LEGISLATIVE OPTIONS BEYOND THE LEGAL SERVICES ACT 2007

EXECUTIVE SUMMARY

About the paper

This paper explores options for reform of the Legal Services Act 2007 (LSA). It follows a summit hosted by the previous Secretary of State for Justice in July 2014 where legal regulators discussed the barriers and opportunities they had encountered since the passing of this legislation. Regulators were invited to consolidate their collective strategic view of the difficulties they were experiencing and to identify the possible short- and longer-term legislative options for creating a regulatory system which fully supports an effective, diverse and healthy sector.

The views in this paper are the product of LSB-facilitated cross-regulator discussions[1] chaired by Professor Stephen Mayson[2]. They do not represent the views of any individual regulator, nor the simple sum of collective views. Rather they articulate some of the choices ahead and the regulatory tools that are available. They should not be read as arguing for any particular way forward either explicitly or implicitly but as a source for further debate and discussion. The paper was informed by engagement with representative bodies for legal practitioners, the judiciary, the Legal Services Board Consumer Panel and others.

The case for change

The LSA has gone some way in beginning to address the pressing issues of the time. Regulatory reform following the LSA has been wide ranging: collectively the regulators have simplified processes and removed barriers to market entry, enabling innovation among new and existing providers, improving consumer choice and competition. The structure of the market has already changed as a consequence of liberalisation, allowing a wider range of business models.

Despite this progress, some pressing market and social challenges remain, not least significant levels of unmet legal need. While many factors beyond regulation affect access to justice, an efficient and effective regulatory framework – one which eases market entry, sets only proportionate constraints on commercial operations, and which seeks to minimise burdens on practitioners – can make a positive contribution.

The legal regulators are embarked on an extensive programme of regulatory reform and recognise their duties to maximise the potential of the existing legal framework. However, a number of significant issues are holding back the pace of reform and make the work of the regulators far more difficult than is necessary. These problems arise from both the architecture of the current regulatory framework itself and the widespread inflexibility that this architecture engenders.

The chief problems are:

- *The foundation for legal regulation is a fixed list of six reserved activities*, which are largely an accident of history, rather than the result of any recent, evidence-based assessment of the benefits or risks created by those activities.

[1] The members of the group included representatives of the Bar Standards Board, CILEx Regulation, the Costs Lawyer Standards Board, the Council for Licensed Conveyancers, the Institute for Chartered Accountants in England and Wales, the Intellectual Property Regulation Board, the Legal Services Board, the Master of the Faculties, and the Solicitors Regulation Authority.

[2] Centre for Ethics and Law, Faculty of Laws, University College London; independent non-executive director and adviser to a number of law firms and law-related organisations.

- *The current approach of some of the legal regulators is that, once a provider is authorised for one or more of the reserved activities, all non-reserved legal activities of that provider are then also regulated as a consequence.* While this offers blanket consumer protection, it is a response by the regulators to the existence of a fixed list of reserved activities and thus is equally not based on a targeted or proportionate reaction to the risks to the public interest or to consumers.
- *There is a regulatory gap where the provision of non-reserved legal services provided by those who are not otherwise authorised cannot be brought within the scope of legal services regulation regardless of the risks posed by the activities undertaken.* The narrow scope of the reserved activities creates grey areas and leads to inconsistencies not understood by consumers. Further, consumers may then use such 'unregulated' providers under false assumptions about the protections available to them. An uneven market also potentially hinders competition between providers and stifles innovation and growth.
- *There is insufficient independence between some lawyers and their regulators* because of the historic link between the professional bodies and regulators being largely preserved under the LSA. This for some bodies is holding back the pace of reform and undermines public confidence in the independence of regulation. It also means that practitioners are required to fund representative activities regardless of their wishes.

Key issues and options

There remains a convincing public interest case for sector-specific regulation despite a recent strengthening of consumer protection and competition laws. There are two central justifications for this. First, there are ***public good*** reasons such as supporting the rule of law and maintaining the effective and efficient administration of justice. This includes dimensions such as public confidence in the justice system, protection of third parties, and the importance of English law and law firms to the UK's position in global markets and competition.

Second, there are ***consumer protection*** reasons, reflecting the imbalance of information and power between consumers and lawyers, the risk of significant detriment including financial harm, the risk of irreversible harm (such as loss of liberty or impact on family life), and the possibility of forced participation in the justice system (for example in relation to criminal matters).

Nevertheless, any sector-specific regulation must be proportionate and, where appropriate, remove barriers to competition, support market entry and exit, and reduce regulatory burdens and costs, consistent with the public and consumer interests it seeks to promote.

This paper does not contend there is a 'burning platform' that requires emergency attention. However, it does suggest that the current framework will increasingly inhibit further reform and that a considered and timely approach to reforming the LSA would yield benefits for meeting broader objectives of economic growth, and reducing regulatory burdens, as well as achieving greater proportionality, cost-efficiency and effectiveness in legal services regulation, whilst protecting public and consumer interests.

This paper is not intended to represent a roadmap to a future legislative settlement; rather, it seeks to explore the current and likely future territory for the legislative framework, providing a set of possible options for consideration. It does not present an exhaustive set of options, but focuses on a core set of issues that could frame possible future reform. The work of establishing which options, if

any, would form the basis of any future regulatory settlement would of course be a matter for much broader discussion and consultation, led by the Government.

This paper considers the following questions, and sets out the pros and cons of the following possible options:

1. What should be the number, nature and presentation of any regulatory objectives? Options considered are:

   (1) Continue with the current objectives
   (2) Introduce a new set of objectives
   (3) Introduce an overarching objective
   (4) Introduce a hierarchy of objectives
   (5) A combination of the above

2. What should fall within the scope of regulation? How should that be addressed? Options considered are:

   (1) Regulation of all legal activities and providers
   (2) Limited or no sector-specific regulation
   (3) Targeted regulation (assessed relative to the regulatory objectives)

3. Should regulation be focused on activities or the providers who carry them out? Options considered are:

   (1) Regulation by activity
   (2) Regulation by provider
   (3) A combination of the above

4. How can the independence of legal services regulation from both government and representative bodies best be assured? Options considered are:

   (1) Regulation and representation functions in one body (with safeguards)
   (2) Partial separation of regulation and representation functions (with safeguards)
   (3) Full separation between regulation and representation functions

5. Does the regulatory framework need to give consumers a voice? If so, what is the best way to achieve that? Options considered are:

   (1) An embedded consumer panel
   (2) A remit for Citizens Advice
   (3) General duties to consult or establish mechanisms to obtain the consumer perspective

6. How should the legal services regulator(s) be structured? Options considered are:

   (1) Separate regulatory bodies focused on professional groupings, with or without independence from representative bodies, and with or without an oversight regulator
   (2) Separate regulatory bodies focused on regulated activities, with independence from representative bodies, and with or without an oversight regulator
   (3) A single regulator with specialist sub-units or divisions (focused on professional groupings or activities, or possibly a flexible combination of both)

In thinking about these issues now and how they might be addressed, it is hoped that this paper creates a resource that can be used as an input to any future reform process and that it will expedite that process.

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PART I: INTRODUCTION

1. The origins and purpose of this review

1.1 In July 2014, the Secretary of State for Justice hosted a summit of regulatory bodies in the legal services sector. This summit was the first time that regulators in the sector had met collectively to discuss the barriers and opportunities they had encountered since the passing of the Legal Services Act 2007 (LSA), which shaped the current regulatory landscape and to discuss options for reducing regulation. Regulators were invited to consolidate their collective strategic view of the difficulties they were experiencing with the current legislative framework and the possible short and longer-term legislative options for creating a regulatory system which fully supports an effective, diverse and healthy sector.

1.2 Following the July 2014 Ministerial summit, at a subsequent meeting of Chairs of regulators in October 2014 it was agreed that, amongst other things[3], a review of possible future legislative options for legal services regulation would provide an opportunity to consider some of these issues in more depth. To that end, a group of representatives from the regulators was convened, chaired by Professor Stephen Mayson[4], with secretariat provided by the Legal Services Board (LSB). This working group held six meetings under the Chatham House Rule, at which it agreed the scope of the review and discussed future legislative options.

1.3 The views in this paper are the product of these LSB-facilitated cross-regulator discussions[5] chaired by Professor Mayson. They do not represent the views of any individual regulator, nor the simple sum of collective views. Rather they articulate some of the choices ahead and the regulatory tools that are available. They should not be read as arguing for any particular way forward either explicitly or implicitly but as a source for further debate and discussion. The paper was informed by engagement with representative bodies for legal practitioners, the judiciary, the Legal Services Board Consumer Panel and others.

1.4 This paper is not intended to represent a roadmap to a future legislative settlement; rather, it seeks to explore the current and likely future territory for the legislative framework, providing a set of possible options for consideration. It does not present an exhaustive set of options, but focuses on a core set of issues that could frame possible future reform. The paper therefore explores (without attempting to provide definitive answers or positions) the following areas:

- the case for change
- the rationale for sector-specific regulation
- regulatory objectives

[3] Other cross-regulator work streams explored (i) progress on regulatory reform to date; (ii) what minor legislative changes could be made within the current framework to reduce the burden of regulation and to improve the efficiency of the regulatory process and (iii) what alternatives there might be to the handling of client money by legal practitioners. The handling of client money by legal practitioners is a significant source of both regulatory burden to practitioners and risk to consumers. The discussion in this paper assumes that the minor legislative amendments proposed under item (ii) are made.

[4] Centre for Ethics and Law, Faculty of Laws, University College London; independent non-executive director and adviser to a number of law firms and law-related organisations.

[5] The members of the group included representatives of the Bar Standards Board, CILEx Regulation, the Costs Lawyer Standards Board, the Council for Licensed Conveyancers, the Institute for Chartered Accountants in England and Wales, the Intellectual Property Regulation Board, the Legal Services Board, the Master of the Faculties, and the Solicitors Regulation Authority.

- what, if anything, should be regulated, and how this decision should be taken
- once a decision is taken to regulate, how regulation could be implemented
- the dynamics and tension between regulation of activities, individuals, entities and titles
- regulatory independence
- consumer representation; and
- the shape of the regulatory infrastructure.

1.5 There was not always unanimous support for the particular options explored by the group. This was to be expected given the diverse opinions that the Coalition Government had received in response to its call for evidence in late 2013[6]. However, whilst not necessarily agreeing to specific actions, the regulators did explore what some of the options might be and the various strengths and weaknesses associated with them.

1.6 The work of establishing which options, if any, would form the basis of any future regulatory settlement would of course be a matter for much broader discussion and consultation, led by the Government. However, this paper is presented as the first collective undertaking by regulators in the legal services sector to consolidate their thinking and experience in this area, and to outline in an open-minded manner the alternatives to the status quo with a view to answering the simple question: what range of possibilities exist for the future?

[6] https://consult.justice.gov.uk/digital-communications/legal-services-review/results/legal-services-government-response.pdf

PART II: BACKGROUND AND PRINCIPLES

2. The current framework

2.1 The legal services market is diverse in relation to the clients it serves (ordinary households to big business and government), the spread of activities it covers (from simple family matters to complex mergers and acquisitions and criminal matters) and the range of practitioners working in it (including practitioners authorised under the LSA, 'third sector' practitioners including those in not-for-profit organisations and practitioners not subject to any sector-specific regulation). In 2014, there were some 167,000 lawyers working in the sector[7], and it has been estimated as generating £30.6bn to the UK in 2013[8].

2.2 The sector is not simply one that consists of suppliers and consumers operating in a market that is readily amenable to general market forces and standard regulatory intervention in the consumer interest. It must also take account of broader public interest factors relating to the rule of law and the administration of justice, and involves a wide range of interested parties beyond suppliers and consumers, including the judiciary, the government and society at large.

2.3 Against this background, the regulatory framework for legal services should necessarily reflect this diversity of provision and range of broader, complex interests. In summary[9], the current framework for the regulation of legal services takes place through a wide range of responsible bodies who, in addition to the LSA, must take into account a large number of other existing statutes and statutory instruments. There are 11 front-line regulators, an oversight regulator and a statutory legal ombudsman scheme. The regulators each have a duty to promote eight regulatory objectives. Only six 'reserved legal activities' actually require regulation (see paragraph 3.2(1) below). Funding of the legal regulators and the Legal Ombudsman is through payment of an annual levy on regulated individuals and entities.

2.4 Regulators are obliged in some cases to regulate by both reserved activity and title or entity, and must also consistently aim to balance the sometimes competing priorities of the regulatory objectives. The regulators also operate within a landscape that has a rich, often deeply-rooted, history and culture: for example, the titles of 'solicitor' and 'barrister' are widely recognised by consumers[10], and the role of 'notary' carries particular international authority as an integral part of its purpose.

2.5 There is also, separate to this regulated community of legal services providers, a proportion of the market that operates, legitimately, outside of the current regulatory framework, subject only to cross-economy consumer protection and competition regulation rather than legal sector-specific regulation (this is explored further in paragraph 3.2(3) below). The market also includes legal services providers which fall under regulatory frameworks in other parts of the justice sector (e.g. the Claims Management Regulator and Office of the Immigration Services Commissioner) as well as businesses providing legal services which fall under regulatory frameworks outside of the justice sector (e.g. accountancy bodies, architects, insolvency practitioners).

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[7] As at 1 April 2014, the legal professions in England and Wales comprised 138,243 solicitors, 15,279 barristers, 7,927 chartered legal executives and 5,404 individuals operating in other areas of the legal profession such as conveyancing.

[8] See http://www.thecityuk.com/research/our-work/reports-list/legal-services-2015/.

[9] See Annex 1 for further details.

[10] However, despite the widespread recognition of these titles among the general public, most consumers are nevertheless hard-pressed to express or understand the differences between the two professions – or between them and the more generic description of 'lawyer'.

2.6 Providers of legal services have seen a great deal of recent change – to the market, to wider economic conditions, and to the ways in which they provide services. In addition, consumer expectations have changed: there is increased use and understanding of technology and social media, a greater expectation that consumers will be able to undertake some or all work themselves, and greater ease of research for informed consumers. There also remains a significant proportion of consumers who may be considered vulnerable, including those without good (or indeed any) access to technology, those who are priced out of the market and those who, for a variety of reasons, are unable to obtain access to justice.

2.7 The LSA's reforms have gone some way in beginning to address the pressing issues of the time – independence of regulation, poor complaints handling, anti-competitive restrictions and the need for greater focus on the consumer. Regulatory reform since then has been wide ranging. Regulators have increasingly simplified and focused their processes and removed barriers to market entry, enabling innovation among new and existing providers, improving consumer choice and competition.

2.8 The structure of the legal services market has already changed as a consequence. Liberalisation has introduced reforms that allow a wider range of business models. Restrictions on business ownership have been removed, making non-lawyer ownership of and investment in a wider range of legal services businesses possible while maintaining emphasis on the interests of the public and consumers. Existing providers have also benefitted, as regulators remove unnecessary rules and target their efforts on areas of greater risk.

2.9 A key remaining market and social challenge is that, as research has shown[11], there is considerable unmet legal need. Many individuals, small businesses and small charities do not seek legal information, advice or assistance to help deal with a range of common legal problems. While a wide range of factors affect the extent of access to justice – and many of these lie outside the control of the legal regulators – an efficient and effective regulatory framework can make a positive contribution. For example, regulation which eases market entry, sets only proportionate constraints on commercial operations, and which seeks to minimise burdens on practitioners, has the potential to improve access to justice.

3. The case for change

3.1 Against this backdrop, the legal regulators are continuing an extensive programme of regulatory reform. They recognise their responsibilities to achieve more within the parameters of the existing legal framework. For example, following the July 2014 Ministerial Summit, the regulators collectively identified five minor/'clausal' amendments to the LSA that would simplify regulatory processes and reduce regulatory burdens.

3.2 However, a number of significant issues are holding back the pace of reform and make the work of regulators far more difficult than is necessary. These problems arise from both the architecture of the current regulatory framework itself and the widespread inflexibility that this architecture engenders. Chief among these issues are:

[11] Pleasence & Balmer (2014), *How People Resolve 'Legal' Problems*, prepared for Legal Services Board; Pleasence & Balmer (2014), *In Need of Advice? Findings of a Small Business Legal Needs Benchmarking Survey*, prepared for Legal Services Board; MVA Consultancy (2011) *Study into the provision of legal services to small charities*, prepared for Legal Services Consumer Panel. For example, over a three-year period, about half of individual citizens experienced at least one legal problem, but one in three did not get the legal help that they needed. Also, 54% of small and medium-sized enterprises (SMEs) see law as very important for doing business, but fewer than 20% seek legal advice when they have a problem.

(1) *The use of a fixed list of legal activities (the six reserved activities[12]) as the foundation for regulation.* The current reserved activities are not the result of any recent, evidence-based assessment of the benefits or risks created by those activities. To the contrary, research has revealed that the LSA's reserved activities were largely 'an accident of history' or the outcome of political bargaining[13]. This has meant the regulatory settlement in the LSA represents a contentious starting point for a modern framework for the regulation of legal services.

(2) *The current approach of some of the regulators that, once a provider is authorised for one or more of the reserved activities, all non-reserved legal activities of that provider are then also regulated as a consequence.* This extension of regulatory reach has benefits[14] in that consumers are given greater protection than the law requires. In so doing, it also potentially covers any shortcomings that would otherwise arise from the current limitations of the approach to the definition and scope of the reserved activities discussed above.

This automatic extension of regulatory reach is not required by the LSA, but rather is a response to the existence of a fixed list of reserved activities that is not based on any assessment of relative risks. Inclusion by some regulators of non-reserved activities within scope may be justified in individual circumstances. However, the automatic extension of regulation is not explicitly based on targeted or proportionate responses to assessed risks to the public interest or to consumers. As such, although affording blanket consumer protection, it could amount to unnecessary 'gold-plating' of the approach to regulation. It imposes a regulatory burden and cost on providers that the law does not require and is not explicitly proved to be proportionate to risk. As these costs are imposed on all providers across the market, it is likely that they will be passed on, at least in part, in higher prices for consumers.

(3) *There is a 'regulatory gap' since providers wishing only to provide non-reserved legal activities to the public, and who are not otherwise authorised or licensed for reserved work,* cannot *be brought within the scope of sector-specific regulation, regardless of the risks posed by the activities undertaken.* There is a growing alternative 'unregulated' market where consumers are not protected beyond general consumer law. There are benefits due to ease of market entry and cheaper services for consumers. However, the corollary of the reserved activities not being risk-based is that some high-risk activities currently fall beyond the reach of sector-specific regulation[15]. Also, the narrow scope of the reserved activities creates grey areas and leads to inconsistencies not understood by consumers. Further, although research suggests that consumers navigate the market rationally on the basis of their perception of the complexity of their matter[16], the users

[12] The reserved legal activities are: the exercise of a right of audience; the conduct of litigation; reserved instrument activities; probate activities; notarial activities; and the administration of oaths.

[13] Mayson & Marley (2010) *The regulation of legal services reserved activities – history and rationale*, Legal Services Institute: available at: https://stephenmayson.files.wordpress.com/2013/08/mayson-marley-2010-reserved-legal-activities-history-and-rationale.pdf.

[14] These benefits are also reflected in the scope of the jurisdiction of the Legal Ombudsman. By virtue of authorisation or ABS licence, the Ombudsman can consider complaints from consumers in relation to both the reserved and non-reserved legal activities of regulated individuals and entities.

[15] The LSA provides scope to de-designate reserved activities and for approved regulators to tailor approaches to regulate in a lighter-touch way where activities are relatively low risk.

[16] See research on will-writing, available at: http://www.legalservicesboard.org.uk/projects/reviewing_the_scope_of_regulation/will_writing_and_esta

of such services often do not realise that they are not buying regulated legal services and that they do not have the protections that they might assume (such as the benefits of professional indemnity cover, and access to the Legal Ombudsman). The LSA provides scope for approved regulators to authorise providers operating in the unregulated market, while there is also provision for the Legal Ombudsman to establish a voluntary jurisdiction. However, in both scenarios, a key limitation is that it would be still only be voluntary for providers to participate.

(4) *The historic link between professional bodies and regulators has been largely preserved by the LSA.* This has been the source of ongoing practical difficulties for some bodies as well as leading to perceptions of lack of independence between lawyers and their regulators, undermining the credibility of and public confidence in regulation. It can also mean that mandatory fees for practising are used to fund both regulatory and 'permitted purposes' under the LSA, regardless of the preferences of practitioners[17]. Issues relating to regulatory independence are addressed in more detail in Section 9.

3.3 Further analysis of these issues is set out in Annex 2. Thinking about these issues now and how they might be addressed will create a resource that can be used as an input to any future reform process and will, it is hoped, expedite that process.

3.4 It is not the contention of this paper that there is a 'burning platform' that requires emergency attention. Rather, the paper proceeds on the basis that the current framework will increasingly inhibit further reform and that market developments are outpacing the regulatory structure. A considered and timely approach to reforming the LSA would yield benefits for meeting broader objectives of economic growth, and reducing regulatory burdens, as well as achieving greater proportionality, cost-efficiency and effectiveness in legal services regulation.

4. The case for sector-specific regulation

4.1 Against the background of the case for change articulated in Section 3 above, understanding the rationale for any specific regulation in the legal services sector is an important starting point for any discussion of what the shape of that regulation should be.

4.2 The broader legislative landscape features a substantial swathe of general consumer and competition law which is designed both to promote and protect consumer interests and to encourage competitive markets across the economy which are able to serve those consumers' needs effectively. The basis on which sector-specific regulation could be justified for legal services is therefore one that needs to be considered carefully.

4.3 While a well-functioning market for legal services can help to drive innovation, lower costs and create a choice of services for consumers (among other benefits), the role of legal services as a fundamental part of the fabric of society and its government demands further consideration. It is important to recognise that, since the introduction of the LSA, there have been substantial other reforms to the justice system in England and Wales. These include

te_administration.htm. and online divorce tools https://research.legalservicesboard.org.uk/wp-content/media/21104-BDRC-Continental-Online-services-Divorce-case-study-17-03-15-v2.pdf.

[17] The Act gives approved regulators a choice whether to collect fees for 'permitted purposes' but clearly there is a natural incentive for them to do so. The lack of full separation between professional bodies and regulators also generates other problems which are further explained in Annex 2.

reforms to, for example, legal aid, personal injury claims, employment tribunals, and civil court fees.

4.4 These developments have, for some, exacerbated concerns about access to justice and unmet need – although many of these concerns pre-date the recent reforms. These reforms and developments have not been driven by the LSA or legal services regulation, and nor is legal services regulation the sole route to addressing the issues and concerns raised by these other reforms. Nevertheless, any emerging regulatory landscape should be framed in the context of a careful assessment of the state of the legal services sector. It should be flexible enough to take account of emerging trends and pressures and opportunities in legal practice as a result of developments in the sector.

4.5 The primary rationale for sector-specific regulation of legal services is the public interest. This plays out in two primary ways:

(1) There are **public good** justifications relating to supporting the rule of law and the effective and efficient administration of justice. This includes public confidence in, and the positive externalities[18] of, the justice system (an example would be the benefit that arises to the entire population from clarification and enforcement of existing laws), as well as the influence that a strong judicial framework has in encouraging and framing the resolution of disputes outside the formal legal process.

Similarly, sometimes there will be a need to guard against negative externalities where third parties experience detriment because of the actions of a provider but have no formal relationship with them (an example would be the children in a family dispute who are adversely affected by incompetent advocacy on behalf of one or both of their parents).

An additional public good argument relates to protecting and promoting the importance of English law and firms providing legal services to the UK's position in global markets and competition. English law as a governing law of choice in cross-border transactions (even where neither of the parties has any other connection with England and Wales) raises the profile and economic contribution to 'UK plc' of English and Welsh providers and practitioners. It also leads to the courts of England and Wales becoming the jurisdiction of choice for multinational dispute resolution and arbitration. The quality of judges, practitioners and providers, as well as the perceived and actual quality and independence of legal services regulation, is critical to maintaining this competitiveness in global commercial transactions and dispute resolution.

(2) There is also a strong **consumer protection** justification, with several different dimensions. Most importantly, some activities within the legal sector carry significant risk of detriment (for example, holding client money), scope for irreversible loss or harm, or (for example, in criminal law) forced participation in the justice system.

In addition, there are 'information asymmetries' inherent in the relationship between providers and consumers: the law is often complex in its content or process such that lay people need to turn to trained experts for advice[19], and might have very limited experience against which to judge the quality of the service they receive. If there is a

[18] An externality arises when a transaction produces benefits (positive externalities) or harm or detriment (negative externalities) to parties beyond the provider and purchaser of a good or service.

[19] Indeed, some of our most complex laws – such as those relating to social welfare, housing, and immigration – apply to some of the poorest and most vulnerable or disadvantaged members of society.

dispute about the quality of service received, expert assessment will often be required to resolve it.

In light of these issues, general consumer protection regulation and remedies (such as relying on trading standards enforcement or resorting to formal legal action to resolve a contractual dispute) may be less adequate, satisfactory or timely than sector-specific protection.

4.6 Given the features of the legal services market outlined in the previous paragraph, sector-specific regulation could even be argued to enable that market to exist, by:

(i) giving consumers sufficient assurance in the justice system and in the regulation of legal advice and regulation that they have confidence to purchase services;

(ii) ensuring that rogue practitioners do not compromise the quality and credibility of legal services more generally; and

(iii) allowing practitioners to act ethically without putting their reputations or livelihoods at risk.

4.7 Accordingly, there appears to be strong justification for at least some sector-specific regulation to achieve the benefits, and to avoid or mitigate the mischiefs, identified above. If there were no sector-specific regulation in legal services, it is unlikely that generic consumer protection regulation and enforcement could adequately address public interest issues such as risks to the rule of law or problems with legal services such as poor quality of service. These matters require a more focused, proportionate and tailored approach than is possible with cross-economy legislation and enforcement.

4.8 Nevertheless, any sector-specific regulation must be proportionate and, where appropriate, remove barriers to competition, support market entry and exit, and reduce regulatory burdens and costs wherever possible, consistent with the public and consumer interests it seeks to promote.

4.9 The sector itself also needs to be defined more fluidly to recognise the role that law plays in the fundamental operation of society. It permeates many spheres of service supply. Dentists, architects and accountants, for example, will interpret law as part of their service supply but would not necessarily be understood by the consumer nor indeed themselves to be supplying legal services. Regulation, if appropriate, needs to have boundaries that recognise the prime areas of expertise and the alternative protections available to the consumer.

5. Regulatory objectives

Key issues

What should be the number, nature and presentation of any regulatory objectives?

Options

(1) Continue with the current objectives
(2) Introduce a new set of objectives
(3) Introduce an overarching objective
(4) Introduce a hierarchy of objectives
(5) A combination of the above

5.1 The nature and number of regulatory objectives is a question closely linked to the purpose of any sector-specific regulation. Most regulators across the economy have regulatory objectives set out in their originating statute. The current objectives for the legal services regulators (as contained in the LSA) can be found in Annex 1. More detail on the background to the current regulatory objectives is set out in Sir David Clementi's final report on his review of the regulatory framework for legal services in England and Wales, which ultimately led to the introduction of the LSA[20].

5.2 Although the working experience of the legal services regulators has been that these objectives are not necessarily fully clear in their intent or meaning, they do represent, at their core, a positive assertion of the values that a regulatory system should seek to encompass. The integration of these objectives into the work of the regulators in the current system has provided a framework for appropriately argued tension between priorities and, in relation to changing risk indices, helped to define those tensions between consumer, market and public interest outcomes.

5.3 Given the justification for sector-specific regulation set out in paragraph 4.5 above, and the importance therefore to be attached to public interest outcomes reflecting public good and consumer protection in the regulation of legal services, it appears to remain appropriate for regulatory objectives to be set out in the statutory framework.

5.4 The following options are therefore identified:

(1) *Continue with the current regulatory objectives*. The Clementi Report suggested a number of principles to form the basis of the regulatory objectives which were finalised during the passage of the LSA through Parliament. They can be criticised for their breadth, their appropriateness as obligations on regulators (increasing public understanding of the citizen's legal rights and duties), the practical challenges to regulators in implementation (their direct influence in being able to improve access to justice), and the lack of any explicit hierarchy in resolving conflicts (such as public interest versus consumer interest)[21].

(2) *Introduce a new set of objectives*. A new set of regulatory objectives, derived from the justification for sector-specific regulation, could be developed by one or more of incorporating, consolidating, re-wording, removing, or adding to the current list. This would bring the benefit of making the objectives explicitly principles-based, as well as reflecting market and regulatory developments since the LSA. These may include the deregulatory obligations included in the Deregulation Act 2015 and those likely to be included in the Enterprise Bill outlined in the Queen's Speech.

(3) *Introduce an overarching objective*. In some statutes with overriding public interest intent, the regulatory objectives explicitly set out an overarching objective[22]. In legal services regulation, this could, for example, be framed by reference to the public interest justifications as elaborated in paragraph 4.5 above. Any other regulatory objectives would then be secondary or subordinate to the overarching objective. This would help in shaping the overall purpose of regulation and in resolving some of the tensions and conflict among and with other objectives.

[20] The Clementi Report is available at: http://webarchive.nationalarchives.gov.uk/+/http://www.legal-services-review.org.uk/content/report/index.htm.

[21] The Explanatory Notes to the LSA made it clear that, while there was no express hierarchy on the face of the Act, it would be open to the LSB and other regulators "to consider how competing objectives are to be balanced in a particular instance".

[22] For example, this is "the protection of the public" in the Health and Social Care (Safety and Quality) Act 2015.

(4) *Introduce a hierarchy of objectives*. Regulatory objectives identified for inclusion would all be set out in an explicit hierarchy, with the 'higher' objectives overriding the 'lower' ones. This would resolve some potential conflict between objectives. However, it would also leave less scope for flexibility and regulators' discretion. It also arguably would fail to recognise that one of the primary tasks of regulation and of a regulator is to recognise and resolve inevitable tensions and conflicts between equally desirable objectives, but based on an assessment at the time of the necessary proportionality of regulatory intervention that is required to provide a targeted response to actual or perceived risk.

(5) *A combination of the above*.

PART III: THE SCOPE AND FOCUS OF REGULATION

6. The scope of regulation

Key issues

What should fall within the scope of regulation?
How should that be assessed?

Options

(1) Regulation of all legal activities and providers
(2) Limited or no sector-specific regulation
(3) Targeted regulation (assessed relative to the regulatory objectives)

6.1 In the legal services sector, a wide range of approaches to regulation have been adopted in different jurisdictions. Internationally, there are examples of regulation taking place at a variety of points on a spectrum ranging from limited or no sector-specific regulation (as in, for example, the current regulatory model in Finland), through to a position where substantially all legal activity attracts sector-specific regulation (as in, for example, the concept of the 'unauthorised practice of law' which can be prosecuted in the United States of America). Further exploration of the approaches adopted in other jurisdictions is set out at Annex 3, recognising that these systems may not be directly comparable with England and Wales.

6.2 The working hypothesis of this paper on the spectrum of regulation is that neither extreme (of no regulation or full regulation) would be appropriate for England and Wales. While this is to express a preference and so exclude the exploration of some options, it is believed to be a justifiable position to take in order to contain the scope of this paper within reasonable and pragmatic bounds.

6.3 An approach based on:

(1) *the regulation of all legal activities and providers* may not provide sufficient opportunity to assess any given legal activity against a logical and informed framework of benefit and risk before imposing regulation, which would otherwise allow regulation to be risk-based, targeted and proportionate. Proportionate and flexible regulation in turn supports the reduction of regulatory burdens and cost which can free up the sector by encouraging competitiveness, innovation and sustainable growth, and thereby contribute to addressing economic growth and unmet needs for legal advice and representation.

6.4 On the other hand, a regulatory approach in which there is:

(2) *limited or no sector-specific regulation* would mean that the public interest issues identified at paragraph 4.5 above could be insufficiently addressed and protected. In turn, this might reduce public and consumer confidence in the rule of law and the administration of justice, as well as in the legal services market, to such an extent that societal and economic harm could result.

6.5 If the hypothesis is accepted that regulatory intervention should be founded on an intermediate point on the spectrum, then the chosen regulatory objectives (perhaps based on the articulated justifications for sector-specific regulation set out in paragraph 4.5 above) would provide a sounder starting point. A third option would therefore be:

(3) *targeted regulation (with need and targets assessed relative to the benefits and risks set out in the regulatory objectives).*

6.6 When a decision has been made about the scope of regulation, this then leads naturally to a consideration of whether the targets for regulatory intervention should be focused on one or more of activities or providers, reflecting that risk profiles may vary by nature of the activity or by provider or professional grouping. These considerations may include taking into account other regulatory environments operating in the same area that may provide sufficient protection to the consumer without the need for additional requirements imposed by legal regulators.

7. The focus of regulation

Key issue

Should regulation be focused on activities or the providers who carry them out?

Options

(1) Regulation by activity
(2) Regulation by provider
(3) A combination of the above

7.1 Consistent with the better regulation principles, regulation should be risk-based and aim – depending on the specific nature of the benefit or harm which potentially arises from the provision of legal advice and representation – to address any risks to the sector-specific needs for promoting the public good or protecting consumers identified at paragraph 4.5 above.

7.2 Whether any regulatory intervention should seek to prevent identified potential harm in the first place or instead to reduce the impact of any subsequent detriment would need to depend on flexible yet clearly justified assessment of the consequences of that harm. An approach to assessment of harm might employ traditional risk evaluation techniques, including cost-benefit analysis, as well as research into the likelihood, numbers affected and impact of harm arising.

7.3 The precise focus of any regulation should therefore be based on the intended scope of regulation derived from the regulatory objectives, and a risk assessment that supports targeted and proportionate regulatory intervention. Where intervention is justified and activities or providers would, in other words, be thought to be candidates for regulation, it should still not follow that regulation would necessarily and automatically follow: this could still remain at a regulator's reasoned discretion.

7.4 This paper does not therefore seek to identify or closely define exactly which legal activities or providers should be regulated, nor at what stage of the process of an activity taking place regulatory intervention should occur. Indeed, the LSA defines legal activity very broadly and the best definitional approach is another area for future consideration. Rather, it seeks to outline the principles on which any given activity or provider could be assessed for regulation.

7.5 It is, then, fundamental to our conception of any future regulatory settlement that it would include a clear way of assessing the extent to which a particular legal activity or provider protected or promoted the delivery of public interest outcomes or, conversely, had the potential to put such outcomes at risk. Following such an approach would then lead to options for:

(1) *Regulation by activity*: the activities in question would either contribute to public good outcomes (such as certain kinds of advocacy, conducting litigation, notarising documents, or swearing oaths) or present a particular risk to consumer protection outcomes. Such an approach would need to take into account (as set out in paragraph 4.5 above) the information gap between the consumer and the provider which is often inherent in legal services[23]. As now, activities could relate to areas of law (e.g. conveyancing, probate), legal activity (e.g. litigation, advocacy), or a combination of both.

A framework to assess which areas justified regulatory intervention on the grounds of consumer protection could, amongst other things, look at activities that result in irreversible harm (including, for example, advice or representation that might lead to loss of liberty, home, children, or citizenship, or arises from a threat to health, physical or mental well-being, or education), and those activities in the legal sector that involve forced participation in the justice system (such as advice or representation given to those on criminal charges or to some defendants in civil litigation).

A challenge with activity-based regulation is that providers will be subject to different requirements in different situations. This requires a balancing act between the attractions of simplicity derived from a largely common approach and retuning a finely calibrated model where various intervention tools are applied based on shifting patterns of risk. The regulation of activities is considered further in Annex 4, paragraphs 1-5.

(2) *Regulation by provider*: where certain providers are assessed to pose greater risk to the public interest or regulatory objectives, regulation of those providers could be justified. Such an approach could adopt the same focus as at present by either (a) providing authorisation for a range of legal activities by virtue of the provider's qualification and award of a professional title, or (b) providing specific authorisation to a provider in respect of only certain legal activities (as with, for example, licensed conveyancers who can only provide probate if specifically authorised by the CLC).

The challenges inherent in the current approach and which would need to be addressed in how any new regulatory settlement is implemented are:

(i) as identified by the Legal Education and Training Review, if there are inflexible routes to qualification, this limits workforce mobility, for example, by requiring students to make early choice of career pathways and hindering transfer between regulated routes;

(ii) maintaining and assuring the currency of the practitioner's competence in respect of legal activities for which authorisation was gained some time ago;

(iii) extending the reach of regulation to *legal activities* that do not pose a significant risk to the public interest or the regulatory objectives, but which are brought within regulation simply as a consequence of the award of a professional title, ABS licence or membership of a professional grouping (cf. paragraph 3.2(2) above);

(iv) extending the reach of regulation to *providers* who do not pose a significant risk to the public interest or the regulatory objectives, but who are brought within regulation simply as a consequence of the award of a professional title, ABS

[23] Indeed, it could be argued that the legal professions exist primarily to negotiate the complex landscape of the law on behalf of those with less expertise and specialist understanding.

licence or membership of a professional grouping[24] (cf. paragraph 3.2(2) above); and

(v) the shifting of traditional boundaries between different types of legal practitioner and professional groupings as these are increasingly eroded and blurred in the face of market developments, such as multidisciplinary ABSs. Regulating providers fundamentally by title or professional group becomes ever more difficult as legal and other services, and lawyers and other people, are presented together to consumers in more innovative business and operational combinations.

A focus on regulation by provider then suggests further sub-options for regulating by:

(a) individual;

(b) title or professional grouping; or

(c) entity or organisation.

These aspects of regulation by provider are considered further in Annex 4, paragraph 4.

(3) *A combination of activity and provider*: where regulation by activity requires the authorisation of someone to conduct that activity, there will inevitably be regulation through a combination of activity and provider. The more fundamental point here is that the requirement in the current framework, in some cases, to regulate by both activity and title not only leads to complexity within the system but can also cause confusion for consumers, and potentially providers, as to what is and is not subject to legal sector-specific regulation.

This complexity and confusion arises not merely from the overlap of activity and provider but because the current system of regulation involves the 'regulatory gap' (see paragraph 3.2(3) above). Consequently, there is an artificial divide between 'a particular regulated (reserved) activity which is undertaken' and 'an individual or organisation deemed competent to undertake a range of (reserved and not reserved) legal activities because they hold a professional title or ABS licence'.

The risk-based, targeted and proportionate approach to the scope and focus of regulation that is advocated in this paper would result in the appropriate focus of regulation on activity or provider which, combined with the most appropriate forms of intervention outlined in Section 8 below, should avoid this regulatory gap.

8. Forms of regulatory intervention

8.1 Where regulatory intervention can be justified as discussed in Section 7, the question then arises about the form and timing of appropriate intervention. Regulators have a range of interventions available to them, and these can take place before, during or after the relevant service is delivered (or as a combination of one or more of those three). These interventions are explained in more detail in Annex 4.

8.2 The current regulatory framework, through the entry point of the reserved legal activities, applies a regulatory 'gate' through which all forms of intervention then become possible.

[24] For example, views are often expressed that groupings such as City law firms, notaries, and costs lawyers, pose inherently lower risks (based, perhaps, on client sophistication or, complaints and disciplinary experience). In this context, however, it would be important that any risk assessment took into account a broad range of evidence of risk (and not just, say, complaints or disciplinary data)

Authorisation to conduct one or more of the reserved activities requires before-the-event (BTE) regulation. Once through that gate, both during-the-event (DTE) and after-the-event (ATE) regulation are then also applied.

8.3 In this sense, the current forms of intervention are 'all or nothing'. The LSA therefore prescribes BTE regulation and DTE and ATE regulation follows. The LSA further prescribes certain types of DTE intervention (such as professional indemnity and compensation fund arrangements for ABSs) and ATE intervention (such as access to the Legal Ombudsman).

8.4 However, because of this prescription in the LSA, there is no opportunity for separate access to ATE intervention by the Legal Ombudsman for, say, consumers who have sought non-reserved legal services from unregulated providers.

8.5 Equally, as described earlier (see paragraph 3.2(2) above), when a provider has been authorised for one or more of the reserved activities (for which BTE regulation is prescribed in the LSA), they may then become subject to DTE and ATE regulation on their non-reserved activities (for which BTE regulation is not required in the LSA). A risk-based and proportionate approach to such regulation might conclude that only ATE intervention of some kind would be appropriate for certain non-reserved activities without the need to subject all providers to full BTE, DTE and ATE regulation in respect of all legal activities they conduct[25].

8.6 With less prescription in the statutory framework, and regulators adopting a more risk-based assessment of why, when and how regulatory intervention is required, a more proportionate, less burdensome and more cost-effective approach could emerge. For example, regulatory interventions which take place before or during service delivery could be considered most appropriate in response to those activities which are classified as posing the highest risk to the public interest or the regulatory objectives, while interventions taking place after the event, such as a redress or compensation scheme, would be more appropriate on their own for low-risk activities, while also being available as an additional safeguard for higher risk activities.

[25] The ADR Directive could assist with ATE regulation, although business participation is voluntary.

PART IV: REGULATORY INFRASTRUCTURE

9. Regulatory independence

Key issue

How can the independence of legal services regulation from both government and representative bodies best be assured?

Options

(1) Regulation and representation functions in one body (with safeguards)
(2) Partial separation of regulation and representation functions (with safeguards)
(3) Full separation between regulation and representation functions

9.1 The legal profession in the United Kingdom has a strong tradition of independence from government[26]. The issue of independence of regulation from representative functions is, however, a newer concept. Before the LSA, regulation of legal services was largely carried out by the same organisations that represented the interests of their members. The LSA 2007 brought significant change to regulation of legal services in England and Wales in that it introduced a requirement that regulation should be independent of these representative bodies. This was in part driven by the need for greater public confidence in the regulation of legal services.

9.2 In his work prior to the LSA, Sir David Clementi concluded that combining regulatory and representative powers did not result in the public interest being consistently placed first and nor did it provide the right incentives to encourage competition or a framework for promoting innovation. Clementi also pointed to issues of public perception, and indeed highlighted the perceptions of members of professional bodies that their respective bodies gave insufficient attention to representative needs due to the combination of roles.

9.3 In addition to the front-line regulators, there is also an oversight regulator, the Legal Services Board, which was set up to be independent from government and the providers of legal services, and to oversee the regulatory reforms of the LSA (including independence of regulation) and the pursuit of the LSA's regulatory objectives.

9.4 The culture and behaviour of regulators – both oversight and front-line regulators – will ultimately determine how effective they are in delivering the regulatory objectives. The 2007 settlement was seen at its inception as a radical departure from the *status quo*. But now, after significant experience of working under the current system, it is increasingly clear that the absence of full separation between the representative bodies and regulators is proving a strong impediment to progress for some. The present arrangements are fragile as they rely heavily on individual personalities and goodwill, whereas a robust regulatory framework should be capable of working successfully independently of these things.

9.5 Issues relating to regulatory independence have manifested in various ways, although the nature of these problems are different across the regulators:

[26] As in other areas of the economy, it is possible for independent regulators to have structures and governance processes that ensure accountability as necessary to Parliament and the relevant government departments, but which nonetheless enable them to maintain the independence of their decision-making processes.

- resistance by professional bodies to some reforms which would appear to benefit competition and consumers[27];
- some instances where complex governance arrangements have been established to manage relationships between the representative and regulatory functions, which do not achieve full independence of the regulator and distract senior management attention from regulatory matters; and
- lack of transparency of the cost of regulation, as a result of sharing of some resources and costs for common purposes, as well as some costs that should be collected from providers as optional professional membership being imposed as a compulsory regulatory levy.

9.6 The representative bodies provide important value to regulators, for example by providing expert knowledge, constructive criticism and a practitioner's perspective on the market and regulation. However, this insight could be retained under alternative arrangements.

9.7 Moreover, the current structure risks undermining the credibility of regulation in the public perception in that some professions are still seen by consumers to be policing themselves (and therefore inferentially to be 'protecting their own'). To ensure public confidence in regulation, it needs to be independent and be perceived to be independent. The experience of the legal regulators is that the public continue to question the fairness and independence of regulatory decisions despite the changes introduced by the 2007 reforms.

9.8 Finally, as set out in Annex 2, commercial drivers are reducing the relevance of a structure where regulation is tied to specific representative bodies. For example, the advent of legal disciplinary practices (combinations of lawyers) and multi-disciplinary partnerships (combinations of lawyers and non-lawyers) in the market is breaking down barriers between professional groups and thereby undermining regulation structured primarily by reference to those groups.

9.9 The structural options are:

(1) *Regulation and representation functions in one body (with safeguards, for example, such increased oversight, and strict functional separation ('Chinese walls'))*: although the general movement in legal services regulation has been towards independence of regulation from representative functions, the option of combined regulation and representation in one body (with safeguards) remains. This could be incorporated with a maintained or indeed strengthened oversight function that could give additional assurance if regulatory and representative functions are to be combined in one organisation. Such an approach could in some circumstances be more efficient and would ensure that the regulator always has access to relevant sector and practitioner expertise. This option however would need to address freedom of choice for practitioners in relation to membership of a representative body.

(2) *Partial separation of regulation and representation functions (with safeguards)*: under the current arrangements, mandatory separation of regulation from representative functions has resulted in most regulation being carried out in bodies that are, to varying degrees, at arms' length from the representative bodies. There are still, however, some historic financial and structural links between some representative and regulatory

[27] Examples include the ICAEW's application to become a licensing authority and resistance to the Legal Ombudsman establishing a voluntary scheme.

bodies[28]. However, as above, this option would need to allow freedom of choice for practitioners in relation to membership of a representative body.

(3) *Full separation between regulation and representation*: complete regulatory independence could be enshrined in statute, enabling greater clarity and efficiency in the regulatory infrastructure. Full independence of regulation contributes to the vital issue of market and consumer confidence in, and the credibility of, regulation, providing a means of addressing perceptions of conflict of interest, even if these do not manifest in reality[29]. Full separation of representation and regulation also makes functional and institutional boundaries clear, and allows full transparency of funding and cost controls.

In such a system, practitioners could then be given a choice about whether or not they wish to belong to a representative body, and any fee for authorisation to practise would clearly cover only the compulsory, non-discretionary costs of formal regulation.

10. Consumer representation

Key issues

Does the regulatory framework need to give consumers a voice? If so, what is the best way to achieve that?

Options

(1) An independent consumer panel
(2) A remit for Citizens Advice
(3) General duties to consult or establish mechanisms to obtain the consumer perspective

10.1 Section 9 above addresses the issue of professional representation within the regulatory infrastructure for providers of legal services. While general consumer law and sector-specific arrangements provide before-the event protections and after-service routes for dispute resolution on a case-by-case basis, the focus of consumer representation should promote the collective interests of consumers and focus on ensuring regulatory arrangements work for all consumers. There is therefore an argument that the regulatory infrastructure should facilitate continued effective consumer representation.

10.2 The ongoing need for consumer representation reflects a range of imperatives:

- that consumers are a principal intended beneficiary of regulation (see paragraph 4.5);
- the scale of consumer spending on legal services and associated potential severity of detriment;
- the inevitable asymmetries of information and power that exist between consumers and providers; and

[28] Few of the front line regulators have a separate legal personality as things stand. The necessary expedient in the LSA of identifying some of the pre-existing professional bodies as 'approved regulators' is no longer necessary now that each has established an independent regulator as required by the Act.

[29] Such independence of regulation has become a unique selling point for the UK, for instance, in the infrastructure sector, giving global investors the confidence they need to invest into the UK: See UK Regulators Network, UK Regulated Infrastructure: An Investor Guide, December 2014.

- the relative inability of consumers compared to lawyers to mobilise and influence decision-makers.

10.3 The LSA defines consumers broadly, including potential as well as actual clients, and encompasses persons who are indirectly impacted by the provision of legal services as well as direct users[30]. Consumers are not one homogenous group and some types of users will have greater need for representation than others. For instance, corporate clients have less need for a consumer voice since they tend to be knowledgeable, repeat users and are well placed to exercise their buying power[31].

10.4 Representation of consumer interests should include a combination of expert input by consumer representatives and engagement with the public through a range of mechanisms. Options for consumer representation therefore include:

(1) *An independent consumer panel*: under the current arrangements, the LSB is required to appoint a Legal Services Consumer Panel (LSCP) which is independent of any of the professional bodies. This is a panel of expert individuals to represent the interests of consumers, supported by a small secretariat team within the LSB. This is a relatively low-cost model that ensures ongoing input from the panel members who bring a range of perspectives. The key characteristic of the embedded panel model is that the LSB, and to a lesser extent the approved regulators and the Legal Ombudsman, can access expert advice at the early stages of policy development.

(2) *A remit for Citizens Advice*: Citizens Advice could be given a remit to work on legal services regulation issues, funded through practising certificate fee contributions (as the LSCP is now). The energy and postal services work of Citizens Advice, for example, is funded on a similar basis.

(3) *Duties to consult, etc*: a further option would be to place a statutory requirement on the legal regulator(s) to consult with consumers and/or establish mechanisms to obtain the consumer perspective, but without being prescriptive about the precise form this should take. The extent to which the regulators deliver this successfully would likely be a focus of scrutiny by Parliamentary and other mechanisms.

11. Future shape of the regulatory infrastructure

Key issue

How should the legal services regulator(s) be structured?

Options

(1) Separate regulatory bodies focused on professional groupings, with or without independence from representative bodies, and with or without an oversight regulator

[30] LSA 2007, section 207: "'consumers' means … persons – (a) who use, have used or are or may be contemplating using [legal services], (b) who have rights or interests which are derived from, or are otherwise attributable to, the use of such services by other persons, or who have rights or interests which may be adversely affected by the use of such services by persons acting on their behalf or in a fiduciary capacity in relation to them".

[31] The 2007 reforms did not specify which types of consumers should be represented, instead giving discretion to the Legal Services Consumer Panel to choose its priorities. In practice, reflecting the imperatives discussed above, the Panel has focused its resources on individual clients, plus small businesses and small charities.

(2) Separate regulatory bodies focused on regulated activities, with independence from representative bodies, and with or without an oversight regulator
(3) A single regulator with specialist sub-units or divisions (focused on professional groupings or activities, or possibly a flexible combination of both).

11.1 While there has been significant change to regulation of legal services in recent years, there is, nonetheless, a range of cultural and social factors which continue to exert a strong influence and which must be taken into account when considering any future structure of the regulatory framework. Any future structure needs to be practical to implement, and those designing it should be mindful that policy development would neither exist in isolation nor start from a 'clean slate'.

11.2 There are also, of course, a range of key stakeholders already within the system, which includes practitioners and providers, consumers, government and the legislature, the judiciary, organisations that provide representative functions, and organisations that fulfil regulatory functions.

11.3 The current system contains an integral requirement for consultation with and approvals by the Lord Chancellor, for example in relation to appointments, financial penalty limits and the Legal Ombudsman's scheme rules. A future framework would need to consider carefully the role of ministers in relation, for example, to approving designations[32] and appointments, while being particularly mindful of the imperative to maintain the reality and perception of the independence of regulation and legal services from state interference. This is particularly important in the context of international perceptions of the independence of lawyers and the justice system that underpin the contribution of legal services to 'UK plc', as discussed in paragraph 4.5(1) above.

11.4 There would, therefore, need to be appropriate checks and balances in the future regulatory framework, and the role that the legislature or ministers might play in this[33].

11.5 The judiciary, in the context of the current regulatory framework, is an important and significant stakeholder, and will naturally remain so in the future. The role that judges play, as the embodiment of the Crown in terms of controlling their own courts (including who appears before them, in what capacity, and with what effect) is considered in Annex 4, paragraph 7(c). It could be argued that, under the present system, the judiciary do sometimes act as 'regulators', for example if they refuse to hear specific advocates on specific occasions. However, where professional standards for practice are set, these are set by legal services regulators, and not directly by judges.

11.6 The contribution of the judiciary to an effective, efficient and accessible justice system is, nonetheless, of paramount importance, and a future system should recognise this by clearly defining and 'hard-wiring' mechanisms, where appropriate, for involvement of the judiciary in the functioning of regulatory system through legislation[34]. In part, as set out above, this is

[32] For example, currently, where a body wishes to authorise persons to carry on one or more reserved activities as either an approved regulator or a licensing authority, it must first apply to the LSB, which in turn must then ask the Lord Chancellor to designate the body as such.

[33] The audit model provides an interesting alternative outside the legal services sector. Here the Department for Business, Innovation and Skills has devolved a substantial part of the decision-making to the Financial Reporting Council and the Department for Communities and Local Government has followed this model with respect to local audit. This has allowed these ministries and Parliament to stand clear of day-to-day discussions and to only intervene at major stress points.

[34] In any reference to the role of the judiciary in regulation, a distinction needs to be drawn between the roles of judges in the secular courts and those of the ecclesiastical courts. The senior ecclesiastical judicial posts

already achieved in the LSA by the statutory requirements to consult the Lord Chief Justice in certain instances.

11.7 Options for structuring the regulator(s) are:

(1) *Separate regulatory bodies focused on professional groupings, with or without independence from representative bodies, and with or without an oversight regulator*: where the focus of regulation is on authorisation by title (see Annex 4, paragraph 4(b)), the responsibility for regulation and supervision could fall naturally to those regulators that operate by reference to professional groupings. The question of their independence from practitioners, providers and representative bodies was addressed in Section 9 above. The function of an oversight regulator is considered in paragraphs 11.9 and 11.10 below.

Such an approach is close to the current settlement, and brings the potential for specialist expertise by type of practitioner. But it also runs the risk of lack of independence, of perceptions of conflict and regulatory capture, lack of consistency in the regulation of the same legal activities carried out by members of different professional groups and, for that reason, of regulatory arbitrage.

Further, in the new landscape of organisations carrying out multidisciplinary legal and other activities within the same business, the multiple regulation of practitioners and employees from different professional groups presents potential complexity, burden and cost, and exacerbates the risks of inconsistency in regulatory standards.

(2) *Separate regulatory bodies focused on regulated activities, with independence from representative bodies, and with or without an oversight regulator*: to address the risks of regulatory consistency, capture and arbitrage, regulators could instead be organised by the activities carried out. Such a structure would be more likely to bring separation from professional groups. It would, however, contain a similar risk of multiple regulation for the same business carrying out a range of activities, with consequent risks of complexity, burden and cost.

(3) *A single regulator with specialist sub-units or divisions (focused on professional groupings or activities, or possibly a flexible combination of both)*: to encourage consistency and economy across specialist regulators – whether they regulate by title or activity – an alternative to separate oversight regulation would be to establish the specialist regulators as sub-units or divisions of a single sector regulator. Potential advantages of this model include economies of scale, while retaining specialist expertise that recognises market diversity. However, the model risks (as a result of the likely size

in England are the Dean of the Court of Arches and Auditor of the Chancery Court of York who preside over the ecclesiastical appellate courts for the provinces of Canterbury and York respectively. Both posts are held by the same person appointed by the Archbishops of Canterbury and York jointly, with the approval of the monarch (Ecclesiastical Jurisdiction Measure 1963, s. 3(2)(a)). The Dean of the Arches and Auditor is, by virtue of his office, also Master of the Faculties to the Archbishop of Canterbury (Ecclesiastical Jurisdiction Measure 1963, s. 13(1)). The Master of the Faculties has been responsible for the appointment of notaries public in England and Wales (and certain other Crown dependencies and overseas territories) since the creation of his post pursuant to the Ecclesiastical Licences Act 1533 and he is now the approved regulator for notaries under the LSA. He is the presiding judge of the Court of Faculties of the Archbishop of Canterbury which, inter alia, acts as the disciplinary court for notaries, although the Master delegates his judicial role in disciplinary cases to a commissary. His role as regulator is thus an administrative one and consistent with that of the other approved regulators and with the principles of regulation set out in the LSA.

of the organisation) lack of responsiveness and more bureaucratic decision-making structures as various interests are accommodated.

11.8 The representative bodies in the legal services sector represent a wide range of professions and service providers. Some representative bodies are newer than others, and some have been through many changes and iterations of purpose. They all, nonetheless, have strong traditions of representing the best interests of their members. Whichever structural option is adopted, it is important that any future regulatory framework creates scope for regulators to invite participation and obtain expert input from representative bodies as significant stakeholders.

11.9 The current role of the LSB is as an oversight regulator acting independently of Government. The LSB was created to oversee the new regulatory framework and ensure that the approved regulators carry out their regulatory functions to the required standards. The benefits of oversight regulation include: monitoring the independence of regulators from those they regulate; promoting consistency of approach and alignment of public and consumer interests on rule changes in areas where multiple regulators may have conflicting perspectives; spreading good practice; and doing things that can only practically and realistically be achieved through a coordinating body. However, there are potential drawbacks too, including: increasing the time before rule changes can take effect; duplication of effort; and additional cost, including the resources required for the front-line regulators to interact with it.

11.10 The LSA gives the LSB a range of duties, functions and powers so that it can fulfil its responsibilities. In this sense, one possible set of functions for such a regulator are already set out in statute. Under a structure where representative and regulatory functions are combined within one organisation, there is a case for strengthened oversight to ensure that all interests are fairly addressed. Other areas of the economy – for example, the medical or teaching professions – might provide useful models for how these key stakeholder relationships could develop as part of a future regulatory framework.

11.11 Conversely, where there is full separation of regulation and representation, it might well be proportionate for separate oversight of rules and decision-making to be more relaxed, with a more strategic approach to oversight becoming increasingly feasible. For example, at present the LSB is required to approve changes to regulatory arrangements proposed by the approved regulators. However, if there was a more independent regulatory architecture, the need for such oversight could be reduced or possibly even eliminated. There would need to be clear lines of accountability were this to be considered as an option.

11.12 Finally, any future regulatory body or bodies would require access to both specialist knowledge of legal activities and specialist knowledge of regulation itself, whatever form the organisational architecture took. In addition, expertise in research and analysis in this historically under-researched and under-analysed sector is likely to be critical in ensuring that there is a sound evidence base for effective and proportionate policy development and decision-making.

Annex 1: The existing regulatory framework

1. There are at least twelve pieces of primary legislation (including the Legal Services Act) that govern the regulation of lawyers in England and Wales. There are also a number of pieces of secondary legislation and a number of court judgements. However, no definitive list of statutes concerning legal regulation exists – for instance, a search of the term 'solicitor' in the legislation.gov.uk database returns over 200 results. One reason why regulation remains overly complex is the failure to consolidate existing legal services regulation statutes.

2. A non-exhaustive list of relevant statutes is produced below:

    - Ecclesiastical Licences Act 1533
    - Public Notaries Act 1843
    - Solicitors Act 1974
    - Senior Courts Act 1981
    - Administration of Justice Act 1985
    - Copyright Designs and Patents Act 1988
    - Courts and Legal Services Act 1990
    - Trade Marks Act 1994
    - Access to Justice Act 1999
    - Legal Services Act 2007
    - Legal Aid, Sentencing and Punishment of Offenders Act 2012
    - Crime and Courts Act 2013

3. The eight regulatory objectives for the Legal Services Board, the approved regulators and the Office for Legal Complaints as set out in the Legal Services Act 2007 are to:

    - protect and promote the public interest
    - support the constitutional principle of the rule of law
    - improve access to justice
    - protect and promote the interests of consumers
    - promote competition in the provision of legal services
    - encourage an independent, strong, diverse and effective legal profession
    - increase public understanding of the citizen's legal rights and duties
    - promote and maintain adherence to the professional principles.

4. The Legal Services Act further defines the professional principles as:

    - acting with independence and integrity
    - maintaining proper standards of work
    - acting in the best interests of clients
    - complying with practitioners' duty to the Court to act with independence in the interests of justice and
    - keeping clients' affairs confidential.

5. The six reserved activities set out in the Legal Services Act are:

    - the exercise of a right of audience
    - the conduct of litigation
    - reserved instrument activities
    - probate activities
    - notarial activities
    - the administration of oaths

6. The following pages contain a table which lists: the approved regulators as set out in the LSA 2007; their associated respective profession; the independent bodies responsible for regulation, including whether that body is an approved regulator, licensing authority, or both; and the reserved legal activities which that body is authorised to regulate.

Profession	Approved Regulators (representative body)	Independent Regulatory body	Approved Regulator (AR) Licensing Authority (LA)	Reserved legal activities regulated
Solicitors	Law Society	Solicitors Regulation Authority	AR LA	▯ The exercise of right of audience ▯ The conduct of litigation ▯ Reserved instrument activities ▯ Probate activities ▯ The administration of oaths
Barristers	Bar Council	Bar Standards Board	AR	▯ The exercise of right of audience ▯ The conduct of litigation ▯ Reserved instrument activities ▯ Probate activities ▯ The administration of oaths
Legal Executives	Chartered Institute of Legal Executives	CILEx Regulation (formerly ILEX Professional Standards Limited)	AR	▯ The exercise of right of audience ▯ The conduct of litigation ▯ Reserved instrument activities ▯ Probate activities ▯ The administration of oaths
Licensed Conveyancers	Council for Licensed Conveyancers (regulatory body for Licensed Conveyancers, no representative body)		AR LA	▯ Reserved instrument activities ▯ Probate activities ▯ The administration of oaths

Profession	Approved Regulators (representative body)	Independent Regulatory body	Approved Regulator (AR) / Licensing Authority (LA)	Reserved legal activities regulated
Patent Attorneys	Chartered Institute of Patent Attorneys(CIPA)	Intellectual Property Regulation Board (Regulatory body for both CIPA and ITMA)	AR LA	▯ The exercise of right of audience ▯ The conduct of litigation ▯ Reserved instrument activities ▯ The administration of oaths
Trade Mark Attorneys	Institute of Trade Mark Attorneys (ITMA)			
Costs Lawyers	Association of Costs Lawyers	Costs Lawyer Standards Board	AR	▯ The exercise of right of audience ▯ The conduct of litigation ▯ The administration of oaths
Notaries	Master of the Faculties (regulatory body for Notaries, no representative body)		AR	▯ Reserved instrument activities ▯ Probate activities ▯ Notarial activities ▯ The administration of oaths
Chartered Accountants	Institute of Chartered Accountants in England and Wales There is no separate regulatory body; all decisions relating to legal activities are delegated to the independently chaired Probate Committee		AR LA	▯ Probate activities

The following are also approved regulators for probate activities only but do not currently authorise anyone to offer this service:

- Institute of Chartered Accountants of Scotland (ICAS)
- Association of Chartered Certified Accountants (ACCA)

Some professional groupings are represented by membership organisations that do not have a statutory footing, for example the Notaries Society, the Society of Scrivener Notaries and the Society of Licensed Conveyancers.

Annex 2: Detailed analysis of the case for change

This annex presents further analysis and explanation of the case for changing the current regulatory framework for legal services.

(1) Fixed list of reserved activities

1. The legal activities that *have* to be regulated are currently fixed by statute in section 12(1) of the LSA. These are the six reserved legal activities. The current activities were 'passported' into the Legal Services Act without change. The Clementi Review took as its starting point where the regulatory net fell at the time, and considered that it was for government to decide which types of legal services should be regulated, on the basis that this is a public policy decision[35].

2. The government in turn decided that the LSB should have a statutory duty to determine whether a legal service should be regulated, with powers to make recommendations to the Lord Chancellor where it considered that the reserved activities should amended. However, on the one occasion that such a recommendation was made by the LSB (in relation to will-writing activities), the recommendation was not accepted.

3. As the statutory 'hook' on which so much turns, the reserved activities are crucial to the current regulatory settlement. Thus, they are pivotal to (i) the designation of a regulator as an 'approved regulator' and a 'licensing authority', (ii) whether an individual can be designated as an 'authorised person' or an entity can be licensed as an alternative business structure (ABS), (iii) whether an individual may be approved as a Head of Legal Practice of an ABS, and (iv) whether or not a consumer has access to the Legal Ombudsman.

4. The consequences and limitations of the current statutory framework are therefore:

   (a) The LSA's current reserved legal activities have not themselves been subjected to any recent, evidence-based assessment of any continuing public policy justification or rationale[36] for them warranting mandatory regulation.

   (b) While each of the current reserved activities might be capable of public policy justification, it is not clear that the narrow scope of some them, or the absence of other activities that might equally justify mandatory regulation, would result in exactly the same list or basis for mandatory regulation if an evidence- and risk-based public policy review were applied.

   (c) Although the LSA does contain provisions in sections 24-26 and Schedule 6 that would allow reserved activities to be added to or removed from the current list, that process has two further limitations. First, the LSB can only proceed on an activity-by-activity basis that is cumbersome in terms of setting a more coherent, proportionate and risk-based foundation for mandatory regulation. Second, the LSB's recommendation must be accepted by the Lord Chancellor, which introduces a perception of political influence on the substance of regulation and regulatory reach[37].

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[35] The Clementi Report is available at: http://webarchive.nationalarchives.gov.uk/+/http://www.legal-services-review.org.uk/content/report/index.htm.

[36] This paper explores fully the nature of a public policy justification for sector-specific regulation of legal services in Section 4 above.

[37] Such perceptions can be significant causes for concern, particularly in the context of public and international assessments of the independence of lawyers and legal services from State or political interference.

5. A different approach to the statutory prescription of regulated activities and how they might be changed would require amendments to the LSA.

(2) The current approach of some of the regulators that, once a provider is authorised for one or more of the reserved activities, all non-reserved legal activities of that provider are then also regulated as a consequence.

6. Given that this extension of regulatory reach is not required by law but is in effect the result of the codes of each of the approved regulators (endorsed by the LSB), a different and more proportionate approach could be achieved within the terms of the LSA without the need for further statutory change. However, when combined with the limitations of the current approach to the designation of reserved legal activities, there is an essential conjunction between points (1) and (2).

7. The consequences and limitations of the current statutory framework are therefore:

   (a) The absence of current explicit public policy justification for the reserved legal activities supports an extension of regulatory reach to non-reserved legal activities as an involuntarily condition and consequence for providers of being authorised or licensed for one or more of the reserved activities.

   (b) This automatic extension of mandatory regulation beyond that required by statute, while it offers blanket consumer protection, has not been explicitly justified by reference to the 'better regulation' principles[38], and nor has the additional burden and cost of regulation that it imposes. Although these issues could be addressed within the current statutory framework, it would be more consistent with the better regulation principles for them to be addressed in the context of a fundamental review of the reserved legal activities.

(3) The regulatory gap

8. The Clementi Review identified a 'regulatory gap' that the LSA did not fill. It arises by default from the designation of reserved legal activities. Non-reserved legal activities do not require a provider to seek authorisation or an ABS licence. The automatic extension of regulatory reach described in (2) above means that where an individual or entity is authorised to carry out one or more of the reserved activities, all of their non-reserved legal activities also become regulated as a consequence. However, where a provider wishes only to provide non-reserved legal activities to the public and is not otherwise authorised or licensed for reserved activities, that provider *cannot* be brought within the scope of sector-specific regulation regardless of the risks involved.

9. There are a number of benefits to such a position:

   (a) Providers can enter the market to offer innovative and potentially cheaper legal services to consumers without the burden and cost of regulation. There are many instances of family law and employment advisers (for example) operating in this way.

[38] These principles require regulation to be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed. They are set out in the Legislative and Regulatory Reform Act 2006, and are also referred to in sections 3 and 28 of the LSA.

(b) Consumers who perceive that the cost of legal services provided by regulated legal services business is too high therefore have access to alternative sources of legal advice and representation. In this way, unmet need for legal services is potentially reduced.

10. Equally, though, there are disadvantages:

(a) Research[39] has shown that consumers may not distinguish between regulated and unregulated se vices, and may expect to have sector-specific regulatory protections (such as access to the Legal Ombudsman) even when using unregulated services of uncertain quality. While consumers appear to make rational choices about which provider to use based on the complexity and importance of the matter at hand, they may also choose unregulated providers based on false assumptions about the protections in place. There is an innate risk to public confidence in law and the regulation of legal services arising from this gap.

(b) Just as there is no regulatory protection, indemnity or compensation (other than recourse to general consumer law), so there is also no access to the services of the Legal Ombudsman.

(c) There is a paradox that arises from the regulatory gap and the automatic extension of regulatory reach discussed in (2) above. Because the law does not require mandatory regulation for non-reserved activities, those who are not legally qualified are able to provide their services without any regulatory supervision or intervention, without financial protections and without recourse to the Legal Ombudsman. Those who are legally qualified (and therefore on the face of it better able to provide a technically competent service) are subject to regulatory burden and cost if they provide those very same services.

(d) It is plausible to surmise that the additional and involuntary regulatory burden and cost borne by authorised individuals and ABSs inhibits their appetite and ability to invest in growth and innovation in order to expand their businesses to meet a greater volume of legal need and to compete with unregulated providers of non-reserved services.

11. The consequences and limitations of the current statutory framework are therefore:

(a) The absence of any current explicit justification for the reserved legal activities creates a consequential market in unregulated non-reserved services. This market arises simply by default (the available activities are merely required not to be reserved activities).

(b) With no rationale for reservation, there can be no rationale (let alone, transparent, accountable, proportionate, consistent and targeted non-intervention based on assessment of risk) for non-reserved activities.

(c) There is an illogicality in the complete absence of mandatory regulatory intervention in non-reserved activities and the automatic extension of regulation to non-reserved activities carried out by otherwise authorised individuals and ABSs, which is equally not based on any transparent, accountable, proportionate, consistent and targeted assessment of risk.

[39] Vanilla Research (2010), *Quality in legal services*, prepared for Legal Services Consumer Panel; GfK NoP (2010), *Consumer attitudes towards the purchase of legal services*, prepared for Solicitors Regulation Authority.

(d) Consumers might be confused about whether they are or are not choosing to deal with a regulated provider of legal services, and may proceed on a false assumption that protection and redress will be available to them.

(4) Links between professional bodies and regulators

12. Historically, legal services regulation applied only to individual lawyers who were regulated by reference to their professional title or qualification. In essence, the professional body was typically also the regulator. This link was largely preserved by the LSA.

13. Within the structure of the LSA, regulators (which still have their origins in a profession or qualification) are approved in relation to one or more of the reserved legal activities[40]. Only approved regulators can authorise individuals to carry out a reserved activity for which the regulator is approved[41]. In addition, only approved regulators can apply to become licensing authorities for ABSs; and licensing authorities can only authorise ABSs to carry out a reserved activity in respect of which the authority is itself approved. Further, the Legal Ombudsman's formal jurisdiction is restricted to complaints relating to authorised persons (that is, those who have been authorised by an approved regulator in relation to one or more of the reserved activities[42]).

14. There is thus a close and inextricable link between the reserved activities and who can currently be approved to regulate. However, the implementation of the LSA has also begun to stretch the formerly linear relationship between regulator, title and activity. In certain circumstances, a regulator can now be regulating:

(a) lawyers who hold different professional titles or qualifications (legal disciplinary practices, or 'LDPs'), entities in which lawyers and non-lawyers work together (ABSs);

(b) entities in which lawyers and professionals who are regulated by non-legal regulators work together (multidisciplinary ABSs, or 'MDPs');

(c) individuals who originally qualified for a different profession and under a different regulator (such as solicitors who practise conveyancing or probate might switch to be regulated by the Council for Licensed Conveyancers, or barristers might be regulated within an ABS licensed by the SRA).

15. The consequences and limitations of the current statutory framework relate to:

(a) *The regulatory gap*: Reference has already been made to this gap (in (3) above. Where the current list of reserved activities is not based on a modern public policy rationale, the authority and powers of approved regulators derived from such a list also lack cogency and completeness. In particular, the inability of a consumer to access the Legal Ombudsman or any other sector-specific regulator for any form of protection or redress

[40] No regulator is approved for all of the reserved activities; and while for some reserved activities there are multiple approved regulators, in the case of notarial activities, only the Master of the Faculties is an approved regulator.

[41] However, as discussed in (2) above, once an individual or entity is authorised for reserved activities, the regulators extend their regulatory reach to their non-reserved activities, thus establishing themselves as regulators of non-reserved legal activities in circumstances where statute does not require those activities to be regulated.

[42] However, LeO can then deal with complaints that relate to non-reserved activities carried out by such an authorised person.

where non-reserved activities have been performed by providers who are not otherwise authorised or licensed is a significant limitation of the current structure.

(b) *Independence and regulatory capture*: Under the LSA, and its intention to increase the independence of regulation from professional representation, many of the approved regulators have established front-line regulators with delegated regulatory powers (such as the Law Society and the Solicitors Regulation Authority, and the Bar Council and the Bar Standards Board). In some cases, there is a perception that this separation is not complete (especially where the delegated regulatory body is not a separate legal entity and continues to share resources or remains dependent on the approved regulator for funding and resources)[43]. In those cases where there is incomplete separation of regulation from representation, there is a risk of the continuing perception of regulatory capture or self-interested regulation.

(c) *Lack of transparency of funding*: The historic connections between approved regulators and their professions resulted in the LSA allowing the professional bodies to continue to collect funds for 'permitted purposes' through the mandatory levy of fees on the regulated community. Such fees therefore are not confined purely to the costs of regulation. This again suggests that the separation between regulation and representation is not complete.

(d) *Regulatory consistency*: With a number of approved regulators being able to regulate the same type of legal activity (whether reserved or non-reserved), there is a risk that each will apply different sets of standards, requirements or rules, resulting in inconsistency and confusion for practitioners and consumers. Although the LSB exists as an oversight regulator to ensure minimum standards and a degree of consistency, it has limited powers proactively to call-in regulatory arrangements and require them to be changed in specific ways.

(e) *Regulatory arbitrage*: Providers seeking an ABS licence, or practitioners seeking to switch regulator, already have some choice available to them. However, as an extension of the consistency point above, the choice of regulator should not be based on any perceptions of a lighter regulatory burden or cost with one regulator as opposed to another – at least unless the regulatory framework ensures (through the LSB or otherwise) that there is an explicit requirement for minimum requirements to be met such that any 'higher' burdens and costs are voluntarily assumed on a fully informed basis.

(f) *Regulatory competition*: Because not all approved regulators are necessarily approved in respect of the same reserved activities, there is limited competition among approved regulators for practitioners who might wish to switch. For example, a solicitor currently regulated by the SRA who wished to switch to the CLC could still be authorised for, say, reserved instrument and probate activities by the CLC but not for contentious matters such as litigation or rights of audience. Any intention that the infrastructure of the LSA should encourage such competition among regulators is thus limited.

(g) *The degree of statutory prescription*: The nature and extent of detailed statutory prescription (particularly in Schedule 13 to the LSA in relation to ABSs) creates inflexibility for regulators and licensing authorities and inhibits them in responding in a proportionate and timely way to the issues and risks posed.

[43] In these cases, there is also a risk that the delegated regulators have not been able to establish sufficient independence for them to feel that they are truly and fearlessly able to regulate in the public interest with the funding and resources necessary for them to do so.

(h) *Market developments outpacing the regulatory structure*: The remaining close link in the current structure between regulators and professional groups proceeds primarily from an assumption that an individual providing legal services will first have acquired a professional qualification or title. As the liberalised legal services market continues to grow and innovate, this is increasingly either a false assumption (non-lawyers wish to seek approval to participate in ABSs), or leads to complex regulatory solutions. Thus, there might need to be authorisation for individuals from one or more approved regulators, a licence for an entity from a different licensing authority and within which those differently authorised persons may participate, and possibly waivers in respect of some individuals who are already regulated by non-legal regulators. The relative burden and cost-efficiency of such multiple and over-lapping regulation – and its likely inhibiting effects on further growth and innovation – will inevitably lead to fundamental questions about the design and sustainability of the current regulatory settlement.

Annex 3: International models of legal services regulation

Introduction

1. This table provides an overview of regulatory systems in a selection of other developed countries to enable comparison with the England and Wales model. It is split into European and non-European countries for ease of presentation.

2. The main source of information was the International Trade in Legal Services database prepared by Hook International for the International Bar Association. The country fields in the first column of the table have been hyperlinked to this database, which should be updated over time. For European countries, this data has been cross-checked against the European Commission's Regulated Professions Database. The accuracy of the information below has not been independently checked by the LSB.

Europe

Country	Protected titles	Reserved activities	Permitted legal forms	Organisation
Belgium	Avocat (lawyer), Avocaat (barrister), Rechtsanwalt (solicitor)	Pleading and filing briefs of arguments before any court	A civil company taking the form of commercial company; a limited liability cooperative company; or a private limited liability company. An individual lawyer may organise his or her practice as a civil company taking the form of a single shareholder private limited liability company	All lawyers must be members of their local Bar. There is no requirement for a law firm licence but the different bar associations have their own requirements for notification by lawyers of the establishment of a firm and/or its authorisation
Denmark	Advokat (barrister)	Right to conduct cases for others before the courts (Separate authorisation possible as defence-lawyer, as administrator concerning deceased persons estate and administrator concerning division of matrimonial property)	Danish lawyers may work as sole practitioners, in a grouping of lawyers, or in public limited, private limited or limited partnership companies. Such companies must have as their only permitted object the practice of law and they must be owned solely by lawyers. Professional corporations of lawyers are required and have exclusive right to use the certain titles	Lawyers are licensed by the Ministry of Justice, Civil and Police Department. The Danish Bar and Law Society is then responsible for the ongoing supervision of licensed lawyers

Country	Protected titles	Reserved activities	Permitted legal forms	Organisation
Finland	Advokat, asianajaja (advocate)	IBA: None EU: Advocates provide legal advice to private persons and corporations and assist the parties in court or when dealing with other authorities	Lawyers may practise as sole practitioners, in partnerships or in limited companies. According to the Advocates Act, the practise of legal profession in a company is not allowed, except with another lawyer, unless the Board of the Association grants a permit based upon specific grounds. A decision in principle has been made according to which the Board may not grant such a permit; hence MDPs are not allowed.	Only members of the Bar Association are entitled to use the professional titles. New law firms must be registered and subject to inspection to ensure compliance with issues such as audit and accounting requirements, confidentiality and security arrangements, client resource management, and liability insurance. Each year a proportion of Finnish firms are subject to inspections by the Finnish Bar.
France	Avocat (advocate, barrister. Solicitor)	Only lawyers may represent clients, plead before jurisdictions or disciplinary bodies (there are exceptions for disputes on labour laws and proceedings before the French Supreme courts). Only lawyers may assist parties in the "participative procedure" addressed by the Civil Code and carry out assistance and representation of clients in courts of justice.	Lawyers may be self-employed, or practise in an association of lawyers in which liability may be limited. They may also practise in a "professional civil company" which is the equivalent of a partnership; a "liberal labour company", either as a collaborator or as a salaried lawyer. Lastly lawyers may be members of an "economic interest grouping" and of a "European economic interest grouping" which provides a vehicle for sharing overheads.	Licences to practice in France are issued by local Bar Associations. Law firms do not need separate licensing.
Germany	Rechtsanwalt (no translation provided)	Rechtsanwälte have exclusive rights to represent clients in German Courts and provide all purpose general legal advice. These rights are shared with various other legal professionals in relation to specific areas such as tax, pension advice, insurance, claims collection, patent matters and certain areas of legal aid.	Lawyers are permitted to practise as sole practitioners, in partnerships and in corporate bodies. In the case of sole practice or partnerships (general or limited) no additional licensing is required. In the case of corporate entities, separate registration is required with the court register and law firms taking these forms must include "Rechtsanwaltsgesellschaft" (law firm) in their name	Authorisation to practise is given by the 27 regional bars (RAK) or the Bundesgerichtshof (BGH - Supreme Court Bar). Authorisation is required both for individuals and for corporate forms of law firm. Other forms of law firms do not require separate licences to practise but lawyers must obtain prior authorisation in order to be able to practise in certain forms.

Country	Protected titles	Reserved activities	Permitted legal forms	Organisation
Ireland	Solicitor, Barrister	(a) the drawing or preparing of a document relating to real or personal estate or any legal proceeding, (b) the procuring or attempting to procure the execution by an Irish citizen of a document relating to (i) real or personal estate, or movable or immovable property, situate or being outside the State and the United Kingdom, or (ii) any legal proceeding, actual or in contemplation, of which the subject-matter is any such estate or property, (c) the making of an application, or the lodging of a document for registration, under the Registration of Title Act, 1891, or any Act amending that Act, at the Land Registry or to or with a local registering authority, (d) the taking of instructions for, or drawing or preparing of, documents on which to found or oppose a grant of probate or letters of administration. Barristers have reserved rights to appear in the Irish courts.	Solicitors may practise as sole practitioners, in general or limited liability partnerships. Barristers may only work as sole practitioners.	The Law Society of Ireland issues licences to solicitors and the Bar Council licences barristers. Law firms do not require a separate licence in Ireland but there are specific firm related rules in relation to solicitors accounts and compensation fund.
Italy	Avvocato (lawyer)	Italian lawyers have the right to provide representation, assistance and defence of different actors within the judicial processes. Supreme Court lawyers have exclusive right to undertake representation before special courts	Italian lawyers may work as sole practitioners, in partnerships and in various forms that permit cooperation with other profession	Licences are issued by local bar councils but a national register is maintained by the Consiglio Nazionale Forense. Law firms do not require separate licences to practise in Italy.

Country	Protected titles	Reserved activities	Permitted legal forms	Organisation
Netherlands	Advocaat (advocate)	The monopoly of Dutch advocates is limited to representation in Court. Citizens may represent themselves in district courts for claims of up to €5,000 and in criminal cases	Dutch advocates may work in sole partnerships, in general or limited liability partnerships. Under certain limited circumstances they may also work in partnership with some other specific quasi-legal professions.	The Netherlands Bar Association issues licences to practise in the Netherlands but disciplinary procedures are carried out locally by the Deans of the local bars of the district in which a lawyer is working. There is a requirement for law firms to complete an annual compliance statement electronically and to appoint a representative to submit information on behalf of the firm.
Northern Ireland	Solicitor, barrister	(a) Preparation of any instrument of transfer or charge or any other document for the purposes of the Land Registration Act 1970 or any enactment repealed or proposed to be repealed by that Act; (b) drawing or preparation of any instrument relating to real or personal estate, or any legal proceeding; or (c) lodging of any instrument or other document for registration in the Land Registry or the Registry of Deeds, or the making of any application (other than an application to search in, or to receive copies of or extracts from, a register) to the Registrar of Titles.	Northern Irish solicitors may work as sole practitioners or in general or limited liability partnerships with other Northern Irish solicitors.	The Law Society of Northern Ireland licences and regulates solicitors and law firms (www.lawsoc-ni.org) and the Honourable Society of the Inn of Court of Northern Ireland governs the rules applying to barristers. Under the constitution of the Honourable Society, the Inn of Court of Northern Ireland admits barristers who are then regulated by the Bar Council of Northern Ireland.

Country	Protected titles	Reserved activities	Permitted legal forms	Organisation
Norway	Advokat (lawyer) Advokater som driver eiendomsmegling (lawyer that are real estate agent)	IBA: The practice of law is reserved to licensed advokater. This is defined as to give legal assistance to others as a profession or in a regular manner". However, a person with a law degree may give legal assistance without being licensed as an advokat. Such legal practice can only be carried on in a one-man firm owned by the said person. Legal assistance may be provided by anyone to the extent that it is necessary to provide good and complete assistance by another profession. A legal licence is required for litigation. EU on real estate agent: (a) responsible for carrying out the individual assignment (b) responsible for the estate agency's compliance with rules and regulations according to the Estate Agency Act (i) the activity implies acting as an intermediary in connection with the sale/buying/lease of real estate, the drafting and registration of the deed, and the completion of the financial settlement (ii) valuation of real estate (iii) agent for banks/insurance companies for negotiation of credit/insurances	The legal practice of advokater may only be organised as a one-man firm owned by the advokat, or as a company in accordance with the provisions below, unless something else follows from legislation. In companies which carry on legal practice, only persons who exercise a significant part of their professional activities in the service of the company may own shares or hold office as directors or deputy directors. Shares in companies which carry on legal practice may also be owned by a parent company, provided that all shares of the parent company are owned by persons who, exercise a substantial part of their professional activities in the service of the parent company, and that the parent company conforms to the provisions of the fourth to sixth paragraphs below" ("the company may only engage in affairs which are reasonably connected with the legal practice as advokater" and "if the conditions for owning shares are no longer fulfilled by a person or a company that owns a share of a company which carries on legal practice, the share must be disposed of within two years")	The Supervisory Counsel for Legal Practice ("Tilsynsrådet") issues (and may revoke) licences to advokater and others giving legal advice. There is no need for law firms to be licensed separately to practice law but advokater must provide the Supervisory Council with their office address and report if they wind up their practice.

Country	Protected titles	Reserved activities	Permitted legal forms	Organisation
Portugal	Advogado (lawyer), solicitadore (legal agent)	(a) Preparation of contracts and preparatory acts leading to the establishment, modification or termination of legal transactions, including those charged with the registries and notaries; (b) negotiating for the recovery of credits; (c) the exercise of a mandate in the context of a complaint or contesting administrative or tax acts; (d) the exercise of a mandate in the context of a complaint or contesting administrative or tax acts; (e) Legal Advice (with solicitadores); (f) preparation of contracts and the practice of preparatory acts leading to the establishment, modification or termination of legal transactions (with legal agents).	No restrictions	The Ordem dos Advogados (the Portuguese Bar Association) is the competent authority for issuing licences to lawyers. There is no licensing requirement for law firms in Portugal.
Scotland	Solicitor, advocate	Conveyancing of land and/or buildings; litigation (civil or criminal); and obtaining confirmation in favour of executors (the Scottish equivalent of probate). Scottish solicitors also have rights of audience in most courts. Advocates have rights of audience in the Court of Session and the High Court of Justiciary (the supreme criminal Courts of Scotland), and in the other Courts (such as the Lands Valuation Appeal Court) whose judges are Senators of the College of Justice.	Solicitors may work as sole practitioners, as members or directors of incorporated practices which may either be companies or limited liability partnerships; or as a member of a multi-national practice. From mid-2013, solicitors will also be able to work in Scottish Alternative Business Structures. Advocates may only be self-employed.	The Law Society of Scotland licences and regulates solicitors in Scotland. The Faculty of Advocates licences advocates. Solicitors must notify the Law Society when setting up a new practice and must comply with rules relating to accounts, guarantee fund and indemnity insurance. Firms which take the form of incorporated practices or multi-national practices require prior approval by the Council of the Law Society.

Country	Protected titles	Reserved activities	Permitted legal forms	Organisation
Spain	Licenciado, Abogado (no translation provided)	Spanish legislation provides that lawyers have the exclusive right to practise the Legal Profession before any Court, administrative body, association, corporation or public entity.	A lawyer can practise as a sole practitioner, or as an employee, or in any legal form, including as a company. The Civil Law Company is the most common form.	Local bars are responsible for licensing lawyers. Lawyers must register their office addresses with their local bar. If they establish an association, then the agreement between the lawyers must be lodged with the Bar. The local bars also maintain registers of any multi professional businesses that involve lawyers.
Sweden	Advokat (advocate)	None	Swedish advokats may practise as sole practitioners, in general partnerships or in a limited liability company or limited liability partnership.	The relevant authorities for licensing of individuals are the Board and the Disciplinary Committee of the Swedish Bar Association. There is no requirement on law firms to obtain licences, however the board of the Bar Association is competent to grant exemptions from the requirements for shareholders and therefore has some control over law firms in Sweden.
Switzerland	Advokat, Rechtsanwalt, Anwalt, Fürsprecher, Fürsprech, Avocat, Avvocato	Representation of clients before federal and cantonal judicial bodies are reserved to those who hold a recognised title. The giving of legal advice is not federally restricted, but regulations may apply in some cantons.	Not governed by federal law	A register of lawyers is maintained by each Canton of the lawyers who are established within it. Licensing of law firms is not governed by federal law.

Outside of Europe

Country	Protected titles	Reserved activities	Permitted legal forms	Organisation
Australia	Barrister, Solicitor, Legal Practitioner, lawyer	Appearing in court or advising on the law [of each state]	Sole practitioner, partnerships, incorporated legal practices, multi-disciplinary partnerships	Responsibility for the regulation of lawyers in Australia rests with the States and Territories. New legislation is intended to harmonise standards and systems across Australia and lead to clear and efficient regulation of the profession, however most States and Territories have indicated they will not join the National Scheme. The three other columns are consistent across States and Territories checked (Queensland, New South Wales, South Australia, Western Australia, Victoria)
Brazil	Advogado (lawyer)	Only lawyers registered with the Brazilian Bar Association (OAB) have rights of audience in court and can provide advice on Brazilian law.	Multi-disciplinary partnerships are not allowed. Brazilian law firms are organised as limited liability entities (but with unlimited liability of the partners with respect to losses attributed to the practice of law). The association of lawyers with non-lawyers is prohibited.	The body responsible for licensing Brazilian lawyers is the Ordem dos Advogados do Brasil (Brazilian Bar Association). Law firms need to register with the OAB in the relevant state.
Canada	Varies by province (checked Alberta, British Columbia, Ontario and Quebec) Alberta, British Columbia, Ontario: barrister and solicitor Quebec: lawyer, avocat	Varies by province Alberta, British Columbia, Ontario: Appearing in court and advising on the law [of province] Quebec: Appearing in court and advising on the law of Quebec is reserved to lawyers licensed in Quebec, except for certain activities that are reserved to Quebec notaries	Varies by province Alberta: Self-employment, partnerships, limited liability, professional corporation British Columbia: Self-employment, partnership, limited liability, law corporation, multi-disciplinary partnership. The Law Society of British Columbia must approve MDPs and approve the name of a 'law corporation' Ontario: Self-employment, partnerships, Professional Corporations, Multi-Disciplinary Partnerships, Affiliations, Limited Liability Partnership. Applications to form an LLP, Professional Corporation,	Governance of the legal profession in Canada is a matter of provincial and territorial responsibility. Every lawyer in Canada and notary in Quebec is required by law to be a member of one of Canada's 14 provincial and territorial law societies and to be governed by its rules. All law societies are members of the Federation of Law Societies of Canada (FLSC), the national coordinating body of the regulators.

Country	Protected titles	Reserved activities	Permitted legal forms	Organisation
			MDP, or an Affiliation must be made to the Law Society of Upper Canada Quebec: Limited Liability Partnership (LLP), Multi-Disciplinary Partnership (MDP), Joint Stock Company (JSC). Applications to form an LLP, JSC or and MDP must be made to the Bar of Quebec.	
Hong Kong	Solicitor, barrister	Only those persons who have been admitted as barristers of solicitors in Hong Kong may practise or give advice on Hong Kong law.	Hong Kong lawyers may work as sole practitioners, or in general partnerships or in group practices which involve the sharing of premises and overheads between solicitors with separate practices. Future legislation will enable law firms in Hong Kong to operate in the form of a limited liability partnership and solicitors to incorporate as companies. Barristers practise independently or in chambers. Two or more practising barristers may share professional expenses in accordance with an agreement or in proportion to their receipts but they may not share professional receipts or agree that any one or more of them shall assume responsibility for the professional work of the others.	The Law Society of Hong Kong issues licenses for solicitors and the Bar Council of Hong Kong for barristers. Local law firms do not need a licence to practice but must complete a number of formalities before commencing trading. The Hong Kong Law Society must be informed within 14 days of a solicitor commencing practice.
Mexico	Abogado/a (lawyer)	Only Mexican lawyers have rights of audience in court and can provide advice on Mexican law.	Lawyers may establish to practise as sole proprietors, in general partnership or may form companies. Most choose the form Civil Enterprise (Sociedad Civil, S.C.) which has no limits on number of shareholders and for which all of the shareholders have joint and several liability. Some foreign firms are established as LLPs.	The federal Ministry of Education grants licences to lawyers. There is no explicit law firm licensing regime.

Country	Protected titles	Reserved activities	Permitted legal forms	Organisation
New Zealand	Barrister, or barrister and solicitor	Work carried out by a person (a) in giving legal advice to any other person in relation to the direction or management of (i) any proceedings that the other person is considering bringing, or has decided to bring, before any New Zealand court or New Zealand tribunal; or (ii)any proceedings before any New Zealand court or New Zealand tribunal to which the other person is a party or is likely to become a party; (b) in appearing as an advocate for any other person before any New Zealand court or New Zealand tribunal; or (c) in representing any other person involved in any proceedings before any New Zealand court or New Zealand tribunal; (d) in giving legal advice or in carrying out any other action that, by section 21F of the Property (Relationships) Act 1976 or by any provision of any other enactment, is required to be carried out by a lawyer	Lawyers may be employed (by law firms or non-law firms) or be self-employed as a barrister or a sole practitioner, practice in partnership in a law firm or in an incorporated law firm. Multi-disciplinary practices are not permitted	The New Zealand Law Society issues practising certificates for all lawyers in New Zealand. Law firms do not need to receive a licence.
United States	Attorney at law	Unauthorised practice of law regime – definitions vary across States and are subject to interpretation as to the scope and breadth of the prohibition, especially relating to out-of-court activities, such as the drafting of documents and giving	Washington, D.C. is the only U.S. jurisdiction that permits non lawyer ownership of law firms, but the relevant rule focuses primarily on the lawyer's role in supervising the non lawyers	Lawyers are subject to regulation from the judicial branch, self-regulation by the organised bar and private malpractice regulations. The American Bar Association has model rules of conduct, but it is necessary to look at respective codes in each State

Country	Protected titles	Reserved activities	Permitted legal forms	Organisation
		advice. UPL statutes usually proscribe three broad categories of activity: (a) representing another in a judicial or administrative proceeding; (2) preparing legal instruments or documents which affect the legal rights of another; and (3) advising another of their legal rights and responsibilities. Some statutes name specific individuals and organisations which are not permitted to practice law, such as title insurance companies and corporations. Exceptions to UPL statutes always include self-representation and sometimes include lay representation before certain local courts or state administrative agencies.[44]		

[44] Derek A. Denckla (1999), *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, Fordham Law Review, Volume 67, Issue 5..

Annex 4: Summary of forms of regulatory intervention

The forms of regulatory intervention can be categorised as:

***(1) Before-service delivery*:**

1. A regulator might decide, after clear and careful assessment, that an activity or provider is of such importance to the public interest or of such a high-risk nature that a preventative regulatory approach should be adopted. The premise of such targeted and proportionate intervention, following an appropriate and evidence-based risk assessment, should be that it is justified because during service and after service interventions would represent inadequate or unsatisfactory responses to the risks in question. However, such barriers and exclusions should carry a high burden of proof that they are necessary in the interests of the regulatory objectives.

2. Any strong restriction or limitation on the carrying out of an activity would need to be transparently assessed against an agreed public interest and risk framework, but such strong regulatory intervention might occur where, for example, there are significant potential issues relating to an individual's position as an officer of the court, or where there is a significant risk of incompetence, fraud, improper investor or management influence, or other consumer detriment. A regulator would need to balance the protection of the public or consumer interest with the possible inhibiting effect any intervention might have on, say, innovation or access to justice.

3. A list of reserved legal activities, which can only be undertaken by authorised persons, is currently fixed in the LSA. While maintaining a list of restricted or reserved activities in one form or another remains an option, a future regulatory system may need to be more agile to meet the challenges of changing market conditions and emerging evidence of higher (or lower) risk[45]. The process and principles for reservation or de-reservation of activities could, therefore, be part of a flexible risk assessment framework. Evidence-based risk assessment might take into account (for example) type of consumer, area of law and type of legal activity in determining whether or not the public interest benefits to be protected or maintained, or the potential harm or detriment to be avoided or reduced, warranted before-the-event intervention.

4. Before-the-event authorisation or licensing requires clarity about whether the authorisation is attached to one or more of:

   (a) *An individual*: the concept of individuals, who are authorised to carry out one or more regulated activities, is present in the current system. It is presently related primarily to authorisation by title for the undertaking of reserved activities, but has recently been extended to direct authorisation, for example, to CLC-regulated probate practitioners.

   (b) *A professional title or membership of a professional group*: the current framework offers authorisation following from title (such as barristers' rights of audience, solicitors' rights

[45] A list of legal activities that are capable of being subject to sector-specific regulation also implies that there will be some legal activities not on the list. These can then currently be provided outside legal sector regulation (and are therefore in that sense 'unregulated'). There could be scope for after-the-event, voluntary or self-regulation in such areas: see further paragraph 12 below.

to conduct litigation, and notaries' rights to perform notarial activities). This formal 'badging' of services, arising from regulation by title[46], can give consumers a certain level of confidence in the services they are purchasing and the person they are buying them from. It can remove the need to invest excessive time and money in searching for a suitable service provider.

However, 'badging', as a barrier to entry, can also limit the availability of services, result in higher quality and performance standards than are necessary relative to the public interest risks posed by the service in question, lead to higher prices, and stifle innovation. It can also generate false consumer – and practitioner – confidence in a provider's abilities across a broad range of legal activities if there are not sufficient safeguards in place (see (2) below in relation to continuing competence and the need for periodic reaccreditation).

Future approaches to before-the-event regulation could separate the current regulatory link between title and authorisation.[47] In turn, this could result in risk-based, targeted and proportionate regulation focused on authorisation by regulators for specific legal activities – either by individual or entity – with the award of titles (and the education and certification of knowledge and competence required for the award of them) being a matter for professional or representative bodies rather than regulators. Care would however need to be taken as to the 'brand value' of such titles (i.e. the extent of willingness of consumers to purchase services from anyone without such a title), and whether the control of award of such titles by a professional body could become a practical barrier to entry and an impediment to competition.

(c) *An entity*: In addition to individual practitioners, consideration needs to be given to the owners, managers and investors in legal firms and businesses. This raises additional questions as to what standards the latter (not legally qualified) individuals can be assessed against.

There could be scope for greater acknowledgement of the authority of other bodies that specialise in the competence standards and regulations that apply to other business disciplines, to avoid duplication.

While the current system applies a 'fit and proper person' test, this can be subject to abuse, and any future application of such a test would require an informed evidence base and clear definition of the standards an individual would be expected to demonstrate. More fundamentally, the requirements set out in Schedule 13 to the LSA are arguably too detailed and too prescriptive to allow licensing authorities to adopt a truly risk-based, targeted and proportionate approach.

Where legal services are provided under the collective banner of an entity or firm, the architects of a future regulatory system might need to decide whether or not to retain

[46] An additional inconsistency in the current legislation is that some professional titles are protected by criminal sanctions against those who claim to have them when they do not, but other titles are not so protected. It would be worth examining whether anything is needed beyond the current offences in s.16 of the LSA (carrying on a reserved activity when not entitled) or s. 17 (pretending to be so entitled or taking any name, title or description to falsely imply entitlement), combined with the general law of passing off or false description. There is some doubt about how often offences in relation to the protected titles are in fact prosecuted (and, indeed, about who would presently initiate, prosecute or enforce the other LSA offences).

[47] CILEx Regulation already operates such a model for conveyancing and probate activities.

or remove distinctions between different types of entity (for example, the current system includes recognised bodies, licensed bodies etc).

5. Finally, any requirement for before-the-event permission would need to consider whether exemptions should continue in respect of self-representation, providing legal advice and representation without a fee or other reward, and other not-for-profit and similar provision.

(2) During service delivery:

6. There are a number of existing regulatory interventions which are targeted at the period during which an activity or event is taking place, including as a last resort a regulator 'intervening' in (that is, taking control of) a law firm. They remain valid options for any future regulatory intervention. As with 'before delivery' approaches, the premise of during-the-event regulation could be that relying only on after-service intervention would be inadequate or unsatisfactory.

7. The principal during-delivery interventions are:

   (a) handling client money: this represents one of the highest risks to consumers, and so the question of whether or not practitioners should be allowed to hold client money and, if so, under what conditions, is important;

   (b) undertakings: the absolute obligation on some practitioners to honour undertakings they have made (and the unconditional enforcement of them) ensures that business and transactions can proceed efficiently and more quickly on a basis of trust[48];

   (c) judicial control of advocacy, litigation, case management and costs management: this might include direct and specific control of the courtroom and who appears before the court and how litigants and their advocates and advisers behave; it might also extend to more systemic input on quality of services;

   (d) the professional principles[49]: these are intended to impose obligations on practitioners to behave in a professional and ethical way (they are equally appropriate, though not currently obligatory, for those who provide legal services but do not otherwise have a professional title or membership of a professional group). It may be desirable to find a way for all providers to be bound by these sorts of ethical principles (e.g. through codes of conduct) and for the Legal Ombudsman to take account of them in adjudications. For the future, there might usefully be some debate about whether these principles should explicitly include a personal obligation to act in the public interest[50], and also whether there should be an explicit hierarchy of duties in relation first to the court, second to the client, and only then to the firm's owners or shareholders;

   (e) professional indemnity insurance: this will offer assurance to clients that if something goes wrong, there may be recourse that will provide redress;

   (f) requirements for the assurance of continuing competence, including re-accreditation or renewed authorisation or licensing and continuing professional development (CPD); and

[48] This will apply in a conveyancing transaction, for example, when a solicitor may have given an undertaking to discharge a mortgage on or by a certain date: the solicitor must fulfill that promise, even if the client has not transferred any or sufficient funds to the solicitor to do so.

[49] The existing principles are set out in Annex 1.

[50] This is in some ways analogous to the notary's particular duty to the validity of the transaction.

(g) risk-profiling by regulators can also facilitate effective and proportionate targeting, together with supervision and monitoring, and provide reassurance to consumers and uphold the reputation of the sector.

(3) After service delivery:

8. After-the-event regulatory interventions are likely to focus on complaints management processes and opportunities for redress. The present system differentiates between:

(a) Service complaints (referring to the manner in which a consumer has received a service). A statutory independent Legal Ombudsman (LeO) deals with service issues that cannot be resolved by the provider to the consumer's satisfaction. The current remit of LeO only extends to those providers who are authorised persons, that is, those who are authorised in respect of one or more reserved activities. Where a consumer uses a provider who is, quite legitimately, providing a non-reserved legal service without being otherwise authorised, LeO has no mandate to investigate and award redress[51].

Expansion of the remit of LeO could therefore facilitate greater confidence in both the regulated sector and that part of the legal services market which does not presently fall under sector-specific regulation (see paragraph 3.2(3) above), and ensure better standards of service provision across the sector. The ADR Directive, which comes into force in July 2015, reinforces such a development, since it creates an expectation that consumers can access out-of-court dispute resolution for disputes with traders across the economy.

(b) Conduct complaints (referring to the competence or behaviour of the provider). The regulators deal with these disciplinary matters. The multiplicity of regulators means that there are different disciplinary systems in place, different forums for hearings, and different standards of proof.

9. Within a new regulatory settlement, the options could be to retain this division of responsibilities or to allocate them differently: for example, LeO could deal with both service and conduct issues, and a common disciplinary institutional framework could be shared across legal regulators.

After-the-event redress and sanctions can include elements of monetary compensation, restitution, enforcement of service adjudications, and disciplinary measures against individuals.

(4) Joint or several combinations of sector-specific intervention:

10. If regulatory intervention is focused on risk, targeting and proportionality, then it probably follows that the highest-risk activities should attract before, during, and after service regulation. In this way, the highest risks will be comprehensively regulated. For the lowest risks, it could be argued that only after-service intervention could be justified on the basis of proportionality. Where there is an assessed intermediate risk (that is, neither high nor low), logically during-service and after-service interventions might be thought the most proportionate.

11. However, any expansion of access to redress could, by introducing additional regulatory requirements, have an unintentionally suppressive effect on innovation and competition.

[51] Although the LSA contains provision for a voluntary scheme, this has not been activated.

Again, therefore, careful consideration and strong evidence would be imperative in reaching a balanced response.

(5) General consumer law or protection:

12. Where there is no perceived risk to the outcomes described in paragraphs 4.5 and 5.4, it is difficult to see that there is any justification for sector-specific regulation or intervention. In these circumstances, consumers should be able to rely on consumer protections from the general consumer law (see Annex 5) that would still apply.

13. The remaining considerations here are then:

    (a) Whether, because non-sector responses might not fully understand the nature of (even no-risk) legal advice and representation and the need for timely resolution of some issues, any consumer of legal services should be allowed access to the after-service complaints jurisdiction and remedies of LeO.

    (b) Any 'regulatory gap' in terms of consumer understanding of which activities attract sector-specific consumer protections and which ones do not could also be addressed to some extent by improved consumer information and choice tools, and the commercial incentives for providers to promote the benefits of using regulated services.

    (c) Given that the general law always applies, whether steps should be taken to remove duplication or extension of general law provisions from sector-specific regulation (in relation to some aspects, say, of money-laundering or data protection compliance).

Annex 5: Summary of existing consumer legislation and remedies

This Annex contains a summary of existing consumer legislation which applies across the economy followed by a commentary on recent and forthcoming developments, in particular the Consumer Rights Act and ADR Directive, which are set to change this landscape.

Summary of existing UK consumer legislation

Cancellation of Contracts made in a Consumer's Home or Place of Work etc. Regulations 2008

These regulations cover contracts that are made during both solicited and unsolicited visits by traders and apply to all contracts with a total payment of more than £35. The regulations set the cooling off period to be seven calendar days and require cancellation rights to be clearly displayed in any written contract or provided in writing if there is no written contract.

Competition Act 1998

The Competition Act prohibits agreements which are intended to, or have the effect of, "preventing, restricting or distorting competition in the UK". The Act also prohibits the abuse of a dominant position in the UK or part of the UK.

Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013

These Regulations implement most provisions of the Consumer Rights Directive (2011/83/EU). The Regulations require traders to provide information to consumers in relation to contracts concluded between them and contain provisions concerning a consumer's right to cancel a distance or off-premises contract without giving any reason or incurring any costs other than those specified.

Consumer Credit Act 1974 (and 2006)

(Will be amended by the Consumer Rights Act 2015) The Act dictates how credit providers must treat consumers. It includes provisions regarding debt recovery, cooling-off periods and liability for breaches of contract or misrepresentations of the good or service that was purchased on credit.

Consumer Credit (Agreements) Regulations 2010

The Regulations impose requirements about what information has to be included in a regulated consumer credit agreement.

Consumer Credit (EU Directive) Regulations 2010

Amend the Enterprise Act 2002 and Consumer Credit Act 1974 by requiring a creditor to provide adequate explanations to debtors and to assess creditworthiness before entering into a regulated consumer credit agreement. Other provisions deal with the right to withdraw from such agreements.

Consumer Protection Act 1987

(Will be amended by the Consumer Rights Act 2015) The aim of the Consumer Protection Act is to help safeguard the consumer from products that do not reach a reasonable level of safety. The Act makes producers liable for personal injury, death or damage to a consumer's property caused by defective products.

Consumer Protection (Amendment) Regulations 2014

The Regulations amend the Consumer Protection from Unfair Trading Regulations 2008 by providing consumers with rights to redress in respect of misleading and aggressive commercial practices. They apply to contracts entered into, or payments made, on or after 1 October 2014.

Consumer Protection from Unfair Trading Regulations 2008

(Will be amended by the Consumer Rights Act 2015) The Regulations prohibit unfair, misleading and aggressive commercial practices. The Regulations include a general prohibition of unfair practices where these could affect the average consumer's behaviour and also ban specific practices that are unfair in all circumstances. The Regulations also impose a prohibition on the promotion of unfair commercial practices by persons responsible for codes of conduct for traders. With limited exceptions, breaches of the prohibition on unfair commercial practices will be criminal offences. The Regulations provide, in relation to the offences, for defences of due diligence and innocent publication of advertisements.

Consumer Protection (Distance Selling) Regulations 2000 (and amendments in 2005)

The Regulations aim to provide a minimum level of protection for consumers who purchase goods or services by means of distance communication (e.g. internet, mail order, email, fax and telephone). They include the right to cancel the contract, and to a specified cooling-off period whose length depends on whether and when the supplier complies with the requirement to provide the written information. If goods are faulty and do not do what they are supposed to, or do not match the description given, consumers have the same rights under the Sale of Goods Act 1979 as when buying face to face.

Enterprise Act 2002

(Will be amended by the Consumer Rights Act 2015) The Act gives the Office of Fair Trading the power to apply to the court to disqualify an individual from being a director of a company. In addition, designated consumer bodies (e.g. Which?) will be entitled to apply for rights to bring damages claims on behalf of consumers.

Fraud Act 2006

The Act created a new general offence of fraud, which can be committed in three ways: fraud by false representation; fraud by failing to disclose information; and fraud by abuse of position. Those guilty of offences can be imprisoned and/or liable to a fine.

Regulatory Enforcement and Sanctions Act 2008, Part 3

The Act provides Government with the powers to make an order by statutory instrument empowering enforcement agencies to impose sanctions such as the return of payment to consumers.

Supply of Goods and Services Act 1982

(Will be amended by the Consumer Rights Act 2015) The Act requires businesses to supply services with reasonable care and skill and, unless agreed to the contrary, within a reasonable time and to make no more than a reasonable charge.

Unfair Contract Terms Act 1977

(Will be amended by the Consumer Rights Act 2015) The Act regulates contracts by restricting the operation and legality of some contract terms. It limits the applicability of disclaimers of liability, rendering terms excluding or limiting liability ineffective or subject to reasonableness, depending on the nature of the obligation purported to be excluded and whether the party purporting to exclude or limit liability is acting against a consumer.

Unfair Terms in Consumer Contracts Regulations 1999

(Will be revoked by the Consumer Rights Act 2015) The Regulations protect consumers against unfair standard terms (this excludes core terms, including the price) in contracts they make with traders. The Regulations require that a standard term must be expressed in plain language.

Commentary

1. This annex provides an overview of current protections afforded to consumers through general consumer law. It is split into two sections: the legal rights which consumers have in relation to how businesses are expected to behave; and the remedies that consumers can seek should these rights be infringed, either individually or via public enforcement agencies. In October 2015 the Consumer Rights Act will streamline and strengthen consumer rights, and also make available a wider set of remedies. Therefore, as well as listing the key current provisions, this Annex covers the key strands of this significant development.

2. Following the BIS consumer landscape review in 2011, the Trading Standards Institute was given responsibility for business education on consumer law. It has created an online 'business companion' resource which includes relevant guidance. This resource should be consulted for a more comprehensive overview than is possible to provide in this annex http://www.businesscompanion.info/.

Rights

3. In addition to observing codes of conduct, like any business, providers of legal services must comply with general competition and consumer laws, as well as laws dealing with fraud.

4. While businesses in this market are likely to define themselves in terms of the practise of law, a better way of understanding differences in the application of general consumer law across economic sectors is to consider three things:

    - what is sold (goods or services)
    - where it is sold (in a shop or online, say)
    - how it is sold (treating customers fairly and abiding by any other rules that apply, e.g. on prices and payments, and contract terms) .

5. As the pattern of delivery of legal services is changing, so it becomes ever more important to understand the rights that consumers enjoy in different situations. For example, an online will-writing service attracts subtly different cancellation rights than wills prepared on business premises, while there are variations again where wills are sold in the client's home.

6. From 1 October 2015, the new Consumer Rights Act 2015 will change the rules relating to the supply of goods, services and digital content for contracts made from that date. The Act protects individual consumers, but does not cover businesses in their capacity as consumers. The significance of the legislation for this sector includes introducing a statutory right for services to be provided with reasonable care and skill, and strengthened unfair contract terms requirements.

7. In relation to services, traders will have to meet the following standards:

    - the service must be carried out with reasonable care and skill
    - information said or written to the consumer is binding where the consumer relies on it
    - the service must be done for a reasonable price (where the price is not agreed beforehand)
    - the service must be carried out within a reasonable time (where the timescale is not agreed beforehand).

Remedies

Public enforcement

8. Some breaches of consumer protection laws are criminal offences and may lead to action by enforcement agencies such as trading standards or the police. In some cases redress may be possible when criminal breaches occur, such as retrieving stolen money, but only if the offender has realisable assets.

9. Civil enforcement powers are available to trading standards services where the collective interests of consumers have been harmed. The key mechanism is seeking injunctive relief through enforcement orders to stop the infringer from continuing to engage in the conduct. At present civil enforcement will not generally give remedies to individual consumers. However, in future, the Consumer Rights Act will allow public enforcers and the civil courts to attach enhanced consumer measures to enforcement orders and undertakings. These must be aimed at achieving one or more of the following:

    - redress for consumers who have suffered loss
    - improved compliance and a reduction in the likelihood of future breaches
    - more information being provided to consumers so they can exercise greater choice and in doing so improve the functioning of the market.

Remedies available to individual consumers

10. Currently, if the service was not carried out with reasonable care and skill, within a reasonable time, or at a reasonable charge, the consumer can ask providers to put the problem right, give a deadline to complete the service or claim a refund or damages. Most claims brought under consumer law that reach court would fall under the small claims jurisdiction. In April 2013 the upper claims limit was raised from £5,000 to £10,000. In future, under the Consumer Rights Act, the remedies available to consumers will be entitlement to a repeat performance of the service or to a price reduction.

11. Note that a private right of action does not apply to all consumer law breaches. Since 1 October 2014, amendments to the Consumer Protection from Unfair Trading Regulations 2008 (the CPRs) mean that, where traders use misleading or aggressive selling practices, consumers have rights to redress on top of the rights they have under existing laws. Yet consumers do not have rights to sue for all types of unfair practices, for example misleading omissions are excluded.

12. From 9 July 2015, the ADR Directive will give consumers more chance to resolve their disputes without going to court, regardless of product or service type. A limitation of the Directive is that it is not mandatory for traders to use an ADR mechanism unless mandated otherwise by sectoral legislation. However, information requirements in the Directive are designed to encourage businesses to participate voluntarily. The implication is that unregulated legal services providers or their trade associations may choose to subscribe to an approved ADR scheme. However, such businesses could not subscribe to the Legal Ombudsman unless and until a voluntary scheme is established.

13. Note that some unregulated providers already participate in independent ADR procedures, although coverage is patchy. For example, complaints about members of the Institute of Professional Willwriters are considered by the Estate Planning Arbitration Scheme operated by the Chartered Institute of Arbitrators.