INSTITUTE OF PARALEGALS
Setting Standards. Promoting Professionalism.

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Dear Ms Rican-Sevitz,

Re: Market Study into Legal Services in England and Wales

(a) About the Institute

This submission is made by the Institute of Paralegals. The Institute is a not-for-profit professional body, incorporated in 2003 and given Institute status by government in 2005.

We are the premier professional body supporting and representing:

(i) Unregulated legal practitioners;

(ii) Paralegal fee-earners employed in the regulated legal sector; and

(iii) Paralegal and unregulated legal staff working in commerce & industry and the public and third sectors.

The Institute's interests, membership and remit straddle both the regulated and unregulated legal sectors and we have both employed and self-employed members, along with unregulated sector corporate members (i.e. unregulated or "paralegal" law firms).

We cover all areas of practice and our involvement is not ring-fenced by the traditional practice area demarcations attached to traditional legal roles (e.g. notaries, costs lawyers etc.).

As well as providing general support and guidance, we set a number of paralegal standards (see http://www.theiop.org/national-competency-standards/contract-terms.html) and provide advice on the setting up an unregulated legal practice (see http://www.theiop.org/regulation/regulation-of-paralegals.html).

For more information about the Institute please visit www.theiop.org.

(b) Ownership of The Institute

The Institute is wholly owned by the registered educational charity Instructus, charity number 1144894 (but still listed under its old name Skills CFA). Instructus is the UK's largest provider, registration and certification authority for apprenticeships and worked based education. With an established background as not-for-profit education providers in national occupational, standards based, apprentice framework qualifications, Instructus covers 30% of all occupational groups across the country.

Instructus is the market leader in the development of apprenticeship programmes, accounting for 30% of all current apprenticeship starts in England, and 3 of the top 4 apprenticeships by volume. As such, it is the strategic partner of choice for a large number of learners and employers in the UK as skills policy and industrial strategy converge. For more information, please visit www.instructus.org.

(c) The Professional Paralegal Register

An example of our customer protection focus is that last year we were instrumental in setting up the (still embryonic) *Professional Paralegal Register ("PPR")*.

The PPR is a voluntary regulatory scheme for paralegals/those in the unregulated legal sector (not all unregulated legal practitioners self-identify as paralegals). Part of its main focus is to help protect customers by allowing them to make an informed purchasing decision when it comes to paralegal service providers.

The PPR, inter alia, offers consumers a sympathetic complaints handling mechanism and, if circumstances warrant, compensation.

Eligibility for inclusion on the PPR necessitates membership of an approved professional body/organisation and ongoing voluntary compliance with high standards of probity and competence. Professional indemnity insurance is also obligatory.

The approved professional bodies must themselves demonstrate that they have a strong consumer protection ethos running through their own rules of conduct and complaint handling.

For more information on the PPR please visit http://ppr.org.uk.

We would welcome discussion on how the PPR might be further used as a platform to aid consumers.

(d) Introduction to Our Submission

As a result of our broad remit mentioned above, we are privy to much feedback from the unregulated sector about the alleged failings of the regulated sector, and vice-versa. This broad "overview" of the legal services market not only informs this response to you, but means that we have no bias towards either the regulated or unregulated sectors.

We would welcome the opportunity to meet with you to discuss some of the issues set out in this letter in more detail.

(e) Historical Context

In reviewing the current situation, we feel it important to remember that for approximately 2 centuries now it has been common knowledge/perceived wisdom that if one has a legal problem one consults a solicitor, and if a matter goes to court then one would usually retain a barrister.

In our experience that perceived wisdom still largely holds sway. Knowledge of the major market changes resulting from the Legal Services Act 2007 have, for the most part, yet to become general knowledge.

A consequence of this lack of current awareness is, we believe, that many consumers do not realise there are solicitor/barrister alternatives, and therefore do not look for them - or know where to look for them – and if they do come across unregulated providers, the said perception means consumers often instinctively distrust the providers' bona fides (it is not unusual for us to be contacted by members of the public wanting to check on the legitimacy of an unregulated practitioner, or to ask whether it is appropriate for a paralegal in a solicitors' firm to be handling their case).

This uncertainty on behalf of customers is not surprising given that we also encounter it with both regulated and unregulated practitioners.

Further, we have been asked to advise bodies as diverse as charities, the CPS, HM Prisons, police forces and Trading Standards on the regulated/unregulated demarcation and what unregulated practitioners can and cannot do.

If such "front line" organisations have uncertainty, then it would be optimistic to assume that busy consumers will self-educate about complex and sophisticated ongoing changes in the legal services market.

Choice is illusory if consumers don't realise they have a choice or lack the information to exercise that choice.

It is part of our role to help with that educational process, but we are a small organisation. We would welcome the opportunity to partner on such an important consumer awareness programme.

Turning now to the 3 key issues upon which you have invited response:

1) **Whether customers can drive effective competition by making informed purchasing decisions**

Clearly customers can drive effective competition through their purchasing decisions. The huge and rapid growth of the unregulated legal sector is testament to this.

A good example is the will writing market where the unregulated sector has grown significantly. The unexpected popularity and diversity of alternative business structures in the regulated sector would also seem to indicate that customers are willing to embrace new types of legal service provider when given the opportunity to do so.

We believe however that there is a problem with how genuinely 'informed' these purchasing decisions really are - particularly with regard to the unregulated legal sector.

From our discussions with unregulated providers, we believe that customers tend to choose them instead of regulated service providers because of perceptions (whether fair and accurate or not) that the unregulated practitioners are cheaper, more approachable and more accessible.

We strongly suspect however that many customers do not appreciate (i.e. are uninformed) as to the myriad other implications (both good and bad) of their choice of service provider, e.g.:

I. Whether or not the provider has professional indemnity insurance;
II. Whether or not complaints can be made to the Legal Ombudsman, a professional body or regulator;
III. How long the practitioner will store important documents after the case has finished, who owns them and whether or not there is a storage/retrieval charge;
IV. Whether or not there are legal limits on the services the unregulated practitioner can provide;
V. Whether or not the practitioner can make any secret/side profit;
VI. What happens to the customer's data;
VII. The level of confidentiality about the customer's business;
VIII. The requirement for a detailed, transparent retainer letter, updates and general customer/provider communication protocols;
IX. The holding/release of important client documents in the event of a falling out;
X. Expected minimum standards of competency;
XI. The holding of client money in a separate ring-fenced account on trust, and who keeps any interest accrued and who bears the risk of loss;
XII. Can the service provider choose to walk away mid-case; and
XIII. What happens if a conflict of interest arises?

Most customers do not approach a transaction anticipating failure, as a result very few will think to ask these questions (and many more like them).

In the regulated sector it is relatively unimportant as service providers are usually bound by customer-friendly implied obligations in respect of them. However, this is not the case in the unregulated sector (unless they are members of the Institute or PPR).

We would flag that regulated sector rules of professional conduct/customer protection are the distillation of the experiences of many hundreds of thousands of practitioners/disputes over 2 centuries. As most unregulated legal service practitioners have never been part of the traditional legal profession, it would be unreasonable to expect them to self-generate a similar set of customer protection protocols after only a few years of independent operation. Indeed, the need for rules on many of the above issues would not even occur to many practitioners unless and until personal experience illustrated the need.

However, consumers need protection now, and we cannot let the market develop at a slow organic rate because too many customers will be disadvantaged in the interim.

For this reason, the Institute and PPR are working hard to establish a set of relevant, appropriate rules of professional conduct for the unregulated sector which build upon the experience of the regulated sector but which are tailored for unregulated sector customers. These unregulated rules of conduct have effective and affordable customer protection at their heart.

A practical hurdle to surmount is the lack of publically available to educate customers so that they can make truly informed purchasing decisions. This is of concern to us, and a major motivator in our recently helping to create the Professional Paralegal Register.

(f) <u>Lack of Information Leading to Consumer Detriment</u>

The specific information which we believe consumers need to make an effective and informed purchasing decision, but which they currently lack is:

- **Which practitioner can offer which service:** most consumers would struggle to answer whether or not:
  - Licensed Conveyancers can offer probate services;
  - If a Chartered Legal Executive can witness deeds;
  - Trade Mark Agents can offer litigation services;
  - Unregulated will writers can provide estate administration services;
  - Advice and assistance in respect of a likely litigious matter before the issue of proceedings is prohibited by the conduct of litigation reserved activity;
  - McKenzie Friends can offer any other services apart from in-hearing support;
  - Dealing with an (SRA authorised) alternative business structure is (from a customer's perspective) that same as dealing with a traditional solicitors' partnership;
  - Company formation is a legal or commercial/administrative activity;
  - Barristers can write letters on behalf of their lay clients where there is no solicitor involvement.

  The legal landscape has become unworkably complex, very much to consumer detriment. This is equally true for SMEs as it is for individuals. Indeed, so complicated has the landscape become that many legal practitioners would struggle to answer all of the above questions correctly.

- **Upon what terms legal services are offered to customers:** a legacy of solicitors having no real competition for most of the past 2 centuries is that customers tend to assume that the myriad consumer protections offered in respect of solicitors' services are replicated by all legal service providers.

  NB: this is not a problem simply resolved by requiring all legal service providers to offer the same protections - those protections come at a high cost and are a significant factor in stopping the regulated sector offering a cheaper, more flexible and consumer-orientated service.

- **What constitutes a legal service:** law and legality is now so woven into the fabric of our society that they are ubiquitous. Just as there is now no clear dividing line between what is an IT function and what is a clerical activity performed online, so it is now very difficult to clearly delineate between a legal service and a non—legal service with a legal element. HR is a good example. It is a distinct service with its own recognised profession. However, it is such a heavily legalistic sector that

beyond a certain level of seniority one is almost invariably giving legal advice. Other examples include debt recovery; company formation; housing advice; the work of contract managers and much of the activity of the new and growing compliance industry.

- **Titles:** "solicitor" is a title whose use is regulated by statute. Most of the other job titles in the regulated sector are sufficiently narrow in focus (e.g. patent agent, licensed conveyancer etc.) that any unauthorised person adopting those titles could be stopped under existing consumer protection, fraud and passing-off laws.

  However, we need a generic title to describe genuine legal practitioners operating in the unregulated sector. Some are already adopting the title "lawyer" in the sense of lawyer meaning a person who practices law. It will be very hard to have a simple easy-to-understand narrative for consumers unless we can give consistent titles to all legal practitioners.

In summary, the pace of change in the legal sector, whilst welcome, has significantly outpaced public knowledge/understanding. Without at least a basic understanding of the new legal landscape, customers will find it almost impossible to make truly informed purchasing decisions. They will continue to make purchasing decisions based solely upon "headline" information such as price and accessibility. For many legal service transactions this will be sufficient. However, as the unregulated sector handles ever more important transactions, widespread consumer misconceptions about other terms of doing business (examples of which are given above) will hinder effective purchasing choices.

More needs to be done to inform consumers about the existence of choice and exactly what they are choosing between. Over time, of course, this knowledge will seep into the general consciousness, but there will be many more wronged customers between now and then if we are content to leave the information to merely disseminate organically.

2) **Whether customers are adequately protected from potential harm or can obtain satisfactory redress if legal services go wrong**

Before addressing the question directly, we would flag that:

- The previously mentioned ubiquity of legal interaction in today's world means that legal services span the whole arc from the fairly trivial to the hugely important. Therefore, the answer to your above question will vary significantly depending on the service in question; and

- The focus on ever-better protection and ever-greater access to redress comes at a cost and can be self-defeating past a certain point (what that point is will, again, vary depending upon the legal service in question).

  In the legal market we already have a number of situations where customer protection/redress mechanisms are actually hurting rather than helping customers.

  An example of a flawed **protection measure** is the monopoly on who can conduct litigation and rights of audience in court. This (ostensibly at least) consumer protection mechanism has made the court system unaffordable for all save the wealthiest of individuals and cash-

rich of companies. The needs of the many have arguably been sacrificed to protect not even the few, but that small percentage of the few who actually encounter serious problems.

An example of a flawed **access to professional redress measure** is the way that professional indemnity insurance has become so expensive that it inhibits practitioners from doing certain types of work and can make other types of work markedly more expensive. This is linked to another **protection measure** which is becoming problematic: namely the significantly heightened liability/competency standards demanded of solicitors.

With the above two caveats in mind, we believe the answer to your question to be a qualified "yes" for the regulated sector and an unqualified "no" in respect of the unregulated sector.

The regulated sector has a large and expensive training and monitoring regime. It is hard to see how it could be significantly improved without escalating the drift of regulated practitioners away from "uncommercial" types of work or increasing prices for consumers.

As mentioned above, the provision of legal services is now ubiquitous in our society. In our grandparents' time the average consumer might make use of legal services 2 or 3 times in his/her life (buying a house, making a will etc.). Today legal interaction, directly or indirectly, is a regular event for many people.

In our grandparents' time every legal service was in respect of a matter of great importance, and the current regulatory system still works on that now outdated assumption, despite that fact that today many legal services can border on the trivial.

It is therefore extremely important to identify which legal services are being discussed when considering whether protection is adequate and what redress would be appropriate if things go wrong.

To lump them all in together would be to create a regime which treats the essential and the trivial as identical. Such a "one-size-fits-all" approach has already caused significant and ongoing discontent with some legal regulators and has arguably been a major factor in fashioning a civil justice system which many find intimidating, and which is largely impenetrable to anyone who is not an expert litigator.

Our response here, therefore, relates to important and essential and costly legal services, not those (i) which consumers feel are unimportant or trivial or (ii) which are offered at such a cheap price that the maxim *"you get what you pay for"* becomes a legitimate part of the bargain with the consumer.

Point (ii) above is important. There are some legal services which are important and essential, but in respect of which consumers cannot afford to pay much. An example would be representing a tenant or mortgage holder about to be made homeless by the county court for non-payment of rent/mortgage.

Such persons tend not to have money to pay for legal representation. Under the current professional conduct rules, a solicitor would not be able to waive any of the professional conduct obligations which lie heavily on his/her shoulders when representing a client about to be evicted. Such clients can usually pay so little that the solicitor regulatory burden means if he/she does act then he/she is likely to do so at a loss. As a result, it is almost impossible to get a solicitor to represent these needy persons.

What on the surface appears to be a wonderful example of upholding standards and saying that consumers should not suffer lower standards just because they can't pay, has – through the law of unintended consequences - had the effect of denying them much-needed legal representation: a truly pyrrhic victory for standards at the cost of the very consumers that the standards are meant to protect (the customer is, of course, not allowed to get alternative, affordable, representation because the right to conduct litigation/represent at court is a reserved activity).

We suspect that if you asked these unrepresented, often frightened, consumers attending court alone to fight against homelessness, most would welcome a watering down of their "protection" if that meant they could actually afford representation.

Returning to the question, the prevention from harm element is problematic. Legal service providers are human and will make mistakes. The law is becoming ever more complex and expectations ever higher, so errors and similar problems will not go away. The only way that we can foresee an improvement in prevention from harm is to require practitioners to become ever more specialist – i.e. to move away from the general licence to practice law granted to solicitors and barristers and make licences to practice be practice-area specific. This is what happens in the paralegal world: paralegals specialise.

Unfortunately, such a move would bring its own set of problems. Cost may increase because specialists often feel they should charge more (either because they are expert, or to make up for no longer getting income from other practice areas); it will get very difficult to find anyone to give legal advice on unusual, exotic or newly emergent sectors; and on any remotely complex matter consumers would be obliged to retain a whole host of different advisers with all of the duplication of cost, miscommunication and project management headaches that would entail. Choice would also be further curtailed because practitioners would have to do a considerable "apprenticeship" with an existing provider before being deemed expert enough to set up in practice independently. Relying on practitioners to train their competition is not a solid framework.

Much will depend on what you mean by *"...are adequately protected."* and which legal services in particular you had in mind, since the appropriate level of protection will vary dramatically from service to service.

That said, we believe there is a clear need for at least consistent benchmark standards of competency, training, service delivery and complaint handling in the unregulated sector. The Institute and PPR are working on all of these matters for the unregulated sector.

Turning to the second part of your question, *"... obtain satisfactory redress..."*. We believe there to be sufficient (but increasingly misdirected) mechanisms in the regulated sector, but insufficient means of obtaining satisfactory redress in the unregulated sector.

The regulated sector has numerous tiers of oversight focused on improving the customer experience. At provider level there are mandatory complaints procedures. Should these prove unsatisfactory there is the Legal Ombudsman. There is also the relevant frontline regulator (e.g. the Solicitors Regulation Authority) and, of course, the courts. From our long experience we see that most regulated legal practitioners (certainly with regard to solicitors) feel that the front-line regulators, Ombudsman and Courts are already heavily pro-consumer. That may or may not be true, but certainly there is no general feeling in the regulated legal sector that the system is weighed in their favour to the detriment of the customer – often they feel quite the opposite.

Given the weight and focus of the existing machinery, it is hard to envisage how it could fairly be made significantly more pro-consumer, or how yet more layers could be added to it.

We say that the mechanism is increasingly misdirected because we feel that the well-meaning attempt to create these various layers of appeal and redress have been done in a very legalistic and heavy manner, to the extent that they are intimidating or at the very least off-putting to most consumers.

Further, the formal, legalistic nature of the structure means that should a regulated practitioner's firm be found to be at fault then the consequences to it can far outweigh the original loss or damage suffered by the consumer.

This can put a regulated practitioner in an invidious position of either having to compromise disputes even where they genuinely believe they have done no wrong, or to fight to the bitter end because the consequences of losing are so disproportionate.

It seems that neither the regulated professional nor consumers are benefiting from the current system. We would advocate a less formal more mediation/arbitration approach for all but the most difficult of cases. Neither side typically wants to fight, but the system is designed in a confrontational format.

In contrast, consumers using the unregulated sector just have the same rights of redress as are available with respect to service providers in other non-legal and unregulated sectors.

It is important to bear in mind that, thus far, almost the entire structure of and debate about regulation of the legal services market has been based upon job title, despite job title being rendered largely redundant for many legal services.

As a result, we have the remarkable situation where regulated legal service provider Mr/Ms X must:

- complete long, expensive and difficult formal training;
- be subject to several layers of regulatory oversight from a variety of different regulatory bodies;
- comply with a detailed list of requirements about how he/she handles the case and interacts with the client;
- be held to uniquely high standard of competency by the courts;
- have cripplingly expensive professional indemnity insurance;
- provide a detailed client engagement letter;
- undergo rigorous continuing professional development obligations;
- limit his/her practice to areas where he/she can prove existing competence:
- hold client monies under strict conditions;
- have a detailed client complaint procedure which must be fair and made known to the client;
- has to purchase a license to practice each year, and can have that licence revoked;
- can be personally fined or sanctioned;
- must self-report through a dedicated compliance officer any suspected breach of professional conduct.

Yet unregulated legal service provider Mr/Ms Y who works in his/her own paralegal law firm can handle 100% identical cases without having to meet even a **single one** of the above requirements (unless a member of the Institute or Professional Paralegal Register).

This has come about because of a failure to acknowledge that with the loss of monopoly, the regulatory focus must move from the job title of the provider to the service provided – regardless of who provides it. From a consumer protection perspective, the current situation is deeply unhelpful.

The said transition from regulation by job title to regulation by service has successfully been managed with regard to immigration and asylum legal work.

The drafters of the Legal Services Act 2007 recognised that many business-to-consumer legal services were retail/consumerist in nature, and therefore genuinely were no different to buying a book from a bookshop or a red-letter-day event in a hot air balloon or on a racetrack. The fact that there was a legal element did not in and of itself suddenly and automatically make it a matter of much greater importance and thus in need of a much higher level of consumer protection.

That still remains the case for the majority of unregulated legal sector service providers. However, we do not think the drafters of the 2007 Legal Services Act foresaw how unaffordable (or otherwise unobtainable) the services of many regulated providers would become.

Today there is clearly a case for considering whether or not some unregulated legal service providers should operate under a greater degree of consumer protection regulation. The Institute's Professional Paralegal Register is a project to achieve that goal on a voluntary basis.

Again however, it must be stressed that protecting consumers against the occasional rogue or incompetent practitioner cannot be applied in such a heavy-handed manner that it chokes off the provision of such services or makes them otherwise unaffordable or sparsely available. Protection at all costs is in effect an argument that says (for example) that it is preferable that 1,000 citizens be unable to afford to take or defend their case in court if it means that the 10 of those 1,000 likely to suffer bad service from an unauthorised practitioner are protected from that danger.

3) How regulation and the regulatory framework impact on competition for the supply of legal services

We believe it impacts heavily. The current system, although far from perfect, does at least offer consumer choice. The regulated profession is a success story: competent, expert, monitored and subject to a wide variety of regulatory oversight covering all aspects of their service and operation.

This protection and badge of proven competency (at least to the extent that anyone can ever measure competency) comes at a price however. The service is often expensive and is frequently a bureaucratic and regulatory minefield for the practitioner. True innovation is undoubtedly hampered. Most worryingly, because a £50 case is treated the same by the regulators as a £50,000 case, there are strong disincentives to take £50 cases.

This contrasts with the unregulated sector which is so dynamic and innovative that no one has even properly mapped it. The unregulated sector offers affordable and accessible legal services. It also promotes diversity in the delivery of legal services amongst ethnic groups whose members have not yet managed to enter the regulated legal sector in sufficient numbers to be able to offer appropriate levels of service to (or to meet the specialist needs of) their communities.

On the other hand, the completely unregulated nature of the sector coupled with the widespread confusion at all levels about what is and is not a permissible activity means that poor quality services and abuse can all too easily occur. As regulated services continue to become even more

unaffordable to ever larger swathes of the community, the unregulated sector is being called upon to handle ever more complex and diverse and important legal matters - matters that warrant increased consumer protection.

In summary, we are living with a legal services regulatory system still focused on regulation by job title rather than the actual legal service provided. As an unintended result consumer need often comes a poor third. This can lead to arbitrary, mini-monopolies; confusion and the creation of a them-and-us mentality under which the large and growing unregulated sector is largely ignored by the regulated sector.

We would make the following five recommendations to improve the consumer experience:

1. **Regulate by type of legal service:** only regulate those activities which (i) genuinely and demonstrably require a greater degree of consumer protection than is normally available (ii) require regulated involvement to reduce fraud (e.g. Land Registry conveyancing submissions and applying for probate). Set focused entrance exams on those subjects and licence anyone who passes those exams - but do not prescribe the route by which they must go to get the knowledge necessary to pass the exams. This would also do wonders for diversity in the profession.

2. **De-escalate complaints:** at present, making a complaint against a regulated professional is a fraught matter for both sides. The formalistic approach can be intimidating for consumers and expensive to manage for the professionals. We need a simpler, quicker, less confrontational, less formalistic dispute resolution mechanism. This same mechanism should be used for all legal service providers.

3. **Educate:** the Legal Services Act 2007 created a huge opportunity for consumer choice. It is only now beginning to blossom. Consumers need to know more about their options.

4. **Work with the unregulated sector:** rightly or wrongly, many consumers largely see no distinction between regulated and unregulated service providers. Reform should follow their lead. The Institute would welcome the opportunity to work more closely with regulators and government.

5. **Fine tune:** there is not a "legal services market" any more than there is a "metal" market. There are numerous different markets with their own needs and circumstances. Any action needs to be clear on which of these markets are to be affected, and which are not.

We would welcome the opportunity to discuss these and other matters, and to take full part in any further consultations and discussions on this subject.

Yours sincerely,

David Holland
Chief Executive Officer