



**LSB Consultation Paper
on Enhancing Consumer Protection,
Reducing Regulatory Restrictions**
The CLC's response
November 2011

The CLC's response to the LSB's Consultation Paper on Enhancing Consumer Protection, Reducing Regulatory Restrictions

Introduction

1. The Council for Licensed Conveyancers (the CLC) was established under the provisions of the Administration of Justice Act 1985 as the Regulatory Body for the profession of Licensed Conveyancers. As set out at section 28 of the Legal Services Act 2007 the CLC must, so far as is reasonably practicable, act in a way -
 - (a) which is compatible with the regulatory objectives (set out at section 1 of the Legal Services Act 2007), and
 - (b) which it considers most appropriate for the purpose of meeting those objectives.

2. Further, the CLC must have regard to -
 - (a) the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed, and
 - (b) any other principle under which regulatory activities appearing to it to represent the best regulatory practice.

The purpose of the CLC

3. To safeguard the public interest and consumers by regulating providers to deliver high quality and accessible legal services.

Consultation

4. The CLC welcomes the opportunity to respond to the LSB's discussion paper on Enhancing Consumer Protection, Reducing Regulatory Restrictions.

Reservation

5. We agree that there is no justification consistent with the regulatory objectives for continuing the current system of reservation of legal services to particular sectors of the profession. We welcome the LSB's proposals to set a clear vision to determine the pattern for its approach to regulating the delivery of legal services fit for the 21st century.

Discussion Questions

Question 1 - What are your views on the 3 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?

6. Theme 1 - *'Consumer protection and redress should be appropriate for the particular market'*. The Theme assumes the sub markets in legal services are homogenous. As the LSB's Research Note (published in August 2011) acknowledged, legal services is a highly segmented market. Whilst the residential conveyancing market ultimately supplies legal services to the individual consumer, large elements of it consist of business to business, as well as business to consumer, delivery. We believe that the Theme should be expanded so that it reads "Consumer protection and redress should be appropriate for the particular market and the nature of the client/provider relationship".
7. We are also concerned that markets have been, and will continue, to be defined by supplier rather than by consumer need. For illustration, the wills market review has been defined by providers but could, and arguably should, be redefined by closer alignment with consumer needs.
8. Consumer protection is only one of the regulatory objectives. Identifying a particular regulatory objective as a separate Theme creates the risk that it will assume a priority which was not intended by Parliament. As the LSB stated in its paper on Regulatory Objectives

The regulatory objectives are not set out in any hierarchy in the Act. Indeed, any attempt to weight or rank them would be doomed to failure by the significant overlap and interplay between them¹.
9. Theme 2 - *'Regulatory obligations should be at the minimum level to deliver the regulatory objectives'*. We agree that the level/method of regulation applied in each instance should be proportionate to the risk the activity poses to the regulatory objectives. To reflect that aspiration more closely, we believe that the word 'minimum' in formulation of the Theme should be replaced by 'appropriate'.
10. We agree that where regulation is applied, the responsibilities it confers are set at an appropriate threshold; the purpose, or unintended consequence, of regulation must not be to stifle innovation. An outcome of regulation should be a market where people and entities have choice and can buy or invest and innovate with trust and confidence.

¹ Published July 2010 at http://www.legalservicesboard.org.uk/news_publications/publications/pdf/regulatory_objectives.pdf

11. Theme 3 - *'Regulation should live up to the better regulation principles in practice'* – the BRPs are tests of good regulation and whilst we broadly agree this Theme, we believe it should be re-worded to read *'Regulation should demonstrate the better regulation principles in practice'*. We observe that it is comparatively straightforward to take into account the Better Regulation Principles (BRPs) – of accountability, consistency, proportionality, targeted, transparency in determining the structure of regulatory arrangements. It is more challenging, but equally important, to ensure that the way in which compliance with the regulatory objectives is monitored and enforced should also take account of the BRPs.

Question 2 - 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 the role of regulation should be?

12. We agree that real competitive and cultural pressures should play an important role in securing delivery of high standards on the foundation of appropriate protections and redress. However such outcomes would only be realised if statutory regulation allows a level playing field to operate for all legal services providers. This playing field should include all regulated entities/individuals being perceived as having the same status, irrespective of the body which regulates them (given that all regulatory regimes and the bodies operating them should be/have been subject to LSB assessment and approval).
13. The theory of competition driving up standards would only become a reality if conditions are created which enable both the supply side and demand side to operate effectively. Maximising the demand side of the competition equation is dependent upon appropriate consumer education, awareness and understanding, enabling informed choices to be made, competitive opportunities to be taken advantage of, and appropriate consumer protection to be recognised and delivered, and redress accessed.

Question 3 – 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?

14. Whilst there may be superficial attractions in extending the remit of the Legal Ombudsman, we believe that no decision should be made until the fundamental issues raised by the Discussion Document have been determined. In addition, the likely expansion of the remit of the Ombudsman must be correlated with the introduction of new statutory consumer protection for a particular legal activity.

15. The rationale for extending the remit of the Ombudsman must be consistent with the totality of the regulatory objectives in the Act because the current remit is based on redress for services provided by Authorised Persons. To depart from that premise by extending the remit, then a new framework must be in place for services provided by non authorised persons. We suggest that considerations which will need to be taken into account in determining whether to extend the remit of the Legal Ombudsman include:
- whether current detriment has been identified;
 - identifying the most appropriate and proportionate way of addressing any detriment;
 - if the Legal Ombudsman remit is to be extended, whether the current tools for enforcing any award (in particular enforcement as an order of the court) are effective;
 - determining the most appropriate mechanism for recouping the additional costs incurred by the Legal Ombudsman in exercising an extended remit (with the exception of the case fees which we understand are unlikely to amount to more than 5% of its revenue, the Legal Ombudsman's costs are met by a levy on Approved Regulators in proportion to the complaints their respective regulated communities have generated to the Legal Ombudsman).

Question 4 – What are your views of our diagnosis of the weakness of the existing system and the problems with it?

16. We agree that legal services regulation has developed inconsistently with no overarching policy determining which activities are reserved, which professionals are regulated (and the nature of that regulation) and which activities should be non-reserved. We accept that it is not reasonable to expect the consumer to be aware of these distinctions and that the consumer is likely to make incorrect assumptions as to the level of regulation and redress.
17. However some of the arguments presented to support the diagnosis of the weaknesses appear to exaggerate the problems. For example in Para 93, the two options presented are clearly hypothetical as regulators are already moving away from a rule book. Likewise in Para 94, the issue of what is and is not reserved does not seem to have an equal impact as the shape of the regulatory arrangements adopted by approved regulators.

Question 5 – What do you see as the benefits and downsides of regulating through protected title such as solicitor and barrister?

18. Although we have no objection to the retention of such protected titles, we believe that the provision of legal services should be regulated by activity and that each Approved Regulator should endorse licences with (and also record on their public registers) the reserved and non-reserved legal activities the

authorised persons/entities they regulate are permitted to carry out. This is the approach which the CLC has introduced with effect from 6 October 2011 when its outcomes focused and principles-based approach came into force.

19. We believe that the major benefit of the protected title is the competitive advantage it confers on the individual who holds it, rather than it being a mark of quality in itself because it creates a high barrier to entry for new providers. Given the breadth of legal services and the increasing need for specialisation, we are concerned it puts consumers and the public interest unnecessarily at risk, should the holder of a protected title on qualification be authorised to provide a wide range of legal services without demonstrating the competence to do so in the consumer interest.

Question 6 - What are your 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?

20. See response at paragraphs 18 and 19 above. We believe individuals/entities should be regulated by activity, rather than by title.

Question 7 – 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?

21. The proposed case by case review appears at odds with the explanation set out in the discussion paper for the current fragmented arrangements. Adopting the live case by case approach will only add another layer on the current fragmented arrangements albeit with a rational basis for additional regulation. A case by case approach does not lead to a coherent framework; neither does it enable the inherent anomalies in the existing arrangements to be properly addressed, nor will the expectations that competitive pressures lead to higher consumer benefits be realised.
22. As mentioned earlier, effective competition in the legal services markets requires consumer education. The current fragmented reservation/non-reservation arrangements potentially disempower and confuse consumers. Adding new reserved activities without a comprehensive review of what is already in place is likely to increase consumer confusion and make consumer education even more challenging.
23. We consider the review should start with general legal advice, since a conclusion that that should become a reserved legal activity is likely to make an examination of specific areas unnecessary, or at least easier to determine. Such a review is also likely to make it easier to identify the issues to be

determined in deciding whether there needs to be a general recasting of the boundaries of regulation.

Question 8 - What are your views on our proposed stages for assessing if regulation is needed, and if it is, what regulatory interventions are required?

24. Should the case by case review be adopted, we agree the LSB's proposed assessment stages:

- Identification of the area of legal services for review
- Identification of issues
- Compilation and analysis of further evidence
- Analysing existing mechanisms and non-statutory interventions
- Option appraisal
- Identifying impacts
- Recommend reservation
- Optimum standards
- Application from potential Approved Regulators.

Question 9 - What are your views on the implications of our approach for professional privilege?

25. We believe that professional privilege should be determined by activity and not by individual. On this basis, tax advice should be subject to professional privilege whether it is provided by a solicitor or by an accountant.

Question 10 - 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?

26. We believe that all the current reserved legal activities should be reviewed to ensure they are fit for purpose. We are not aware of any evidence which suggests consumer detriment that justifies an urgent review.

Question 11 - What are your views on our analysis of the regulatory menu and how it can be used?

27. We agree the analysis that the level of regulation should be proportionate to the perceived risk and targeted at outcomes, rather than inputs or activity. The challenge will come in testing the nature and scale of *potential* harm, as opposed to identified actual detriment. Where a significant risk is identified a timely and joined up response must be implemented to prevent further unnecessary harm.

Question 12 - Do you have any comments on our thoughts on other areas that might be reviewed in the period 2012-2015, including proposed additions or deletions, and suggestions on relative priority?

28. Should the LSB continue with the case-by-case approach it has already adopted, we consider that the priorities for review should be as follows:
- a) Special Bodies – given that the CLC has licensed the first Alternative Business Structure, a review of Special Bodies should be a priority in order that a date can be fixed to bring the transitional arrangements to an end.
 - b) General legal advice – as set out at paragraph 23 above, we consider that general legal advice should be the first area for review.
 - c) Immigration – we agree it is important for the LSB to understand the market, the risks to consumers and the different regulatory protections, particularly in the light of the disparities which have been identified.
 - d) Will drafting and Reserved Instrument Activities – we agree that both these areas should be reviewed.
 - e) Corporate law – we do not consider that this area is a priority area for review.

Question 13. Do you have any comments on the approach that we have adopted for reviewing the regulation of will-writing, probate and estate administration?

29. We consider it is premature to review the regulation of will writing, probate and estate administration until after a review has been undertaken of general legal advice. We have no comments on the proposed approach.