

Risk and the role of regulation



Research report prepared for the Legal Services Consumer Panel
by Vanilla Research, January 2013

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1. Summary

Consumers have minimal knowledge of existing consumer protections

As might be expected, there is little actual knowledge about the various protections that are currently in place for legal services consumers. Nearly everyone assumes *something* is in place, but few can describe what this something is, other than some general references to ‘an Ombudsman’. The assumption is a reasoned one in consumers’ minds – being a solicitor is a ‘profession’, with standards, and so they feel confident there is some kind of consumer protection in place.

But regulation does not always equate to effective protection

In spite of widespread assumptions that some form of consumer protection does exist, in practice many consumers feel less than fully protected in terms of using solicitors (and in most cases, consumers in the groups equated legal service providers with solicitors). In comparison to other sectors they feel more protected than when shopping online, but less protected than for savings accounts. Views are far from homogenous though – some (often older, 55+ consumers) feel relatively unprotected in practice (a function of poor experiences in the past), while others have much more faith in the ‘professional’ nature of the sector and the effectiveness of regulatory protections, with the remainder feeling somewhere in-between.

There is no evidence in the research though of any disengagement from the decision-making process

There is little in the research to suggest that consumers are making ‘lazy’ choices in legal services provider. We saw little detailed knowledge of what protections were in place, the extent of them, or how in practice they could help ‘rescue’ consumers. With little knowledge or detailed awareness around, it was unlikely that consumers were factoring such information into their choice of provider. However, consumers saw the circumstances under which they would need regulatory intervention as a far from satisfactory situation to be in – the costs in terms of time and stress accompanying such an experience means they invest time in selecting a lawyer.

In light of this lack of awareness, existing protections are generally viewed positively

When the main protections are presented to consumers (i.e. the SRA’s compensation fund, the Legal Ombudsman’s powers around customer service, and the compulsory Professional Indemnity Insurance), they consistently take reassurance from them. These positive feelings are only amplified by the associated costs of around 1% - 2% of fees – consumers almost universally see them as minimal, and there is little resentment that they are passed onto customers. They are generally seen as striking a good balance, and relatively few felt they should either be strengthened (at greater cost), or weakened (with potential savings and wider notional choice).

Although consumers generally took plenty of reassurance from the existing consumer protection schemes, a contradiction exists: the risks consumers are most worried about when dealing with legal services are not thought to be covered by these current protections (for example inexorably rising costs), and two of the main risks that *are* covered (fraud and bankruptcy) are not something consumers consider.

Consumers also cited four main reservations when faced with details of the current protections:

- A feeling that such protections were fine in principle, but would they be delivered in practice? Would the Ombudsman have teeth? Would Professional Indemnity Insurance pay out if needed, or would small print invalidate claims?
- A sense that the vast majority of Legal Ombudsman payouts being of less than £250 meant there would be a mismatch between the effort required to make a claim, and the potential reward for doing so.
- The belief that the route of suing a solicitor for negligence would be a costly one, with no guarantee that such costs would be recouped
- A view that consumers should know about such schemes, and that solicitors should make more effort to make customers aware of them.

None of this though makes consumers wish for a shift in responsibility for risk

Few if any consumers – even those who are more accepting of risk generally – were happy at the thought of existing levels of compulsory protection being taken away. There is a view that legal services are different to other sectors (it's a profession, dealing with the law, and life-changing events), and that there *should* be sector-wide protections in place. Similarly there is a consistent level of resistance at the idea that protections could be strengthened with the results of increased fees for all. 'Why should we pay more to protect us against their mistakes?'

They might not have an objective justification of the precise current balance, but neither do they want to see it changed.

Consumers rejected the option of taking risk on themselves

When a scenario was described where sector-wide, regulatory protection was loosened and consumers were able to manage their own risks and choose whether to take on risks themselves (and this scenario was presented as a *fait accompli*), participants in the groups consistently looked to find an option where they were still insured against key risks – essentially reverting back to the (implicit) status quo of choosing firms that offered professional indemnity insurance, albeit at higher cost.

But the idea of purchasing their own insurance is strongly resisted

However, when this suggestion that compulsory sector-wide protections could be lessened and instead consumers choose their own insurance measures (or not) is put to them as a *possibility*, the idea is roundly rejected.

- The belief is that it would inevitably be more costly (in a world of PPI mis-selling, and corporate mistrust, the assumption is that consumers would not get value for money from such insurance, especially in light of the current costs of 1% - 2%).
- There were also worries about how 'independent' insurers would be in assessing claims.
- In practice it was felt it would be unlikely to widen choice, on the basis that most consumers would avoid firms that transparently did not offer insurance cover.

- Most prominently, there is little confidence that consumers would feel able to make informed decisions around which policy is right for them. Consumers don't feel on an equal footing with solicitors in the first place - having to take on responsibility for insuring against risk (with all the attendant small print) would tilt the balance even further against them. This is further complicated by the worry that consumers wouldn't actually know what they were buying (in terms of risks they were insuring against, or the level of cover needed).

In reality, if protections were taken away, some would inevitably buy insurance – but some wouldn't

When consumers were faced with the idea of sector-wide protections taken away as a fait accompli, many said they would look for solicitors that offered protection or insurance as part of the service, but with an assumption that most firms would, as there would be public suspicion of solicitors that didn't offer protections. The expectation was that they would probably end up choosing the same solicitors as before, just at a higher cost. However, responses to the example of Home Owner Protection Policies (HOPPs), suggested in reality take-up of insurance cover would be less than universal. In response to HOPPs, many said their interest in its extra layer of protection would depend on the property they were buying – no if it was a new-build flat in the town centre, yes if it was an old house with land attached.

We would expect some of this level of discrimination to apply more generally in a hypothetical world of risks sitting with the consumer – either through some consumers actively choosing not to pay for cover in limited circumstances (e.g. for a simple solicitor's letter, or possibly a small personal injury claim), or simply neglecting to ensure it was in place before engaging someone. Arguably though, consumers anticipate they would be unable to make fully informed choices around the appropriate shouldering of risks, and would simply revert to what their solicitor suggested or offered – they see the issue as more likely to result in a transfer of costs onto the consumer, than a transfer of risk.

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2. Research Background

The Consumer Panel is an independent arm of the Legal Services Board (LSB), created to provide high quality, evidenced - based advice to the LSB and others on the consumer interest in the regulation of legal services. The LSB has been set up to reform and modernise the legal services market place in the interests of consumers, enhancing quality, ensuring value for money and improving access to justice across England and Wales. The LSB will achieve this pursuing its regulatory objectives and providing regulatory oversight for the eight approved frontline regulators¹.

Aims of the research

The Coalition Government has expressed a desire for people to take more responsibility for decisions affecting their lives, based on a concern that there is an over reliance on government to manage all risks. This is seen to lead to too much regulation, undermining of trust and a lack of resilience in communities. At its most extreme this may be said to lead to a so-called compensation culture, one example of which is in health and safety, where there is now a wish to rebalance risk from a desire to eliminate all risk towards a more balanced common-sense approach. A review of the operation of health and safety laws in the UK has recently been undertaken by Lord Young.

In legal services, as in other markets, there is debate about the appropriate balance of responsibility between consumers and providers. The starting point is the principle of *caveat emptor* (buyer beware) and a recognition that markets will not work effectively if consumers take no involvement in the decisions they make. Furthermore, an absence of risk can lead to disengagement from the decision-making process, resulting in moral hazard for consumers who then do not feel the need to make informed choices.

On the other hand, people lack expertise and experience in dealing with legal matters, while some legal transactions are high-risk, having consequences for their liberty, finances and personal relationships. This makes it incumbent on regulators to be realistic as to the risks that consumers can reasonably be expected to both understand and manage whilst at the same time seeking to improve legal capability and ensure fair market behaviour by providers.

In the legal services marketplace consumers may be at risk of losing sometimes substantial sums of money due to fraud, dishonesty, negligence/poor advice, or insolvency of legal practitioners. There are currently various financial protection measures in place, including the Legal Ombudsman, which can make awards of up to £30,000². Arrangements such as professional indemnity insurance for solicitors, barristers and licensed conveyancers (amongst others) exist as a backstop for when things do go wrong. Furthermore, consumers may also be able to seek redress through compensation funds, which are generally funded through levies on the professions.

¹ The Law Society, General Council of the Bar, Council for Licensed Conveyancers, The Chartered Institute of Legal Executives, The Chartered Institute of Patent Attorneys, The Institute of Trade Mark Attorneys, Association of Law Costs Draftsmen, Master of the Faculties.

² Note that since the focus groups were carried out the Legal Ombudsman award limit has changed and is now £50,000.

The LSB and LSCP are interested in the division of risk and responsibility between consumers and businesses in the legal services market. The research will be used as part of a wider LSCP project, which aims to address the question of whether the financial protection arrangements in place in the legal services marketplace are fit for purpose. Ultimately the research should answer the question of what is considered an acceptable level of risk for consumers of legal services to take on.

Research approach

In total twelve group discussions were carried out, with 6-8 participants per group.

The groups were held with people who had personal experience of using legal services within the past two years. Although the majority of experiences focused on conveyancing, will-writing or divorce/separation - the three most common reasons for consumers to use solicitors - some participants referred to other experiences, such as personal injury claims, unfair dismissal and even blackmail and terrorism charges. Two groups (one in Oxford and one in Cardiff) were held with participants who had relatively low literacy levels – a potentially vulnerable group of consumers that were of particular interest given the context of the research. Participants in these two groups did not necessarily have any recent experience of using legal services (although a number of them did).

Groups were structured to include a range of age and socio-economic groups (SEG), as well as whether respondents considered themselves more risk-accepting or risk-averse in the context of overall consumer behaviour³. Groups were held between 1 – 19 November 2012. Each group was mixed gender, and lasted around 1½ hours.

Location	Socio-economic group (SEG)	Age	Attitude to risk as a consumer
London	ABC1	18-34	More averse
London	C2DE	55+	Accepting
Oxfordshire	ABC1	35-54	More averse
Oxfordshire (low literacy)	n/a	35-54	n/a
Exeter	ABC1	18-34	Accepting
Exeter	C2DE	55+	More averse
Manchester	ABC1	55+	More averse
Manchester	C2DE	35-54	Accepting
Birmingham	C2DE	18-34	Accepting
Birmingham	C2DE	35-54	More averse
Cardiff	ABC1	35-54	Accepting

³ Details of this recruitment criteria are included in the appendices.

Cardiff (low literacy)	n/a	18-34	n/a
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Main Findings

3. Perceptions around existing protections

Consumers are used to managing their own risks

Throughout the groups consumers offered numerous examples of purchases that involve a degree of risk, with the most commonly cited being used cars, holidays, insurance contracts and online purchases. The risks for each were widely accepted – a used car could prove to be a lemon, the holiday hotel could fall short of expectations or the tour company go bust, the insurance contract could fail to offer the expected cover, and online purchases could fail to come through, come through with defects, or expose the consumer to fraud.

In such a consumer environment (and there were many other examples offered), people are used to taking a number of steps to try to minimise any risk:

- Deal with companies they trust – either through personal recommendations or previous experience;
- Deal with big name brands – partly because of the trust this engenders, but also because they are often seen to be responsive to customer complaints;
- Transfer the risk - in the case of online purchases by paying by credit card, or via Paypal, or for instance by buying a car on a lease agreement;
- In limited cases, rely on consumer regulation - primarily the ATOL scheme for package holidays.

Insurance was an interesting example, in that it both resolved and caused risk. For some insurance offered the chance to minimise risk, for instance by insuring against mobile phone theft, or taking out travel insurance to mitigate flight disruption. At the same time though insurance was often seen as the source of risk, a result of widespread cynicism surrounding 'small print', and a belief that insurance companies try to avoid payouts as often as they agree to them.

"Phone insurance – there's a lot of clauses. As soon as you lose your phone it's 'you're not covered for this, you're not covered for that'." Cardiff, 18-34, low literacy groups

There was some recognition of underlying consumer protections in terms of things such as the Sale of Goods Act, the Data Protection Act, Ombudsmen and Trading Standards. In many cases of complaint the initial reaction was simply to take it up with the seller, and demand the problem be resolved. Notably this course of action was just as apparent in the low-literacy groups. They might arguably be vulnerable in some transactions that are heavy on printed detail, but in other cases they are no less confident consumers.

"I just speak to the manager first and if you can't get no joy from them, they're legally bound to give the head office address." Oxfordshire, 35-54, low literacy groups

Regulation is seen as a force for good, but more at an overview level

There were of course some negative references in the groups to regulation as bureaucracy, paperwork and red tape, but the more common associations were with regulating markets, maintaining standards, and keeping companies on the straight and narrow. It was this broader or macro side of regulation that was more prominent, rather than a more micro or personal interpretation of protecting individual transactions through schemes such as ATOL, or the Financial Services Compensation Scheme (FSCS).

Even in light of this interpretation, regulation was seen in a relatively positive light - monitoring companies and working in the interests of consumers. When the costs of such schemes were highlighted (e.g. banks funding the FSCS and passing the costs onto consumers), consumers saw them as justifiable – the protections they offered were valuable, they generally accepted that all business costs were passed onto consumers, and this was no different.

"De-regulation is the Wild West, basically." Manchester, 55+, risk averse

"On the whole I'd rather pay a little bit extra in order to not get shafted later on." London, 18-34, risk averse

There is minimal knowledge of existing legal protections

Whether looked at by age, legal services experience, or location, there was little or no detailed knowledge of the specific protections offered to legal services consumers. Most participants assumed there was 'something', and there were many references to 'some kind of Ombudsman', but this fell far short of knowledge of what was in place, and what it protected against.

"I would have thought it was quite a protected industry but I don't know that as a fact." Birmingham, 18-34, risk accepters

"Naively I just assumed there was something there, and that I'd never have to use them." London, 18-34, risk averse

It should at the same time be noted that all the participants (with the exception of some of the low-literacy participants) had recent experience of using legal services, and some had substantial experience built up over decades. Despite this level of exposure to dealing with the sector, no-one could recall having the various protections explained to them.

The general belief that consumers were offered some form of regulatory protection stemmed from the view that solicitors (and in the groups 'legal service providers' was effectively interpreted as 'solicitors') were part of a 'profession', had 'standards and qualifications', were part of 'the law', and so like Doctors and Policemen would be accountable to some kind of framework through which consumers could seek redress.

This general low level of awareness was also illustrated when participants were asked to say either what they *would* do if they were unhappy with their solicitor, or what they *had done* if they had direct experience of this. The suggestions were so varied as to suggest the public don't have one, accepted, appropriate approach:

- Go to the Ombudsman;
- Do nothing as it's not worth the hassle;
- Approach another solicitor, but more in terms of getting better advice for the original problem than suing the original solicitor;
- Complain to a more senior partner in the firm;
- Go to the Law Society;
- Go to Citizens Advice;
- Go to your MP;
- Go to Trading Standards.

Regulation doesn't always equate to protection

Although it was evident that most consumers in the groups assumed there was some form of regulatory consumer protection, this did not always translate to consumers feeling adequately protected in practice. In the course of the groups we asked participants to mark on a scale how protected or safe they felt as consumers in each of three sectors – savings accounts, internet shopping, and solicitors (the scale ranged from 'totally protected/safe' to 'totally unprotected/risky').

Partly no doubt a function of the earlier discussions around the Financial Services Compensation Scheme, the vast majority of consumers felt 'protected' in terms of savings accounts. In contrast, confidence was a lot lower in terms of internet shopping – the younger 18-34 year olds tended to feel safe and protected, but the majority of participants marked themselves around the middle or to the 'unprotected' end of the scale. Solicitors engendered more varied reviews. Some participants took comfort from the training and qualifications associated with the 'profession', 'assumed' regulation would protect them in practice as well as in principle, and felt safe when dealing with legal services. Others took the opposite view, had had poor experiences dealing with solicitors before and thought that even if there were organisations such as an Ombudsman, in practice it didn't mean consumers didn't face significant risks. Some (unsurprisingly) took a middle ground approach.

Interestingly there was some sense that confidence in consumer protection tended to be lower in the older, 55+, age groups. In all three groups – which covered both C2DE and ABC1 socio-economic segments - individuals tended to mark themselves as feeling less than protected, a function of their cynicism around the extent to which solicitors always work in the customer's interest, and the extent to which the regulators can effectively step in to remedy the situation if things have gone wrong. This might partly have been a function of there being some 'grumpy old men' in the groups, but was perhaps more due to their having accumulated greater experience over the years of dealing with legal services, and therefore greater exposure to negative experiences (which often stick in the mind more firmly than positive experiences).

It was also apparent that the sense of being protected as a consumer was mixed among the low-literacy groups. While some trusted legal services, others felt more vulnerable. This was partly based on poor recent experiences of using solicitors without really understanding what was going on, with one participant feeling they had been 'led up the garden path' for a personal injury claim.

There is no evidence in the research of disengagement from the decision-making process

It has been hypothesised by some that consumers' belief in regulations protecting them from risk may result in a disengagement from the decision-making process, and a form of moral hazard, stemming from consumers seeing little need to make informed decisions (on the basis that regulators will come to their aid if necessary). There was no evidence of this in the research.

Although many consumers would admit to making less than fully-informed decisions on which legal service providers to use, it was not seen to be a result of laziness or moral hazard, but more because consumers simply found it difficult to find the right information on which to make informed decisions. This is particularly so given the degree of *expert* knowledge that would be required to assess the risks of negligence, fraud or insolvency. The finding that without the current mandatory scheme consumers would expect solicitors to prominently mark the fact they are covered by regulatory protections or not indicates that they are aware of risks (in a general sense) and of the fact that they would want to rely on credible signals that those risks are comprehensively covered, rather than having to assess them at the individual level.

Consequently consumers relied primarily on recommendations or previous personal experience, location, or used the Yellow Pages or the Internet if they were looking for a more specialist firm (e.g. employment law) – often in the hope that this would *increase the likelihood* of receiving good quality advice and service, rather than the expectation that it would *ensure* it.

The belief that there was some form of regulation or protection in place for consumers was seen to have little impact on the effort they put into this choice - encountering problems where regulation could be invoked was far from an appealing prospect. Consumers were well aware of the costs in terms of time and stress that would no doubt accompany such an unsatisfactory experience, as well as those which would be required to obtain redress, so they do invest time selecting a lawyer.

Firms were chosen with the aim of *avoiding* such problems, and although the assumption was that if things went sufficiently awry there would be some consumer protection, it would be unlikely to compensate fully for the personal stress, financial loss and overall experience of solicitors' failings. A washing machine breaking and being replaced was seen to be a far cry from an unfavourable divorce settlement or a house purchase falling through.

There is limited differentiation between types of legal service provider

Throughout the research we looked to see if consumers' views or expectations differed between say solicitors and licensed conveyancers, or between solicitors and will-writers. Unfortunately we were unable to unearth any findings of substance, since there were such low sensitivities to the differences. Many - including some of those who in all likelihood had used them - were unaware there were such things as licensed conveyancers, and others who had heard of them just assumed they were similar to solicitors in terms of (albeit more narrow) qualifications and protections.

Similarly there was limited knowledge about (unlicensed) will-writers, with some participants thinking they were just solicitors who specialised in wills.

The end result was that in terms of perceptions around risk and regulation, participants had little to say about the nuances between different legal service providers, other than a handful of comments that perhaps regulations around will-writers might not be as strong as around solicitors.

“People don’t trust will-writers so much as you hear so many bad things about them.” London, 18-34, risk averse

Set against low awareness, existing protections are viewed positively

The majority view across consumers, when shown the detail of existing consumer protections in the legal services market, was that they offer a welcome level of protection.

The detail of what was shared with participants is included in the appendices to this report, but a summary is as follows:

- Solicitors Professional Indemnity Insurance (PII);
- The Solicitors Regulation Authority compensation fund for a solicitor going out of business or defrauding its customers;
- The Legal Ombudsman awards with regard to unsatisfactory customer service from a solicitor;
- These protections are funded by solicitors and the costs are then passed onto customers through the fees we pay when using a solicitor. Economic research has suggested the amount passed onto consumers due to PII probably means fees are increased by around 1% - 2%, so around £5 - £10 for buying a house/flat, maybe £2 - £3 for will-writing⁴.

The protections were viewed positively, gave consumers added reassurance that they could enter the market with a degree of protection, and were generally seen to add positive flesh to the bones of their earlier assumptions.

Importantly, they were seen to offer good value for money in that the costs were seen as minimal.

“We’re actually paying for it every time we use a solicitor, but it’s good to know that it’s going into a pot to protect you.” Birmingham, 18-34, risk accepter

Although £10 is arguably not a minimal amount, it was generally seen to be in the context of both overall legal costs, and the issues at stake (e.g. a house purchase or will-writing). 1% - 2% was not seen to be a significant price to pay for this level of protection and reassurance.

If anything, the benefit was less in the detail, and more in the overall reassurance that *someone* was on their side. As we describe in more detail later in the report, consumers feel vulnerable in the legal service market, and have much less confidence than they do for instance dealing with the major supermarkets, or when buying white goods. Whereas in the latter examples consumers would often feel

⁴ Review of SRA client financial protection arrangements, Charles River Associates, September 2010, prepared for the Solicitors Regulation Authority.

confident taking issues up directly with the company and ‘demanding’ it be put right, this confidence was usually lacking when dealing with solicitors.

“I bought a used car from somewhere and within 2 days I had a problem with the electric window, and I just took it back and said fix it or I’ll seek advice, and they fixed it. Sometimes you’ve just got to stand up for yourself.” Cardiff, 18-34, low literacy groups

“How would you know whether they were incompetent? I don’t know where the law goes or where the law stops or how they begin or what to do, so if they do something how do you know if they’ve messed up? What they tell me, for me is gospel. I don’t know any different – and I’ve been in court on both sides of the law.” Cardiff, 18-34, low literacy groups

The detail of existing protections reassured consumers that this ‘gap’ was at least to some extent filled by a regulatory framework.

“It’s basically the same thing as the NHS. The NHS is funded by everyone, and it’s a free service that people who need it can then benefit from.” Exeter, 18-34, risk accepting

That said, some consumers did cite four main reservations when faced with the details:

- A feeling that such protections were fine in principle, but would they be delivered in practice? Would the Ombudsman have teeth? Would Professional Indemnity Insurance pay out if needed, or would small print invalidate claims?
- A sense that the vast majority of Legal Ombudsman payouts being of less than £250 meant there would be a mismatch between the effort required to make a claim, and the potential reward for doing so.
- The belief that the route of suing a solicitor for negligence would be a costly one, with no guarantee that such costs would be recouped
- A view that consumers should know about such schemes, and that solicitors should make more effort to make customers aware of them.

“The idea of suing a solicitor seemed like a lot of the same stress that I’d already been going through.” London, 18-34, risk averse

However, none of these reservations were significant enough to inherently undermine the perceived value of the protections, or to persuade people that they were not worth having. Unconfident consumers seized on the fact that someone was on their side, and in many ways the details of this were less important than its basic existence.

A contradiction exists between the risks that consumer perceive in using legal services, and the risks that are actually covered

An underlying contradiction exists between consumers’ perceptions of the risks involved in using legal services and the risks that are actually covered by regulatory protection schemes. The two most common risks consumers see in using solicitors were unexpected or ever-increasing costs, and a perceived slowness or delays in procedure.

“How quick will they be? I want all the information as quickly as possible but I’m not their only client. Are they going to work on behalf of you to get you what you need?” Birmingham, 18-34, risk accepting

Neither, they thought (often wrongly), are currently addressed by the Legal Ombudsman.

Uppermost in consumers’ minds were not extreme cases of near-criminal overcharging, but more the perception that consumers have little control over legal costs, and that with solicitors often charging for each letter sent and phone call made, costs are invariably higher than expected, often substantially so. Similarly, the risk of a lack of expediency was not described in terms of a solicitor fundamentally and explicitly failing to progress a case, more frustration that a solicitor might not be felt to be ‘on top of’ things, and that regular phone calls and ‘hassle’ would be required to ensure things move smoothly. The greater risk was that a lot of personal effort and stress would be required to ensure deadlines are met, not so much that the system would simply break-down.

In contrast, the main risks that *are* covered by the Solicitors Regulation Authority compensation fund (fraud and ceasing trading), seldom featured in consumer concerns.

“You never hear of a solicitor going bust – they charge too much.” Cardiff, low literacy groups

Furthermore, as we described earlier some consumers did point out that suing a solicitor for negligence would likely involve significant cost up front, with the risk that if the case were lost the consumer would be left substantially out of pocket. This fact might argue that the protections are stronger in principle than in practice.

“It’s great if it’s a lot of money but if it’s a relatively small amount like less than £10,000, I don’t think (the regulations) would be much use really. I’m in a situation where in order to sue the solicitors it’ll cost me a lot of money to employ other solicitors. I could run up a big bill just trying to sue them.” Exeter, 55+, risk averse

It was interesting to note that when asked about the possible risks in using a solicitor, consumers focused to a large extent on issues that are more visible or transparent – experience attributes such as costs or quality of service. The quality of the solicitor’s actual ‘product’ or knowledge is less verifiable, and in turn was mentioned a little less often than might have been expected given its importance.

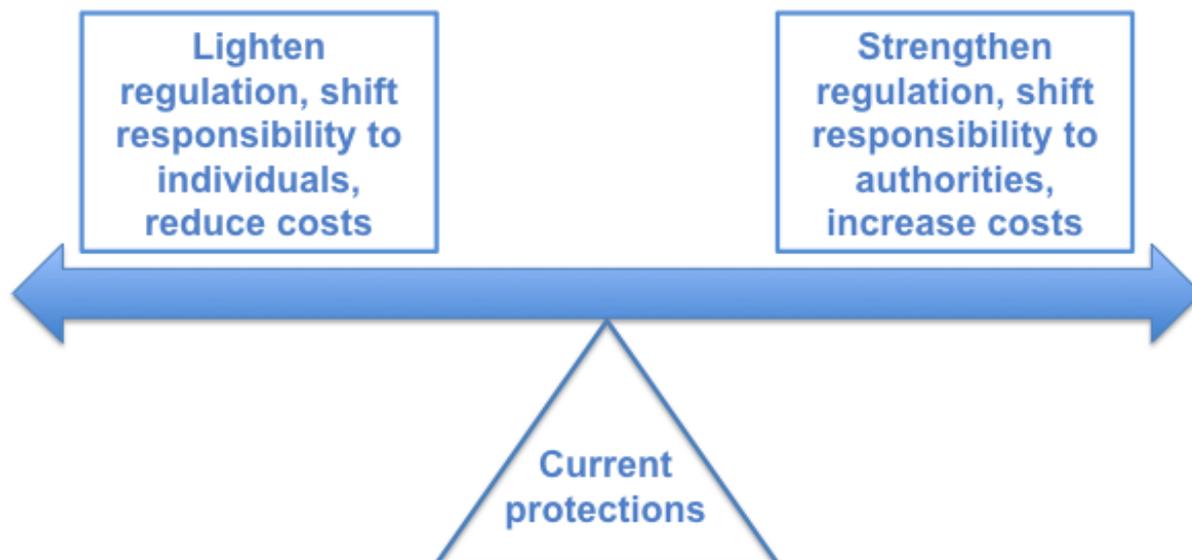
None of this though makes consumers wish for a shift in responsibility for risk

The combination of views that costs in the region of 1% - 2% are fairly minimal, as well as some perceived reservations around the current package of protections (outlined earlier), might suggest that protections as presented to consumers aren’t necessarily optimal. If consumers were presented with a blank page, would they arrive at this point?

Despite this though, there was little wish among participants in the groups to move away from the current balance – either weakening protections, reducing costs and widening choice, or increasing protections at greater expense to consumers.

The diagram below presents possible directions of regulatory change based on the principle that the costs of regulation are generally passed to consumers. Of course, it may be the case that shifting risk to consumers, e.g. by buying their own insurance, might increase costs if this creates a more expensive system than the current model.

Possible directions of regulatory change:



Given the pivotal reassurance that consumers took from the idea that *something* is in place, and *someone* is there to protect them, few customers were happy at the thought of existing levels of regulatory protection being loosened, even if it offered them reduced costs or notionally wider choice. There was a view that legal services are different to other sectors (it's a profession, dealing with the law, and life-changing events), and that there *should* be sector-wide protections in place.

Similarly, there was a consistent level of resistance at the idea that protections should be strengthened, at the cost of increased fees for all. This wasn't so much opposition to the idea of stronger consumer protections, but opposition to the idea that consumers should have to pay more to protect themselves from solicitors' mistakes.

*"Solicitors are expensive enough as it is without paying more on top."
Birmingham, 18-34, risk accepting*

In addition, there was suspicion that any reductions in regulatory costs would be passed onto consumers. People felt they would shoulder the extra risk without receiving the ensuing benefits.

A small minority of those in the groups did feel there was a need for stronger protections, even if this meant higher fees, and these views were largely to be found among the 55+ groups - perhaps a function of older people having more life experience, more legal experience, and perhaps more experience of where things can go wrong.

Even risk-accepters want to keep current protections – law is a special case

Participants in the research were recruited partly on the basis of their overall attitude to taking responsibility for their own consumer decisions. Those who felt that consumers should take responsibility themselves, and consequently benefit from wider choice and lower prices were termed ‘risk accepters’, and those who tended to feel that consumers shouldn’t be asked to shoulder every risk, and should be protected, even if it means more limited choice and higher prices, were termed ‘risk averse’.

Importantly, even the groups made up of risk-accepters, who more happily took to managing risks themselves in the wider consumer world, were similarly reluctant to shoulder greater risk in the legal services market. Legal services was seen to be a special case, for any number of reasons (it deals with life-changing events, is an infrequent purchase, where consumer knowledge is limited, the use of confusing jargon and legalese is common, and so on). In other markets risk-accepters felt more confident and informed, less so when dealing with legal services.

“I can’t believe you’d ever try and save yourself 1% of a cost to un-insure yourself. It makes no sense.” Exeter, 18-34, risk accepting

The low-literacy groups are also protective of regulation

Two of the twelve groups were held with participants who had relatively low literacy levels.⁵ This was so we could include consumers who might reasonably be expected to be more at risk from any potential shift in regulatory protections, especially in the area of legal services, where a lot of the products as well as customer service revolve around written documents.

The suggestion from both groups was that they absolutely believed the current balance of regulatory protection and costs should be retained, and they were both highly critical of any suggestion that regulations could be loosened and consumers take on more of a role of managing the risks. The low-literacy participants already felt less than confident when dealing with solicitors, and they felt this would be undermined further if they were asked to assume even more risk than currently.

This was for many linked to a belief that consumer protection for using legal services should be a ‘fundamental right’, and not something linked to individual awareness or discretion.

⁵ Defined at recruitment as 4 or fewer passes (A-C) at GCSE, plus not passing English, plus lower confidence levels around reading and writing.

4. Reactions to alternative market scenarios

Consumers rejected the option of taking risk on themselves

A possible market scenario was described where compulsory sector-wide protections were loosened, and instead firms and consumers were given freedom to define their own risk arrangements. Some firms might not offer protection against traditional risks (as defined by the current protections), but offer lower fees as a result, others might offer gold-plated insurances but at a cost, with others settling somewhere in between. In principle this could widen consumer choice.

In practice though participants in the groups suggested they would tend to avoid using solicitors who did not offer any protection or insurance against risks, and would in all likelihood still make decisions on the basis they did originally (i.e. recommendations, specialisms, location etc). Any increase in consumer choice was seen to be theoretical rather than practical, and if anything choices might in effect be narrowed due to consumers avoiding solicitors who did not offer appropriate insurance.

The view was that consumers would question the quality of a firm that did not offer some form of consumer protection (assuming others in the market were). And as well as undermining faith in some individual firms, such an unregulated scenario might, it was argued by some, undermine faith in the legal services market as a whole.

Although the research was not designed to offer any quantitative answers (in terms of robust percentages), we did carry out one exercise in the groups to give us an *indication* of how consumers might consider acting in a market with a less prescribed consumer protection framework.

We presented each individual in the first eight groups with two thumbnail descriptions of similar solicitor firms, the difference being one offered professional indemnity insurance and one did not. The former, as a result, charged a higher level of fees – in this case an additional £50 on top of typical conveyancing charges. We then asked participants to tick – in confidence – which firm they would anticipate they would use in such a situation. The descriptions are detailed overleaf, along with the results of the exercise.

Solicitors choice exercise:

Gamper, Brooker and Roy	Woods, Poole and Greenway
	
<p>One, local office; 3 partners; Established since 1965.</p> <p>Typical fees of £500 for house conveyancing.</p> <p>We pride ourselves in the quality of our work, and believe this quality is the best insurance you can have against us making mistakes. We are not covered by Professional Indemnity Insurance, and so are able to keep our fees low.</p>	<p>One, local office; 3 partners; Established since 1965.</p> <p>Typical fees of £550 for house conveyancing.</p> <p>We pride ourselves in the quality of our work, but if you do have real cause for complaint, we are fully covered with Professional Indemnity Insurance to fund any claims against us.</p>
Consumer votes: 4	Consumer votes: 51

The exercise was repeated in the last four groups but with the slight variation that the service in question was will-writing, with fees amended to £150 and £160 respectively. Again the vast majority opted to pay extra for the added peace of mind – in this case by 20 to 1.

“If it comes down to your kids having a legal wrangle at the end of it, for the sake of £10, it’s not worth the argument.” Birmingham, 35-54, risk averse

While we would by no means offer this as a robust statistical assessment of likely consumer behaviour, it does indicate the direction which consumers suggest they would act, and is consistent with the wider discussions in the groups.

Consumers strongly object to the idea of purchasing their own insurance

Despite preferring the idea of paying for the protection offered by professional indemnity insurance over the option of having no consumer protection, when the suggestion was put to participants that compulsory sector-wide protections could be loosened and consumers choose their own insurance policies (or not) instead, the idea was roundly rejected. People’s objections were wide-ranging:

It would prove more expensive

In the current environment of widespread publicity around the mis-selling of Payment Protection Insurance (PPI) insurance, and with many consumers harbouring a cynicism towards small print and insurance companies' general willingness to stick to their side of the bargain, the view was that subsequent privately bought insurance would prove poor value for money compared to the current cost of consumer protection.

"10 years down the line, it'll be the next PPI." Manchester, 35-54, risk accepting

Even aside from some concerns that consumers would be 'ripped-off', there was a rationale that whoever offered the insurance would look to make a profit, and this would just add an extra layer of costs to the public.

*"It will be a lot greater expense than if it's done through a solicitor."
London, 18-34, risk averse*

It might not prove independent

As well as welcoming the basic *existence* of the current protection, there is also appreciation that the regulator is *independent*. Some participants expressed a fear that loosening the regulator's role and shifting risk onto consumers and ultimately onto insurers would leave consumers without an independent arbiter. The insurance industry was not generally seen to be a consumer champion, and whilst it was not necessarily felt that insurers would act in the interests of solicitors, some doubted they would act in the interests of consumers.

It wouldn't in practice widen consumer choice

As described above, in practice consumers felt they would tend to gravitate towards solicitors that offered insurance against mistakes and avoid those that did not, in essence taking no advantage of the wider choice the market scenario offered in principle.

Some have a problem with the idea itself

Some in the groups balked at the idea almost on principle. When driving a car you accept that accidents may happen, and so taking out insurance seems natural. Many people also accept that washing machines aren't guaranteed for life, and so taking out an extended warranty is a perfectly acceptable choice. Many stopped though at the idea of paying significantly extra to insure yourself against your solicitor making a mistake – they wouldn't choose their solicitor if they thought they were error-prone, so it seemed incongruous to then have to confront this likelihood.

*"I just think it sounds insane, paying for their mistakes when you haven't even started yet ... immediately puts you on the back-foot and negative."
Oxfordshire, 35-54, risk averse*

"When I take a customer's car in for repair, I have to cover that on my insurance. I don't say, 'By the way, while it's here do you want to insure it while it's in my workshop because it could get broken into, or set on fire?' I take care of that." Birmingham, 35-54, risk averse

Most crucially though:

Consumers would lack the confidence to make informed decisions

As already described, consumers don't feel on an equal footing with solicitors in the first place - having to take on responsibility for insuring against risk would, it was believed, tilt the balance even further against them.

“So it's the end of our (married) relationship, I've got to see a solicitor, you've got to sell the house, get a divorce, I've got to redo my will as well, and now I've got to think 'hang on, I've got to go and get some insurance' as well?” Cardiff, 35-54, risk accepting

“It's just the lack of knowledge in that sector. I mean I know what I'm doing when I go online. I go to Amazon and they'll look after me. I know what I'm buying with a savings account, because HSBC or whatever are all covered and I know what an interest rate looks like. The law is so far reaching and varied, people who study it their whole life don't know everything about it, so I can't even pretend to know anything about it.” Exeter, 18-34, risk accepting

“I am quite naive, but I wouldn't think about insurance policies, and I don't think a lot of people would.” Exeter, 18-34, risk accepting

The combination of often-stressful, usually important personal situations, that usually only occur infrequently, coupled with the use of unfamiliar legal language and jargon, and inevitable presence of small print, means many consumers are far from comfortable when dealing with solicitors. Given the typical lay-person's imperfect legal knowledge, they wanted to avoid the pressure of also having to make informed decisions about insurance policies – which themselves introduce an extra layer of complexity. It would make for a perfect storm of jargon and small print.

“There's a power sort of imbalance because solicitors have a knowledge base that most of us don't have. It's like going to your GP. Most of us don't understand what our GPs do or medicine. We have to put our trust in people. That can be abused sometimes.” Exeter, 55+, risk averse

The lack of confidence at the prospect of being asked to take on their own insurance was illustrated in comparison to other forms of insurance. With car or buildings insurance participants to a large extent knew what they were buying – a house might burn down, or suffer subsidence, or be flooded. A car might be stolen, be in an accident, and you might want the use of a courtesy car while it was being repaired. With legal insurance there was a sense of the unknown – what exactly *would* you be buying? If you didn't even know what you were supposed to be buying, it would be difficult to make an informed, confident decision about it.

“If you're going into a car shop at least you know what you're going to be paying for and what you're going to get; you can't get that with solicitors.” Cardiff, low literacy groups

This reluctance to embrace the opportunity to seek out their own level of protection and insurance was especially apparent among the low-literacy groups - none of the participants felt they would be able to competently research such a decision themselves.

Therefore there is a risk that under these circumstances, active/sophisticated consumers may look for credible signals such as firms that have insurance, but naïve and vulnerable consumers will either pay no attention or take the risk and pay lower prices. So without mandatory regulatory protection the risk is losing universal coverage at the expense of vulnerable/naïve consumers. At the same time sophisticated consumers may end up being charged higher prices to have insurance included.

It should also be noted though that many consumers showed an underlying reluctance to embrace insurance as a tool that could benefit them, and indeed even the idea seemed to put some on the back foot. Whether it was recent PPI mis-selling, an aversion to small print, a feeling that insurers look to reject claims wherever possible, or just exposure to increasing premiums, many would need convincing that insurance could offer them a value-for-money solution.

5. Possible consumer behaviour

Resolving the inconsistency

To some extent, an inconsistency is present in the research – consumers strongly resisted the idea of having to take on their own insurance against legal services risk, but when faced with the choice of whether to or not, nearly all chose to do so (as suggested by the Gamper, Brooker and Roy exercise described on p18).

The explanation can be found in terms of relativity to the status quo. Consumers overwhelmingly preferred to keep to the status quo of universal, regulated consumer protection (that they happily pay for), rejecting the idea that it would be beneficial to move towards a less tightly regulated market where consumers take responsibility for managing their own risk. However, when confronted with the latter scenario as a *fait accompli*, the majority indicated they would prefer to insure themselves in some way, for instance by only using firms who offered the protection of professional indemnity insurance.

Essentially they would rather not be put in a position where they are expected to completely manage their own risks, but if they were forced into such a scenario, they would probably look to acquire insurance protection against them.

Consumer reactions to HOPPs

The research was not designed to fully explore likely purchasing behaviours around legal services insurance policies. However, following on from earlier discussions around consumers' attitudes to risk and regulation, we did present participants in the groups with examples of an existing Home Owner Protection Policy (HOPP), and explored their reactions to this example of consumers paying to insure themselves against risk (in this case in the conveyancing market).

A number of themes emerged in the ensuing discussions:

There was limited awareness of such policies, and such risks

Although the groups were not limited to recent home-buyers, naturally a significant proportion of participants did have relatively recent experience of buying a home. Even among these, awareness of HOPPs was low, with perhaps just one person confidently recalling being offered it (a fact which is perhaps unsurprising given the relative newness of the product).

Similarly, consumers were relatively unfamiliar with many of the risks outlined in the policy e.g. boundaries differing from those lodged with the Land Registry, a seller selling to more than one person at once, or a previous owner making illegal alterations to the property that they've not disclosed. While some saw these points being raised as helpful information, others saw it as scaremongering (on the assumption that the risks involved were minimal).

"It's a shock tactic - it's just extra money." Manchester, 35-54, risk accepting

A third, more neutral reaction – and one helping to explain earlier comments around a general lack of confidence when faced with the prospect of purchasing legal risks insurance – was to ask how are consumers expected to know the likelihood of such

events, and therefore be able to make an informed decision around the value of such a policy?

It did though open eyes to the limitations of current cover

Part of the information provided with the HOPP described which risks were currently covered by conveyancers' Professional Indemnity Insurance, and which were not. One of the results was to cause surprise among some participants around the risks that *were not* currently covered by the protections outlined earlier in the groups e.g. boundaries differing from those lodged with the Land Registry.

"I'm astonished at how little is covered at the moment." London, 18-34, risk averse

For some participants in the low-literacy groups this reaffirmed their belief that protections should be universal – the example HOPP raised the spectre of their ignorance of many of the details involved with dealing with solicitors (albeit an ignorance that in this case is shared by many), and heightened their feelings of vulnerability.

Interest in the HOPP would be likely to vary by situation

As might be expected, consumer interest in the HOPP varied across individuals, from a wish they'd been offered it when they bought their house, to complete dismissal of the idea. Notably though, as well as varying across individuals, it was suggested interest would vary by situation. Essentially if you were purchasing a property that was felt to be 'low risk' (e.g. a new build flat, in a town centre, with clearly accepted boundaries) you would be unlikely to purchase the HOPP, but if you were purchasing a more expensive, older house with less defined boundaries (e.g. with land attached), then consumers said they would be more likely to consider it.

Similarly, interest was seen to vary by life stage. Some of the younger (18-34) participants saw the cost (£250 plus) as high in the context of a time of their lives when disposable income was more limited (partly due to lower incomes, partly due to the influx of costs involved with buying a first home), and when they were not expected to buy a house 'for life'. Conversely, some older participants felt that if they were buying a home that they were likely to stay in indefinitely (a 'family home') then it would offer better value for money (the HOPP lasts as long as you own the property).

"It sounds like quite a lot when you're already dishing out quite a lot in fees." Birmingham, 18-34, risk accepting

"When you're talking about spending £1,000 on the legal fees for buying a property, for example, £10 either way is just completely irrelevant, but when you start talking about lumping in £250, it's like, 'I could do some stuff with that money.'" Exeter, 18-34, risk accepting

"I'm converted - £250, that's nominal to me." Oxfordshire, 35-54, risk averse

The effect of life-stage was compounded by older participants having greater awareness of possible conveyancing problems (a function of their greater experience of conveyancing in general).

"You can really catch a cold with conveyancing." London, 55+, risk accepting

Willingness to insure varies by type of legal service

It was apparent in the research that consumers' general willingness to pay additional fees for protection against various risks (e.g. via an insurance product) would likely vary by the service in question. However, this variation was *not* seen to be a simple function of value. Most notably the argument that wills are lower value (in terms of legal fees), and lower risk (at least in terms of fraud), and should therefore be less needful of insurance protection, were challenged by consumers. In their minds, wills can be just as 'important' as other legal services, can be just as life-changing in their repercussions, and so would be just as worthy of protection cover (especially when the suggestion was that the absolute price of cover would still be less for wills than say conveyancing).

In terms of insurance cover, especially in the absence of any information about the actual risks involved in different legal services, consumers would be buying emotional peace of mind rather than a practical hedge against actual risk – a service that is just as relevant for wills as it is for conveyancing.

The kind of transactions where consumers *might* choose to save money rather than insure themselves against an unknown risk were suggested as buying a simple solicitor's letter, or low value personal injury claims.

6. Conclusions

Consumers are loath to see a shift in responsibility for risk away from business towards consumers

The consistent view, across all types of legal services consumer, was that they are reluctant to see any loosening of regulatory protections, even if it results in benefits in terms of lower regulatory costs or wider consumer choice. The feeling is that few consumers are confident they can deal with solicitors on an equal footing, and any lessening of regulatory protections would tip that balance further away from them.

If anything, some consumers would like to see stronger regulation

Whilst welcoming the existing consumer protections as reassuring, if anything some consumers would like them to move further in their favour, such as a bridging of the gap between the *free* courses of redress for poor service (Legal Ombudsman) and fraud/bankruptcy (the SRA's compensation fund), and the *costly* approach for seeking redress for negligence (i.e. suing your solicitor). One suggestion made in the course of the research was for a 'small claims court' for actions against solicitors (actions which, by their nature, are often in excess of the [current at the time of writing] £5,000 small claims threshold).

There was though an accompanying reluctance to see stronger regulation if it meant further costs for consumers - although this opinion was arrived at without any reference to the *specific* costs that might accompany any *specific* strengthening. The belief was that consumers should not be asked to pay even more to protect themselves against legal professionals' mistakes.

If consumers were expected to protect themselves against risk, actual cover would be haphazard, and choices less than informed

The research suggests that if regulation were loosened, and consumers expected to make their own arrangements for legal services consumer protection, the results would likely be far from optimal:

- few consumers would feel able to make *informed* decisions;
- few consumers would make the effort to, or feel able to, shop around for the *most appropriate* level of protection;
- many consumers would just default to what their *solicitor recommended*;
- the more vulnerable consumers, such as those with low literacy levels, would in many cases feel cast adrift.

Under these circumstances, active/sophisticated consumers may look for credible signals such as firms that have insurance, but naïve and vulnerable consumers may either pay no attention or take the risk and pay lower prices. So without the mandatory protections the risk is losing universal coverage at the expense of vulnerable/naïve consumers, while at the same time sophisticated consumers may end up being charged higher prices.

Awareness of the regulatory protections should be improved

Although it was not a central focus of the research, it was clearly apparent that not only were many legal services consumers *unaware* of the protections in place for them, they were often *indignant* that they had not been told they existed. Arguably giving greater prominence to the schemes, for instance by requiring legal service

providers to give customers a leaflet describing them, would make customers feel more confident about their dealings in the legal market, as well as giving wider opportunities for the Legal Ombudsman to resolve legal complaints.

Appendices

Consumer Protection options

Consumers using solicitors automatically get protection against fraud or negligence in three different ways:

- The **Solicitors Regulation Authority** (previously part of the Law Society) has a compensation fund it uses to refund any customers' money lost by a solicitor **going out of business or defrauding** its customers.
- The **Legal Ombudsman** can make awards to customers if it feels they have **received unsatisfactory customer service** from a solicitor they were using. Awards can be made up to £30,000, though most of its awards are for less than £250.
- Solicitors are also forced to take out **Professional Indemnity Insurance**, which means if a **solicitor makes a mistake** and the customer **complains, sues them and wins**, the solicitors are covered for the amount awarded to the customer.
- These protections are funded by solicitors – through annual charges they pay to the Solicitors Regulation Authority, and through the price they pay for their Professional Indemnity Insurance. These costs are then passed onto customers through the fees we pay when using a solicitor.
- The amount passed onto consumers probably means **fees are increased by around 1% - 2%**, so around £5 - £10 for buying a house/flat, maybe £2 - £3 for Will writing.

Definition of consumers as risk-accepting or risk-averse

Q5 On this card are two different views people may have about buying goods and services. Can you tell me which view comes closest to your personal opinion, by reading out a number between 1 and 10? For instance if you agree more with the top statement you might pick a rating somewhere between 1 and 5, or if the bottom statement comes closer to your view you might pick a score between 6 and 10. READ OUT STATEMENTS AND USE SHOWCARD.

I like to have a free choice when buying products or services, and think I should be left to make my own decisions on who to buy from, and take responsibility for those decisions.

1

2

3

4

5 RISK ACCEPTER

6 RISK AVERSE

7

8

9

I think consumers should be given the maximum protection possible so that there is minimum risk involved in buying a product or service, even if as a result it costs a bit more or means there are fewer choices available to me

10

No opinion

X EXCLUDE

Consumers scoring 1 – 5 were recruited to the risk-accepting groups, and consumers rating 6 – 10 were recruited to the risk-averse groups.