Solicitors Regulation Authority

SRA response

Enhancing consumer protection, reducing regulatory restrictions, Legal Services Board consultation

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Introduction

1.1

The SRA is the independent regulator of solicitors, the firms in which they operate and all those working within those firms. We regulate in the public interest.

1.2

We welcome the Legal Services Board's (LSB) consultation paper as an important starting contribution to the debate. In this paper the SRA seeks to contribute to and take that debate forward.

1.3

In its paper the LSB, understandably, takes as its starting point the remit given it by the Legal Services Act 2007 (LSA) to consider the scope of legal services regulation provided by the reserved legal activities in the LSA. However, in our view the underlying problems with the current system of the regulation of legal services in England and Wales are more fundamental. The issues that need to be considered are somewhat wider; as are the possible solutions. We believe that we should take the opportunity, provided by the LSB's paper, to undertake a broader review of these issues and that time needs to be taken, by all of the regulators and others with a stake in this issue, to ensure that there is a real understanding of the problems and that all of the possible ways forward have been considered. We recognise that some of these solutions might require amendment to the current statutory provisions but, in our view, that should not constrain this stage of what needs to be a first principles review.

1.4

Our starting point is that It is important to recognise that the Legal Services Act 2007 (LSA) enabled major improvements in the regulation of legal services in England and Wales through

> the liberalisation of the market—through the ability for non-lawyers to own and manage legal services providers;

ensuring the independent regulation of legal services; and

providing a single body (the Legal Ombudsman) to consider consumer complaints about the provision of regulated services.

1.5

In addition, in ss. 1 and 28 LSA, it provided a coherent set of objectives for the independent regulation of legal services in the public interest.

1.6

However, it is also important to recognise that it left some significant problems, most importantly

it did not rationalise the existing foundations of the reserved legal activities; and

it resulted in a complex structure of legal services regulation and regulators.

1.7

With regard to the first of these issues, the Act does provide mechanisms for the further consideration of the scope of legal services regulation (and it is this process that forms the basis for the current LSB consultation), but the Act itself left the long existing foundations in place for the present. In many ways this is unsurprising. The LSA was a major change in the regulation of legal services and, following as it did from the OFT and Clementi reports, the strong focus of the public and political debate was competition, the economic liberalisation of the delivery of legal services and the changes to the structures for regulation felt to be necessary for that liberalisation to be carried through. Within this context there was, reviewing the debates with hindsight, a sense that a concurrent review and reform of the underpinning foundation of legal services regulation (i.e. the reserved activities) simply lay in the "too difficult" box. There is also a sense that it was considered that, in practice, they could continue to serve as the basis for the effective and broad regulation of legal services for two reasons:

first, because there had been little evidence of commercial legal service providers seeking to provide only non-reserved activities outside of the scope of the existing regulators' grip; and

second, because the long-existing approach to legal services regulation in England and Wales, primarily regulation "by title", had ensured that the very wide range of non-reserved legal activities being provided to consumers was regulated because all of the activities delivered by, for example, solicitors were kept within the regulatory grip of the relevant regulator.

1.8

In practice, neither of these two assumptions has proved to be correct. First, because there has been a significant growth in the commercial provision of non-reserved legal activities by unregulated providers. Second, because the mechanisms used by existing regulators to maintain their wide grip on all legal activities (such as the SRA's separate business rule) are being challenged by the LSB as being inconsistent with competition and with the will of Parliament (i.e. Parliament's decision that only the reserved activities required regulation).

1.9

The decisions made by Parliament not to review the reserved activities can be viewed in two ways. One view is that it was a completely correct political judgment to ensure the delivery of the critically necessary changes by ruthlessly excluding from consideration a complex issue that would have distracted attention and may have endangered the successful implementation of those key changes. The alternative view is that it was a significantly missed opportunity to undertake the necessary complete, radical and once-in-a-generation overhaul that was necessary.

1.10

Regardless of the rationale for the decisions made in 2007 and earlier, they have, in our view, resulted in a significantly unsatisfactory system of regulation. The result of each of the issues identified at paragraph 1.6 above and, importantly, their interaction, is what has been described as a "patchwork quilt" of legal services regulation which does not necessarily serve the citizen's interest in the wider aspect of the rule of law (how it operates in the public interest and how quality legal services are delivered to a high ethical and professional standard) and, specifically as an aspect of this, how the interests consumers are protected.

1.11

In our view this detriment arises because of

- a lack of clarity for consumers about which legal services are regulated and which are not against an underlying consumer expectation that all professional legal services will, in one way or another, be regulated;
- a lack of consistent consumer protection and redress not only between regulated and unregulated legal services but also between services regulated by different regulators;
- a lack of focus on quality, standards and ethical behaviour across all legal services leading to the risk of a failure to get things right first time for consumers and, therefore, an unnecessarily heavy reliance on redress; and

increased regulatory cost in the system (which is ultimately borne by consumers) as a result of the multiplicity of regulators and level of resource required to manage the interactions between them.

1.12

As a result the SRA's view is that, particularly with the experience that the SRA and others have had in implementing the LSA changes, it is now clear that the time has come to complete the reform process.

1.13

This paper addresses the issue in three parts:

the justification and objectives for legal services regulation in the public interest;

the approach that should be taken to best meet those objectives; and

a response to the specific questions posed by the LSB.

Justification and objectives for legal services regulation

2.1

The history of the various reserved activities and therefore how legal services came to be regulated in this country have been helpfully set out in a paper produced by Professor Stephen Mayson. Whilst the root of this regulation may lie in various arrangements arrived at in previous centuries, any modern consideration of the need for regulation must start with the public interest, consumers, competition and market economics. However, where legal services are concerned in particular, the SRA's view is that there are additional factors that must be taken into account and these are addressed towards the end of this section.

2.2

Debates about the need for, and the scope of any, regulation tend to polarise into a *competition* versus *regulation* argument. The consideration of any justification for regulation in the legal services market is no different. Both approaches have the same aim, that of benefitting the consumer, and so there is no conflict in that sense; the question is simply the extent to which competition alone is sufficient to achieve this without the need to introduce regulation or other measures.

2.3

The basic economic starting point is that in a perfect market free competition will deliver the best result for the consumer and that monopolistic restrictions on trade, for whatever reason, are likely to distort this to the detriment of the consumer. In effect this was also the starting point for the Legal Services Act, put explicitly into the original remit for the Clementi Review,

"To consider what regulatory framework would best promote competition, innovation and the public and consumer interest in an efficient, effective and independent legal sector",

and as one of the regulatory objectives in s1 of the Act.

2.4

One of the main achievements of the LSB has been to follow through this major driver for the LSA and to continually press Approved Regulators to have proper regard to the role of competition to drive improvements in the delivery of legal services for consumers. As the LSB chairman has recently said, "The LSB was established three years ago with a mandate to increase competition to benefit consumers".

2.5

The judgment to be made, however, is whether or not competition, of itself, is sufficient to ensure the availability of appropriate legal services to consumers and achieve wider public interest objectives or whether there are aspects of legal services themselves, and the market for them, that require regulatory intervention.

2.6

Just as it is widely accepted in economic theory that free competition should be the starting point, it is also equally accepted that the perfect market conditions for pure competition theory to hold almost never exist and so opens the way for the need for other steps, regulatory or otherwise, to be taken to achieve consumer benefits (for a good summary of these arguments see, for example, *" Interactions between competition and consumer policy"* , an economic discussion paper prepared by Professor Mark Armstrong for the OFT in 2008)

2.7

Whilst the starting point always has to be that any regulatory intervention has to be justified (an approach embedded in the better regulation principles) the primary justification for this is the information asymmetry between suppliers and consumers - the supplier's knowledge and expertise

potentially puts the consumer at a disadvantage in selecting services. It is generally accepted that in professional services this exists almost by definition (although this can be caveated, as the LSB does at paragraph 154 of its paper, where equally sophisticated purchasers exist). For the purpose of analysis, products are generally split into three categories depending upon the extent of the information gap:

"search goods" - those where all attributes are fully observable at the time of purchase;

"experience goods" - where these are only revealed after purchase; and

"credence goods" - where even after purchase attributes may not be fully revealed.

2.8

The SRA would argue strongly that legal services primarily (although not exclusively) fall into the third category, for example if a will is badly drawn then the consumer may never know, though their executors might. In such cases though the argument can reasonably be made (as the LSB recognises) that *some* form of regulatory intervention is necessary.

2.9

Although generally the primary justification for regulatory intervention is information asymmetry, there are others, relating to externally driven objectives and wider public goods; both of which are relevant in the legal services market. It is an accepted part of economic and competition analysis that theses "externalities" can apply in a wide range of markets and consumer/provider relationships. They arise where there is a public interest in an outcome being achieved (or harm avoided) which will not be achieved simply as a result of competition operating within the market (i.e. because in any individual transaction between consumer and provider neither necessarily has an economic interest in the achievement of the wider public interest objectives). They are of particular relevance to the legal services market and, indeed, there are a number that are specifically identified in the s.1 LSA regulatory objectives (for example within the professional principles).

2.10

Unlike many other professional services the quality, and professional and ethical standard, of legal services provided do not only directly impact on the consumer of those services. Importantly, legal services and the actions of legal services providers have an impact on:

public confidence in the rule of law;

the overall effectiveness of the operation of the legal system;

the courts; and

third parties, often but not solely, those involved in a dispute with the direct consumer of the legal services in question.

2.11

The first three of these are not only important socially and politically but also have a very direct economic impact. One of the key conditions necessary for thriving economic activity is the ability of economic entities and individuals to make and enforce legally binding contracts. Unregulated, and driven only by competition, legal services, and the legal services market would, in our view, simply not deliver against these wider objectives.

2.12

Given this, we see regulation to protect and promote the interests of consumers (arising for the need to mitigate the impact of information asymmetries) as just *one* aspect (albeit a vital one) of the purpose of the regulation of the legal services market in the public interest. The other key aspect is to ensure that the market operates in the wider public interest. This has direct implications for scope and focus of regulatory intervention and for the extent to which competition (alone) can be relied on within this market to ensure the wider public interest is achieved.

2.13

The SRA would therefore argue that, purely in terms of accepted economic theory as applied to these services, to this market and to the majority of the consumers of services there is an overwhelming case, in principle, for some form of regulatory intervention Whether this should be done simply by means of a system of recognised professional qualifications (as was largely the case throughout the twentieth century and previously) or not, is a more open question (again as the LSB notes) to which this paper will return later.

2.14

Over the past four years the SRA has, necessarily, spent much time scrutinising all aspects of the LSA. As we have said, in some respects it can be considered as a missed opportunity and there are parts of it that are relatively difficult to work with. However, given our analysis above about the justification for regulation in this market, we believe that the combination of the Regulatory Objectives and Professional Principles in s.1 LSA allied to the requirements on Approved Regulators to adopt regulatory best practice and adhere to the principles of better regulation in s.28 LSA, is as good an

exposition of what regulation in this area should be seeking to deliver as it is possible to define.

2.15

Flowing from this analysis, the SRA's approach differs from that set out by the LSB in its paper. Whilst acknowledging the wider range of factors at play, the LSB puts very heavy emphasis on the primary purpose of regulation in this area being the promotion of competition and ensuring consumer redress. Our view is that this emphasis is too narrow, that all of the factors set out in ss.1 and 28 LSA must be considered as a part of a balanced package and that, if any were to be given particular emphasis, it should not be these two that sit at the top of the rankings.

2.16

The focus on consumer redress seems to us to be misplaced. Consumer redress is important, but what consumers really want is for services to be delivered in such a way that problems requiring redress do not arise in the first place. Given the nature of legal services (see paragraphs 2.7 to 2.9 above) and the inevitable information asymmetries, we do not believe that competition by itself can sufficiently assure the competence, standards and quality with which legal services must be delivered. Given this there must be regulatory intervention of some form to ensure standards and quality and/or to reduce information asymmetries. It seems to us that this must have greater emphasis (in the public interest and in the interests of consumers) than ensuring redress when problems have occurred (although this is also important).

2.17

With respect to the LSB's emphasis on competition, we endorse the view that,

"Although its aims may be honourable, there is a long history of 'consumer protection' being used as an excuse for industry protection, which is a form of protection that consumers do not want".

In our view, as in many other professions and trades, the legal profession has tended to confuse the public interest with professional interest. Given the combination of roles as both self regulator and representative that used to exist across the legal professions, that was perhaps inevitable. However, in our view, the separation of those functions following the LSA has gone a very long way to resolving that confusion.

2.18

There are two further aspects of the LSB's consideration of competition that we would also like to comment on:

- the juxtaposition, as apparent alternatives, between competition and traditional regulation by "title"; and
- the extent to which competition already exists within the market.

2.19

In our view there are aspects of the LSB's analysis of the need for the regulation of a wider range of legal activities which put forward the proposition that competition is to be preferred because the alternative is a rather heavy handed, and possibly ineffective, regulation by title approach which has characterised much of the traditional history of the regulation of the legal services sector. By "regulation by title" in this way we would mean:

- entry to the "profession" by means of a combination of academic and vocational qualification; and
- very broad brush consumer redress and disciplinary arrangements applicable to the whole profession

2.20

It seems to us that legal services regulation is already well past this characterisation. For example, the SRA has over recent years moved to entity based regulation. However, we do accept that all legal services regulators need to have a greater awareness of the limitations of the old-fashioned and simplistic regulation by title approach and a much greater willingness to employ a broader range of the tools of regulatory intervention that are available.

2.21

An example of the use of a broader range of regulatory interventions can be seen if we return to the issue of information asymmetry. There are, of course, a range of means of addressing the information gap. For example, by providing more information to the consumer so that they are aided to make more informed choices based on personal preferences. In legal services this might translate to providers having to display for potential consumers details of, say, professional indemnity insurance claims made, complaints registered, SDT action, accreditation, quality assurance measures, etc. Put pithily by John Vickers, when OFT Chairman, it is better "to inform, not curb, free contracting".

2.22

Another quotation from John Vickers puts the "information provision" issue into context.

"*In an ideal world freedom of contract—including caveat emptor—would be a good policy, but that is not the world that consumers live in. Information problems abound. Much consumer policy therefore seeks to inform and/or constrain the process of contracting—who can supply and how—and what may be supplied.*
While no-one could doubt the wisdom of banning quacks practising as doctors, or fraudulent adverts, there eventually comes a point beyond which constraining freedom of contract further brings costs that outweigh benefits. These costs, which consumers ultimately bear and which may be hidden from view, can stem from less choice and competition as well as the cost of regulation itself.
Indeed, the best solutions often involve better consumer information rather than less consumer and producer choice. But improving consumer information is often easier said than done, especially information that is of immediate and direct practical use..."

2.23

Regulatory requirements focused on the provision of information to consumers to correct information asymmetries have never played a major role in legal services regulation. In the future they need to as do other more modern regulatory approaches, such as compulsory activity-specific accreditation and reaccreditation.

2.24

In our view the issue is not, therefore, a choice between competition and regulation. We believe there is an overwhelmingly strong case for the regulation of legal services with the real issue being to ensure that the nature of the regulatory intervention is targeted, appropriate and proportionate through the use of the full range of regulatory tools. Targeted and proportionate intervention and regulatory best practice are, of course already statutory objectives for Approved Regulators under the LSA.

2.25

The second issue identified at paragraph 2.19 above is the extent to which there is already competition in the provision of legal services. There is good evidence that there is already very significant competition between solicitors, between barristers and between solicitors and barristers in the provision of advocacy services. The regulators put no artificial barriers on the number of individuals that may seek to qualify as solicitors or barristers. The last twenty years has seen a dramatic growth in the numbers of both and in the number of solicitor firms.

2.26

During this same period we have seen the prices being charged for, for example, the most commoditisable legal services such as conveyancing and wills reduce. A wide range of legal services, including these commoditisable items and areas such as legal aid are delivered at relatively modest cost - particularly when compared to the cost of many other professional services. Similarly there is very little difficulty for the majority of consumers in physically accessing services. Solicitors firms, in particular, have been able to drive down costs through investment in IT and a far greater use of standard systems and of paralegals.

2.27

In addition, on of the major barriers to competition within the legal services market - the restriction of higher court advocacy to barristers - was removed following the Courts and Legal Services Act 1990and there is now significant competition in, for example, criminal litigation, between barristers and solicitor advocates.

2.28

Indeed, some commentators (for example insurance companies and the Legal Services Commission/Ministry of Justice) have argued that an over-supply of providers has had the effect of "artificially" driving up the demand for legal services. The SRA does not share that view but it is interesting that some have that perspective.

2.29

Therefore in many respects the market does not display some of the characteristics that might be expected if it was over-regulated such that barriers to entry were significant and regulation was acting as a constraint on supply such as to drive up prices. How does this equate to the LSB's views on the primary need being to promote competition and this having been its mandate over the past three years?

2.30

It is arguable that the LSB's task has not been to simply promote competition but to enable new entrants to the market who will innovate and provide a *different type* of competition. Consumers and the market do not simply need the choice provided by more solicitors firms and barristers providing the same services in the same way, but new types of provider capable of providing new services, in different ways, driving a step change in cost and bundling legal services with other related services needed by

consumers. The successful implementation of Part V of the LSA and the imminent entry of Alternative Business Structures will enable the market to demonstrate whether this is what consumers have been seeking.

2.31

Aside from that, if we listen to consumers and examine, for example, the levels and types of complaints being made to the Ombudsman, it is arguable that what we need is not more competition but more effective regulatory interventions that address consumers' real problems with legal services: addressing information asymmetries through clearer more accessible information, driving up standards of customer service and customer communication, driving up standards of performance so services are delivered "right first time" and the occasions on which redress are needed are reduced, and cutting through the regulatory maze so that the services received and protections afforded are the same for the same service and not a matter of chance depending on whether the service provider is regulated or not.

2.32

In the third section of this paper we move on to address how some of these issues might be addressed.

A different approach to benefiting consumers?

3.1

In section 2 we have addressed the justification and objectives for regulation in the public interest with a particular emphasis on the issue of competition. In this section we return to the problems arising for consumers within the current system of regulation (set out in section 1) flowing from the limited and irrational scope of the reserved legal activities and the complex regulatory structure. These are

- a lack of clarity for consumers about which legal services are regulated and which are not against an underlying consumer expectation that all professional legal services will, in one way or another, be regulated;
- a lack of consistent consumer protection and redress not only between regulated and unregulated legal services but also between services regulated by different regulators;
- a lack of focus on quality, standards and ethical behaviour across all legal services leading to the risk of a failure to get things right first time for consumers and, therefore, an unnecessarily heavy reliance on redress;

increased regulatory cost in the system (which is ultimately borne by consumers) as a result of the multiplicity of regulators and level of resource required to manage the interactions between them.

To these we must add concerns about the effectiveness of the current regulatory requirements in addressing consumer concerns as identified at paragraph 2.31 above.

3.2

In this section we put forward an approach which we believe has the potential to address these problems, to the benefit of consumers, within the context of the issues addressed in section 2.

3.3

We are advocating a different approach to that proposed by the LSB in its paper. We do not consider that the approach advocated by the LSB will address the problems faced by consumers in this market or deliver them additional benefits. In our view it would, in fact, run the risk of making the current problems worse.

3.4

The LSB advocates a relatively strict activity by activity consideration of the reserved activities with a view to deciding, on a case by case basis, whether any new activities should be added to the list. In circumstances where it believes a new activity should be added, it would look for a tailored, proportionate regulatory intervention for that activity, and then authorise one or more of the current Approved Regulators to regulate the activity in accordance with the separate regulatory arrangements developed by each Approved Regulator.

3.5

Such an approach would do nothing to address the current problems for consumers and would simply compound them. An example of how this might add to the current regulatory maze for consumers can be identified by considering the position of will writing. At present this is not a reserved activity. Consumers can purchase the service from an unregulated will writer or from a solicitor. If purchased from a solicitor a consumer is purchasing a regulated service because the SRA regulates all legal activities provided by a regulated solicitors firm, whether the service is a reserved or an unreserved activity.

3.6

Under the LSB's proposed approach it is conceivable that the SRA would not be authorised to regulate a new reserved activity of will writing. This would mean that some solicitors' services would be regulated by the SRA and some (in this case will writing) by another regulator to a separate set of regulatory arrangements. Using the patchwork quilt analogy, the LSB is proposing that we add some new patches, rather than resolve the current patchwork into a more seamless item.

3.7

In addition we are concerned that this approach will do nothing to resolve the problems arising from the multiplicity of legal services regulators We are already seeing developments amongst some Approved Regulators to expand the scope of their regulation and create new overlaps with existing regulation. Commentators and others have consistently raised the issue of the LSA giving rise to the prospect of competition between Approved Regulators. The SRA believes that such a development will bring no benefit to consumers and is likely to make matters worse for them in three ways:

- by increasing confusion as to the regulatory protections afforded to them when they are purchasing a legal service as these will inevitably differ as between different regulators;
- not only increase confusion through overlap but increase the risk, in a complex overlapping system, of the creation of unintended regulatory gaps or blind spots creating new risks for consumers; and
- through the danger of a "race to the bottom" as regulators compete for regulated entities by lowering their regulatory requirements and reducing the scope of their authorisation, supervision and enforcement activities so as to be able to reduce regulatory fees.

3.8

In order to address all of the issues identified we propose two approaches:

- first, a move to regulating all legal activities; and
- second, a move back from the approach of increasing competition between Approved Regulators.

3.9

To achieve the first of these approaches it would be necessary to define "legal activity". This might be possible by taking the approach adopted in the Financial Services and Markets Act 2000 where, in Schedule 2, a very long list of specific financial services activities is identified. Essentially this would involve adding specific activities to the reserved legal activities currently set out in s.12(1) and Schedule 2 LSA. Alternatively, and in our

view a better approach would be to encompass the currently reserved legal activities as well as legal activity as defined in section 12(3)(b) of the LSA:

> *"(b) any other activity which consists of one or both of the following -*
>
> *(i) the provision of legal advice or assistance in connection with the application of the law or with any form of resolution of legal disputes;*
>
> *(ii) the provision of representation in connection with any matter concerning the application of the law or any form of resolution of legal disputes."*

3.10

In principle, this would bring within the scope of regulation, and therefore consumer protection, the entire range of currently unregulated legal services - e.g. the provision of employment advice by non-regulated employment service providers and will-writing service providers.

3.11

To achieve proportionality in accordance with the requirements of the Government's principles on better regulation such an approach could include provisions for exemptions/exclusions, for example, in the following types of circumstance:

- where another competent regulator exists. An example would be where an accountant provides tax advice which fell within the definition of legal activity that must be regulated. This activity is regulated, now, by the Institute of Chartered Accountants in England and Wales and the legal advice would either be encompassed within their regulation or, under a specific exemption (for example in the same way as solicitors are currently able to provide financial advice under the Part XX exemption provisions under FiSMA;
- where the provider is a practising member of a foreign regulated legal profession and the advice relates to the application of that jurisdictions' law; or
- where the activity is a necessary but subsidiary part of a main service which is not itself a legal activity that must be regulated. An example would be incidental advice on an employment contract provided by a recruitment agency to a job-seeker.

3.12

The regulation of all such activities would have to be undertaken within the objectives currently provided by the combination of ss.1 and 28 LSA which require regulators to take account of issues such as targeting and proportionality. The arrangements applied to any particular category of

activity should therefore be capable of being those necessary to address the relevant market failures without being disproportionate, reducing competition or increasing cost and barriers to entry.

3.13

A necessary part of this approach would be to ensure that the regulator, or regulators, was capable of deploying the full range of possible regulatory interventions appropriately including, for example, requiring the provision of consumer information. It should not be assumed that within this new approach regulators should continue to regulate in the way that they have historically done.

3.14

This leads to the issue of the multiplicity of regulators and the complexity of the regulatory structures. A move, as advocated above, to a broader more seamless scope for regulation would not deliver all of the potential benefits to consumers if there continued to be a multiplicity of regulators competing between each other.

3.15

We believe that a starting point that could be taken, within the current regulatory framework, would be for the LSB to have greater regard to the risks to consumers and increased regulatory cost arising from competition between regulators. This could mean only allowing any increase in the current overlap between regulators (by granting authority for an existing Approved Regulator to increase its range or regulation) where public interest benefit clearly outweighed the increased risks.

3.16

In considering this we should have regard to one other way in which the current regulatory system resembles a patchwork quilt. Regulation is not undertaken by all the Approved Regulators in the same way. There are three main ways in which legal services are regulated:

- entity regulation, undertaken, for example by the SRA and CLC but not, for example, by ILEX Professional Services or the Bar Standards Board
- regulation by title (or regulation by education/qualification) which has been the traditional approach and is part of all Approved regulators' approaches
- regulation by activity, e.g. across the complete range of legal activities as undertaken by the SRA, across a smaller subset such as the CLC, or across none.

3.17

There is no doubt that all three approaches have their place, deployed appropriately and proportionately, in a considered way to achieve an overall efficient system of regulation. However, currently this multiplicity of approaches (largely arising as an accident of history) might be considered to be contributing to the complexity and lack of clarity of the current regulatory system.

3.18

All of these factors in the SRA's point of view point to the urgent need for a wide debate on the scope of legal services regulation firmly focused upon consumer needs for clarity, choice, quality and protections, and on the need to ensure that the regulatory arrangements established by the LSA do not undermine those needs.

Summary

- 4.1

  We started this paper by welcoming the opening of this debate by the LSB. The fact that, in this paper, the SRA raises the possibility of a different approach does not detract from that welcome. At this stage we do not agree with the LSB's conclusions. We have started from a different place and reached a different view.

- 4.2

  We believe that the time is right for real engagement on the issue of how we should develop legal services regulation, in the public interest, over the medium to long term - not least so as to ensure that any shorter term decisions are consistent with the overall direction of travel. We recognise that, in this paper, we have raised some relatively fundamental issues that should challenge all organisations and individuals with an interest in this matter. We have done so deliberately and with a desire to engage with others in an open debate about the future.

Annex A - SRA's responses to questions in the LSB's discussion document

Q1: What are your views on the three themes that we have put at the core of our vision for the legal services market? If different, what themes do you believe should be at the core of our vision?

Our response:

We do not agree with the three themes that the LSB has put at the core of its vision for the legal services market. Our view, which we have set out in this paper, is that this takes too narrow a view of the factors relevant to the regulation of the legal services market. They are all relevant factors but should not be substituted for the broader range of factors set out through the combination of ss.1 and 28 LSA 2007.

We believe that there is an over-emphasis on "redress" at the expense of the use of the full range of regulatory tools to provide either an increased level of assurance that services will be provided "right first time" or to correct information asymmetries such that consumers can make better informed choices.

As explained in this paper, the SRA is a strong proponent of the role that competition must play in benefiting consumers. However, there is a risk that, by placing it as one of just three themes its role within this particular market can be over-emphasised and, potentially, emphasised in a way that increase problems for consumers. The characteristics of the legal services market (including the impact of poor services on individuals and institutions who are not the purchasers of those services) means that, in our view, competition of itself is unlikely ever to be the sole answer to ensuring that the legal services market operates fully in the public interest.

Q2: What is your opinion of our view that the purpose of regulation is to ensure appropriate protections and redress are in place and above this there are real competitive and cultural pressures for legal services to deliver the highest possible standards with a range of options for consumers at different prices? If different, what do you consider that the role of regulation should be?

Our response:

We disagree with this view. As set out in our response, the purpose of regulation in the legal services market is to ensure that the market failure, primarily arising from asymmetry of information, is corrected so as to ensure that the public interest is served, that consumers are protected and that third parties are appropriately protected where they are impacted by the activities of legal service providers. In addition, it is to ensure that issues that competition by itself would not address, for example obligations to the court, are addressed. Competition has a key role to play and the increasing emphasis on competition within the market operating to the benefit of consumers is welcomed and must continue to play an increasing role. However, as formulated in the question, the role that competition and cultural pressures can play is misstated.

Q3: In light of the changing market do you think that specific action may be needed to ensure that more legal

services activity can unequivocally be included within the remit of the Legal Ombudsman and, if so, how can this best be achieved?

Our response:

Consumers do need clarity and certainty concerning the protections available, including their routes to redress. Under the current arrangements they do not have this.

We consider that any arrangement for voluntary oversight by LeO could be contrary to the regulatory objectives since a voluntary, as opposed to mandatory/statutory regime, would be unlikely to be either in the interests of consumers, or in the wider public interest. If, however, a statutory regime is unavailable, a voluntary scheme is preferable to none.

We consider that a legal services market in which consumers (regardless of service provider) know that they have routes to proper redress, will also deliver benefits for the consumer in terms of quality, as well as in terms of public protections.

The proposed approach set out in this paper would enable an alignment (and clarity for consumers) between the comprehensive scope of legal services regulation and the scope of LeO's remit. This would be in the public interest and in the interests of consumers.

Q4: What are your views of our diagnosis of the weakness of the existing system and the problems within it?

Our response:

We have set out in our paper our analysis of the weakness of the existing system and the problems these weaknesses give rise to; particularly for consumers.

Q5: What do you see as the benefits and downsides of regulating through protected title such as solicitor and barrister?

Our response:

We have addressed the issue of regulation by title within the body of our paper. There are benefits to regulation by title, these can include:

- clarity to consumers as to the protections they can expect in terms of quality assurance, regulation and redress;
- clarity for consumers and others (e.g. opposing parties; the courts, etc) regarding the services which come within the scope of a regulator's reach;
- clarity regarding the existence of privilege;

- enhancement of the administration of justice through the court's inherent jurisdiction (i.e. solicitors are officers of the court).

The issue of the ongoing role of regulation by title within a reformed system of legal services regulation needs to be considered as part of a broader attempt to reduce the current regulatory maze. However, in taking forward this debate it is important to put the issue into its proper context.

Part of the SRA's role is to regulate by title. Historically this was its primary role but we are now well past that point. Regulation by title is only one aspect of the SRA's regulatory approach as that approach also encompasses the other two major approaches of regulation by entity and regulation by activity. We would argue that simple regulation by title is unlikely to meet the needs of consumers in the modern market for legal services, and is unlikely to enable the full benefits of an open and competitive market, but with appropriate protections, to be realised.

In addition, regulation solely by title does not provide a modern regulator with access to the full range of regulatory tools it requires to address, for example, failings in quality or standards within a particular category of business.

The SRA's approach, of combining the mechanisms of title/entity and activity enables proportionate approaches to be taken to address different risks to consumers. For example, within the broad "title" approach of authorising solicitors it is possible to identify a particular activity (be it, for example, advocacy or will-writing) that present particular risks and apply further regulatory tools to them.

Regulation solely by title may continue to have a place in a reformed structure, but possibly only to provide a recognisable qualification in a particular specialism, to provide services within entities regulated by other regulators with a broader approach.

Q6: What are you[r] views on whether there should be a consistent approach to the allocation of title to authorised persons? What are your views on whether the title should be linked directly to the activities that a person is authorised to undertake or linked to the principal approved regulator that authorises them?

Our response:

We have partially addressed this in our response to question 5. We believe there remains a place for regulation by title within a regulatory framework that also utilises the approaches of regulation by entity and activity.

We would not favour an approach which resulted in a multiplicity of regulators each regulating a narrow range of activities linked to a title that

permitted the individual to undertake that activity. Such an approach would increase the multiplicity of regulators focusing on narrow ranges of activities and increase overlaps and consumer confusion. It is important, in the public interest and in the interests of consumers that there remain readily recognised titles for legal service providers where the individuals and entities can deliver a broad range of legal services within a single coherent and readily understood regulatory framework. However, in order to ensure adequate public protection and proportionate regulation such regulators must be prepared to flex their requirements across those activities depending on the level of risk. As an example under the SRA's approach, we regulate all solicitors, but not all solicitors are authorised to undertake higher court advocacy. In future we might require the delivery by SRA regulated activities by solicitors firms to be the subject of positive permissions dependent on meeting certain regulatory requirements.

Q7: What are your views on our proposal that areas should be examined "case-by-case", using will-writing as a live case study rather than through a general recasting of the boundaries of regulation? If you disagree, what form should a more general approach take?

Our response:

For the reasons set out in the paper we disagree with the proposed approach as it will not address the current problems and runs a significant risk of compounding them. We believe that the time is now right for a broader examination and a different approach.

Q8: What are you[r] views on our proposed stages for assessing if regulation is needed, and if it is, what regulatory interventions are required?

Our response:

We disagree with this approach—see our response to question 7 and our comments in the paper.

Q9: What are your views on the implications of our approach for professional privilege?

Our response:

We consider that there should be clarity for consumers (and others) as to when clients have the benefit of professional privilege. This the key outcome to be achieved.

Q10: Do you believe that any of the current reserved legal activities are in need of urgent review? If so, which activities do you think should [be] reviewed and why?

Our response:

We believe that the artificial distinction between reserved and unreserved legal activities should be removed and replaced by a simple requirement that legal activities must be regulated.

Q11: What are your views on our analysis of the regulatory menu and how it can be used?

Our response:

We agree with the range of approaches identified in the regulatory menu and with much of the analysis.

If we are to ensure that regulation delivers in the public interest and in the interests of consumers, regulators must act robustly and independently in the public interest and make a much greater targeted use of the full range of regulatory interventions. In order to ensure proportionality and to allow the role of competition to operate as fully as possible to deliver consumer benefits these interventions should be the minimum necessary to correct the underlying market failure in favour of the consumer or to achieve one of the wider public interest objectives.

In the past, legal services regulation has not always achieved this: almost certainly under-regulating in some areas and under-regulating in others to the disadvantage (in both cases) of the consumer and the public interest.

This has arisen both because of a lack of real regulatory independence, insufficient focus on the public and consumer interests and because of a limited and old-fashioned approach to regulation. It is to correct this final issue that greater imagination about the use of the full range of possible regulatory interventions will have the greatest benefit.

Q12: Do you have any comments on our thoughts on other areas that might be reviewed in the period 2012-15, including proposed additions or deletions, and suggestions on relative priority?

Our response:

We agree that all areas mentioned should be reviewed, but in the context of the broader approach to reform we advocate in this paper.

Q13: Do you have any comments on the approach that we have adopted for reviewing the regulation of will-writing, probate and estate administration?

Our response:

We believe that there is a strong case, in the public interest, for all consumers of will-writing and estate administration services to benefit from

appropriate protections. We believe that the best way to achieve this outcome is bring these services, along with all other legal services, within the scope of regulation. However, we recognise that the fundamental reforms we propose in this paper may take some time to develop and deliver and that there is a more pressing need to address the issue of will-writing in the very near future. Given this, our view is that there might be a case for bringing will-writing within the scope of regulation ahead of wider changes. If this is to be done, it must be done in a way that is consistent with the longer term reforms advocated in this paper. Therefore we would not support the approach proposed by the LSB for reasons we have set out. The majority of will-writing is already undertaken by regulated solicitors firms. Therefore, one approach would be to invite the SRA to develop arrangements, specifically tailored for will-writing, and proportionate to the risks, to apply to both existing regulated firms and to currently unregulated non-solicitor will-writers.