ombudsman’s scheme rules – for example to increase the compensation limit, lengthen time limits and allow

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<sup>51</sup> <http://www.legalfutures.co.uk/blog/the-drama-taking-place-under-our-noses>

<sup>52</sup> LSB, *Developing Regulatory Standards: An assessment of the Bar Standards Board*, May 2013.

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[http://www.legalservicesboard.org.uk/news\\_publications/latest\\_news/pdf/20130603\\_letter\\_chris\\_kenny\\_to\\_stephen\\_crowne.pdf](http://www.legalservicesboard.org.uk/news_publications/latest_news/pdf/20130603_letter_chris_kenny_to_stephen_crowne.pdf)

complaints from prospective customers – were all opposed by the Law Society in their consultation response. The Law Society has resisted making its professional register publically available to comparison websites, who need this data to develop services allowing consumers to search the full market. The Law Society has openly acknowledged they are not making this available because doing so would harm their commercial interests.<sup>54</sup> For the Panel, this has brought home why regulatory independence was so necessary in the first place, and, crucially, why we can never return to self-regulation.

- 8.7. When professional bodies exert too great an influence over the design of regulation this can lead to excessive barriers to entry and protect members from competition. A key area of focus is controls over who is allowed to practise within a profession through the qualifications regime. It has been pointed out that this can be done with good intentions to maintain quality and may be sub-conscious, not a deliberate attempt to restrict competition. However, economists warn that *“even self-regulatory objectives that are heavily weighted towards promotion of the general good, and only very modestly weighted towards professional self interest, could have significantly adverse implications for consumers”*.<sup>55</sup> The Law Society’s position on will-writing is a case in point. It argues that will-writing companies should continue to be able to provide services, but only if they face the same controls as solicitors. This ignores the fact that technical standards of will-writing appear similar for both professional groups yet training requirements are vastly different.

### Consumer engagement

- 8.8. One area where approved regulators have been lacking is evidence-based policy making, in particular an absence of consumer engagement. Since the Act, the SRA and BSB have been the only regulators to commission consumer research and

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<sup>54</sup> Law Society, *Adjudication in a matter raised by SW: Law Society Freedom of Information Code*, July 2013.

<sup>55</sup> Regulatory Policy Institute, *Understanding the economic rationale for legal services regulation: A report for the LSB prepared by Dr Christopher Decker and Professor George Yarrow*, October 2010.

other activities involving public dialogue. Such limited consumer engagement is a serious omission in a period defined by massive market change and transformation in approaches to regulating legal services. It casts doubt on both the legitimacy and quality of regulatory decision-making, as the approved regulators have not tested the likely impact of their proposals directly with the people they are designed to protect. While various generalised commitments have been made to correct this in business plans, no specific projects have come to fruition.

8.9. We appreciate the smaller regulators have limited resources for this work, although this reinforces points in the previous chapter about lack of critical mass. However, it may also reflect that some of these organisations are on a journey from trade associations to modern regulators with a consumer-focused culture. The LSB has said it is *“of significant concern that some regulators continue to question the need to know more about consumers and how they use legal services. Such an approach would be unacceptable from a regulator of any other sector and I believe should be unacceptable in legal services regulation”*.<sup>56</sup>

8.10. The regulators have been slow to get to grips with issues around empowering consumers. The competition reforms will not fulfil their potential unless consumers have the tools to shape the market through their purchasing behaviour. The Panel’s evidence has shown that consumers lack power in legal services relative to other markets, seen for example in lower levels of shopping around and confidence to complain.<sup>57</sup> For example:

- 22% of consumers shop around for legal services
- 1% of the public use comparison websites to find lawyers

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<sup>56</sup> Legal Services Board, *Developing Regulatory Standards, An assessment of the legal services regulators: the Costs Lawyer Standards Board; ILEX Professional Standards; the Intellectual Property Regulation Board; the Council for Licensed Conveyancers; and the Master of the Faculties*, December 2012.

<sup>57</sup> Legal Services Consumer Panel, *Empowering consumers – Phase one report to the LSB*, March 2013.

- 42% of people do nothing when dissatisfied with the service they receive
- 23% of consumers decide not to complain to their lawyer because they have no confidence their complaint will be resolved fairly
- 70% of consumers who are dissatisfied with how their lawyer handled their complaint abandon their complaint at this stage (i.e. they don't pursue it to the Legal Ombudsman)

8.11. However, while regulators in other markets are pursuing initiatives to tackle these problems, activity in the legal services sector has been comparatively limited. Again, as former trade associations, perhaps the approved regulators are more focused on the conduct of providers than consumer behaviour. They also individually lack the resources to get to grips with these issues. Yet the modern regulator is investing in research to understand consumer behaviour and is seeking to harness consumer power to help make the market work better, for example by publishing information on provider performance and developing credible choice tools. We need to see the same level of focus in legal services, but this requires a regulatory model that can sustain such approaches.

# 9 A way forward

## Setting an agenda

- 9.1. Four years of evidence of the consumer experience has demonstrated to the Panel that the existing regulatory framework does not provide a sustainable model in the long term to offer consumers the best system of consumer protection or support a competitive market place. Consumers have to find their way around a labyrinthine maze; the scope of regulation is not based on any consumer protection rationale; there are gaps and overlaps in redress; there is considerable duplication in regulatory structures that consumers ultimately pay for; regulation is not sufficiently independent of the profession; and there are serious doubts about the capacity and capability of the smaller regulators to do a good job.
- 9.2. For the Panel, the key question is not whether change is needed, but when would be the most sensible time to introduce a new regulatory framework.
- 9.3. In our response to the Triennial Review<sup>58</sup>, the Panel said there were legitimate questions as to whether the oversight model of regulation offered the best solution for the market. However, we suggested it was not the appropriate time to overhaul the existing structures. The alternative business structure reforms had only just been put in place and it was necessary to see how the market took shape before making decisions about the most appropriate form of regulatory supervision to underpin this. Secondly, two major reviews were underway – on the scope of regulation and the education and training of lawyers – that would inform the best

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<sup>58</sup> Legal Services Consumer Panel, *Submission to Ministry of Justice call for evidence on the Triennial Reviews of the Legal Services Board and Office for Legal Complaints*, March 2012.

future design of regulation. Thirdly, the approved regulators were undergoing a major transformation from trade associations to independent modern regulators; we said they needed time to implement these changes and prove their ability to regulate effectively before removal of an oversight regulator was countenanced.

- 9.4. The direction of travel is clearer nearly 18 months on, although the implications of the LETR research report are still being digested and the full impact of the ABS reforms have yet to be seen. We are mindful of Bill Gates' observation that: "*We always overestimate the change that will occur in the next two years and underestimate the change that will occur in the next ten*". While there is still much uncertainty about what the future market will look like, this has to be balanced against whether the existing complex and costly regulatory structures are deterring new entrants. Incumbent firms and potential new entrants alike are aware that a major review is likely at some point, and this in itself may be having an effect. A judgement also has to be taken about whether the smaller regulators can deliver given time or whether they lack the critical mass to do the job required.

### Success criteria

- 9.5. On balance, it is the right time to *start* designing a new blueprint. Throughout this paper we have used our evidence to highlight current flaws and highlight implications for the future. Based on this review, the following success criteria emerge as being those that should inform the design principles of a new regime:
- Access to the Legal Ombudsman for all legal services transactions
  - Regulation which is fully independent of the profession
  - Consumer focused regulatory objectives
  - A simple system that starts from a consumer journey perspective
  - A flexible regime better targeted at the risks facing consumers; one focused on the activity rather than the person doing the work
  - Strong and effective consumer representation

- A strong emphasis on evidence-based policy making including direct engagement with consumers and robust datasets
- Works transparently and is accountable for its performance
- Avoids duplication of processes yet respects the diversity of providers
- Sustainably resourced and capable of delivering effective regulation with a level of investment that reflects the contribution which the sector makes to GDP and its importance to wider societal objectives

9.6. We suggest that the Ministry of Justice task the LSB with gathering evidence and exploring options, in order to produce recommendations for Ministers on the best way forward. The LSB has the independence required for this role, which would require sufficient time and expertise. As part of this, further work is needed to address some fundamental issues that lack resolution to date:

- Come up with a workable definition of legal activities, reflecting that the definition in the Act is all-encompassing and open to interpretation
- Map the unregulated sector and assess risk
- Determine which activities should be subject to regulation
- Determine whether all consumers should be covered by regulation; this reflects that large corporate clients may be sufficiently able to protect their own interests, although there may be public interest reasons to retain regulation given concerns about the conduct of lawyers in areas such as phone hacking, tax avoidance schemes and Lehman Brothers
- Review the right balance between individual and entity regulation
- Consider the future role of the professional title
- Consider how to deal with providers already subject to regulation elsewhere
- Identify alternative regulatory models and analyse the costs and benefits

## Initial options

- 9.7. Government should immediately rule out a return to self-regulation based around the professional bodies. This option would not command public confidence and we fear it would produce a regulatory system which is even less reflective of the changing and increasingly integrated legal services market. The history of legal services suggests that self-regulation erects unnecessarily high entry barriers and would undo progress made to create a more diverse and competitive market place that works in the interests of consumers.
- 9.8. Our lead candidate for a future regulatory model is a single regulator for the legal services market. The Panel considers it would be possible to design this while respecting differences between branches of the profession. It would not automatically lead to the fusion of the profession or undermine an independent bar, as some may claim. Instead, it would better reflect the changing professional boundaries happening now, as seen in rule changes designed to allow different types of lawyer to compete with each other for the same business and in new business structures that combine disciplines. A single regulator is arguably the solution that would best enable the most diverse market – one made up of traditional and new providers.
- 9.9. A further strength of a single regulator model is that it would offer full independence from the profession, giving consumers confidence that regulation is protecting them, not lawyers. This option could produce the simplest system to navigate for consumers, making it easier for them to know their rights and make informed choices. It could also have the critical mass to make a real impact and be the most cost-effective model to operate by reaping economies of scale and removing the existing multiple codes of practice and duplicative systems for the likes of discipline and financial protection.
- 9.10. On the basis of the evidence available to date, a single regulator is the solution that is most likely to deliver an outcome where consumers are put at the heart of legal services regulation.

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

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