



# **INDEPENDENT REVIEW OF LEGAL SERVICES REGULATION**

**Assessment of the Current Regulatory Framework**

**Working Paper LSR-0 | March 2020**

**Stephen Mayson**

Centre for Ethics & Law  
Faculty of Laws, University College London  
Bentham House  
4-8 Endsleigh Gardens  
London WC1H 0EG

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## ASSESSMENT OF THE CURRENT REGULATORY FRAMEWORK

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### 1. Introduction

The Centre for Ethics & Law in the Faculty of Laws at University College London has undertaken a fundamental review of the current regulatory framework for legal services in England & Wales. Further details and the full terms of reference are available at <https://www.ucl.ac.uk/ethics-law/news/2018/jul/ucl-centre-ethics-law-undertake-regulatory-framework-review>.

The independent review has explored the longer-term and related issues raised by the Competition and Markets Authority (CMA) market study in 2016 and its recommendations, and therefore intended to assist government in its reflection and assessment of the current regulatory framework.

The Review's scope reflected the objectives and context set out in the terms of reference, and included: regulatory objectives; the scope of regulation and reserved legal activities; regulatory structure, governance and the independence of legal services regulators from both government and representative interests; the focus of regulation on one or more of activities, providers, entities or professions; and the extent to which the legitimate interests of government, judges, consumers, professions, and providers should or might be incorporated into the regulatory framework.

This project was undertaken independently and with no external funding.

This is a preliminary paper that seeks to set out an assessment of the current regulatory framework, drawing conclusions from a range of sources. It provides a basis for identifying potential problems that might need addressing or avoiding in any future regulatory settlement. This paper is followed by five others, each of which addresses the issues and challenges raised by five fundamental questions for the Review:

- (1) Why should we regulate legal services? (Rationale)
- (2) What are the legal services that should be regulated? (Scope)
- (3) Who should be regulated for the provision of legal services? (Focus)
- (4) What are the tools of regulation? (Form)
- (5) How should we regulate legal services? (Structure)

These Working Papers have been updated and reissued as the Review progressed.

The work of the Review has been helped by input from the members of an Advisory Panel<sup>2</sup>. Some of the published work and comments of Panel members are referred to and referenced in the working papers. However, the content of this working paper is the work of

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1. The author has led the Independent Review, and is an honorary professor in the Faculty of Laws and the chairman of the regulators' Legislative Options Review submitted to the Ministry of Justice in 2015.

2. For details, see: <https://www.ucl.ac.uk/ethics-law/publications/2018/sep/independent-review-legal-services-regulation>.

the author, and should not be taken to have been endorsed or approved by members of the Panel, individually or collectively.

## 2. The 2007 framework

In summary, the Legal Services Act 2007 created a new framework for the regulation of legal services and those who provide them, and has five major features:

- First, it sets out eight regulatory objectives that regulators must promote. These include objectives that many lawyers would regard as unobjectionable, such as the public interest, the constitutional principle of the rule of law, an independent and strong legal profession, as well as a set of professional principles.<sup>3</sup>

It also has other objectives, such as promoting competition and consumer interests, improving access to justice, and increasing public understanding of citizens' rights and duties.

- Second, the Act affirmed the six pre-existing reserved legal activities, which are legal services that can only be delivered by those who are appropriately qualified and authorised.

These activities are: exercising rights of audience and rights to conduct litigation; preparing documents that relate principally to the transfer or registration of land and applications for probate; carrying out notarial functions; and administering oaths.

- Third, it created the Legal Services Board (LSB) as an overarching regulator, with a lay chair and a lay majority, that now oversees ten front-line regulators.<sup>4</sup>

It also established the Office for Legal Complaints and the Legal Ombudsman to provide a single point of complaint resolution and redress for dissatisfied consumers of legal services.

The Legal Services Consumer Panel was also created to represent the interests of consumers. It would be right to emphasise that in discharging its role. In practice the Panel has sought to provide balanced, independent advice to the LSB. It has ensured that the front-line regulators take account of the consumer perspective, rather than acting primarily as an advocate of consumer interests.

- Fourth, it enshrined in statute the principle of the independence of the regulation of professionals from the representation of them. In doing so, it led to, for example, the creation of the Bar Standards Board (BSB) and the Solicitors Regulation Authority (SRA) as the separate regulatory arms of the Bar Council and The Law Society.
- Fifth, the Act allowed the participation in law firms of those who are not legally qualified, whether as owners, managers or investors: these are the so-called 'alternative business structures' (or ABSs).

This reform led to a very significant shift from a regulatory position before the Act under which law firms had to be wholly owned by qualified lawyers to one where they could be wholly owned by individuals who are not legally qualified.

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3. The professional principles are set out in section 1(3) of the Legal Services Act 2007: that authorised persons should act with independence and integrity, comply with their duty to the court to act with independence in the interests of justice, maintain proper standards of work, act in the best interests of clients and keep their affairs confidential.

4. They are: Solicitors Regulation Authority, Bar Standards Board, CILEx Regulation, Master of the Faculties, Council for Licensed Conveyancers, Intellectual Property Regulation Board, Costs Lawyers Standards Board, Institute of Chartered Accountants in England & Wales, Institute of Chartered Accountants in Scotland, and Association of Chartered Certified Accountants.

### 3. Assessment of the current framework

In comparison to most other jurisdictions around the world, the regulatory framework for legal services in England & Wales is one of the most liberal. In an assessment of legal monopoly within the European Union articulated by Claessens, the UK is classified as having an ‘intermediate’ degree of regulation; only two other EU countries – Finland and Sweden – were classified at a lower level (Claessens (2008: page 123)<sup>5</sup>.

Many would suggest that the Legal Services Act 2007 has led to the positive developments and outcomes intended by Sir David Clementi in 2004<sup>6</sup> and the then Department for Constitutional Affairs<sup>7</sup>. It is doubtful, though, that those intentions have been realised as quickly or as fully as their initiators would have wished.

The CMA, as part of its market study in 2016<sup>8</sup>, makes a number of observations about legal services that are worth recording here as contextual information:

- There are some inherent characteristics of legal services that affect consumers’ use and experience. These include: legal issues not always being clearly identifiable or defined; infrequent purchase; needs arising at moments of distress or time pressure; and asymmetry of information, making assessments of providers and quality of service difficult to assess (paragraph 2.5).
- Consequently, many individuals and small businesses do not characterise their problems as ‘legal’ and therefore do not deal with them as such (paragraphs 3.27-3.35).
- Even when a problem is recognised as being legal, about two-thirds of individuals and three-quarters of small businesses tend to do nothing, seek to resolve issues themselves, or with only informal help from friends and family rather than seek formal advice (paragraphs 3.166-3.172).<sup>9</sup> This and the previous bullet point identify the outcome that is often described as ‘unmet legal need’<sup>10</sup> and, for many, is symptomatic of the broader challenge of securing access to justice.
- More particularly for small businesses, perceptions of risk deter them from seeking legal advice: high and uncertain costs, compounded by their open-ended nature; complexity, with associated fear and time commitment; the risk of escalation; difficulty in finding the right provider; and the perceived lack of practicality and business understanding of lawyers (paragraph 3.181).
- The provision of legal services to individuals and small businesses is highly fragmented, with more than 7,000 law firms serving these types of consumers, ranging from sole practitioners to large national businesses; the LSB reports that concentration levels are low across all legal services areas, but particularly for residential conveyancing and family law (paragraph 2.36). Such fragmentation makes it harder for those who might wish to seek legal advice to find their way to an appropriate provider.

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5. See Competition and Markets Authority (2016: Appendix I). Comparative approaches to legal services regulation are touched on in LSR-2 (2020: paragraph 2.1).

6. See Clementi (2004).

7. See Department for Constitutional Affairs (2005).

8. See Competition and Markets Authority (2016).

9. More recent and extensive research by YouGov (2020), on behalf of the Legal Services Board and The Law Society of England & Wales, provides a more nuanced picture.

10. The origins of such need is explained by Chambliss in this way (2019: page 100): “Many people with civil justice problems do not recognize their problems as ‘legal,’ even when those problems raise clear legal issues and have legal remedies. Most people with civil legal problems never consider using a lawyer, but rather rely on their own understanding and support networks to deal with the problem, or do nothing, even when the potential stakes are high. Many people forgo available legal assistance even when it is free.”

- Intermediaries (such as estate agents, mortgage brokers and trade unions) can be very influential in linking consumers to providers, thus filling a potential lack of information and experience in seeking advice and representation – though the interests and incentives of these intermediaries “may not always be aligned” with those of the consumers (paragraph 3.8).
- Although most legal services (i.e. non-reserved activities) can be provided by either authorised or unauthorised providers, more than three-quarters of consumers will still obtain them from those who are authorised; and for more than two-thirds of consumers, that provider will be a solicitor – and even higher for conveyancing, and for will-writing, probate and estate management advice (paragraphs 2.32, 2.33 and 3.6).
- Consumers and small businesses are generally not aware of the distinction or differences between authorised and unauthorised providers, and tend to believe that all providers are regulated in the provision of legal services, such that they as consumers would be protected in some way if matters did not turn out as expected (paragraph 4.16).
- Where consumers have some experience of legal services and feel that a particular provider is trustworthy, they are then more likely to use the same provider for a repeat or related purchase (paragraph 3.53). Given that solicitors are the authorised providers most often used, there is also a high degree of trust in them, with solicitors being regarded by consumers as the most qualified and trustworthy of professional legal advisers (paragraph 3.49). Trust and loyalty would seem to be closely correlated.
- There is some evidence of innovation and commoditisation in the market, particularly (and not surprisingly) for legal services that are less complex and more process-based; in turn, this makes it easier for providers to be more informative and transparent about the nature and cost of their services and so allow consumers to make comparisons among providers (paragraph 3.8).
- Examples of innovation include unbundling of services, online service delivery and a greater use of technology, and ‘virtual’ firms – though these were most likely to be adopted by unauthorised providers and ABSs (paragraph 3.201 and footnote 515). Although regulation and legislative issues were the most commonly cited constraint on innovation, barely a quarter of providers regarded them as a ‘significant’ constraint (paragraph 5.37).
- However, partial adoption of innovation and new ways of working in the sector could well be evidence of limited competition and thus of consumers paying more for legal services than they otherwise should (paragraph 3.197).
- Despite additional regulatory requirements for ABSs being incorporated into the 2007 Act because of concerns about heightened risks from non-lawyer owners and investors, ABSs do not carry any more inherent risk than other forms of legal services businesses (paragraph 5.31).
- Regulation does not appear to create significant barriers to entry to or exit from the market (paragraph 5.34). Nevertheless, regulatory costs might be felt more acutely and disproportionately on smaller firms and sole practitioners and so deter or delay their entry or exit (paragraph 5.35).
- However, “some regulatory costs may be excessive in nature. As such, they are likely to be passed on to consumers in the form of higher prices” (paragraph 5.35). Such costs might also be a barrier to innovation and to the introduction of newer business models (paragraph 5.54), as well as distorting competition between authorised and unauthorised providers (paragraph 5.7). In summary, the regulatory costs of the current framework are likely to be “disproportionate to its objectives”, being “based on burdensome and overly prescriptive rules” that “impose high compliance costs on providers” (paragraph 6.53).

This Review is focused on the position in England & Wales. I am aware that the Scottish Government set up its own independent review of legal services regulation in April 2017 (see <https://www.gov.scot/About/Review/Regulation-Legal-Services>) and that the final report for that review was published in October 2018.<sup>11</sup> Its assessment of the Scottish framework and its conclusions and recommendations have been considered with great interest in the context of this Review. The recommendation that the title ‘lawyer’ should be protected (2018: page 37), and the approach to entity regulation (2018: pages 38-39) and to activity-based regulation (2018: pages 41-42) are particularly pertinent.

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11. See Robertson (2018).

## 4. Challenges in the current framework

On the basis of the work carried out by the regulators in their Legislative Options Review<sup>12</sup> and by the CMA in their market study<sup>13</sup>, it is possible now to identify a number of shortcomings and limitations in the current regulatory framework.

### 4.1 Inflexibility of the 2007 Act

The Legal Services Act 2007 is a large piece of legislation. Part of the reason for this is that during the passage of the Bill through Parliament, many interested parties and Parliamentarians expressed concerns that a fundamental shift away from self-regulation could provide too much discretion and latitude to a new style of regulator (with the involvement of lay persons) who might not understand well enough the particular value and circumstances of legal practice.

Consequently, much prescriptive and protective detail was 'hard-wired' into the Act, and that has created a rather inflexible statutory structure (particularly in relation to the reserved activities and ABS licensing requirements: cf. CMA 2016: paragraphs 5.28 and 6.40) that often requires over-stretched Parliamentary or ministerial time and attention to use, let alone to change.

The CMA concluded that (paragraph 6.5) "the current framework is insufficiently flexible to apply proportionate, risk-based regulation to reflect differences across legal services markets and across time"<sup>14</sup> and that any review "should be focused on introducing more long-term flexibility into the framework".

In particular, such flexibility is important to target more effectively activities that carry greater risk, to respond to market changes such as the growth of new business models, and to respond to technological changes such as automation and artificial intelligence (paragraph 6.35).

The CMA was concerned that regulatory gaps (cf. paragraph 4.5 below) might emerge or that lower-cost providers might be unduly restricted from competing for services (especially in relation to reserved activities). Although these risks are currently low – because of the limited involvement in the market of unauthorised providers – the CMA feels that the risks will be amplified as consumer awareness of unauthorised providers increases over time (2016: paragraph 6.41).

These concerns were also emphasised recently by Semple, in a report for the Legal Services Board (2019: paragraph 3.3):

One under-regulation risk is that technological innovation makes a non-reserved activity riskier to consumers. Another is that innovation creates new fields of practice in which the risks justify reservation. One plausible scenario involves advice-giving or document-drafting in a field – such as consumer or parenting disputes – that was not economically viable in 2007 because consumers were not willing to pay the costs. Technological innovation might reduce the cost of service provision, creating a new market and a new set of risks to consumers.

Some risky services might not even fit within the LSA definition of 'legal activities,' in which case they could not be reserved under the LSA s. 24 procedure. For example, it might be argued that the automated output of a chatbot does not constitute 'the provision of legal advice or assistance'

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12. See Legislative Options Review (2015).

13. See Competition and Markets Authority (2016).

14. As such, the structure resulting from this enabling Act does not itself meet the requirements of the better regulation principles: cf. CMA (2016): paragraphs 6.69 and 6.73.

but is rather merely legal information. In such cases, Parliament would have to amend s. 24 before the activity could be brought within the LSA regime.

## 4.2 The regulatory objectives

The Act contains regulatory objectives and principles to which few lawyers would take exception. However, it also contains regulatory objectives that are more challenging. For example, the objective to protect and promote the public interest<sup>15</sup> does not always sit easily with another to protect and promote the interests of consumers<sup>16</sup>, or with yet another to promote competition in the provision of legal services<sup>17</sup>.

What this points to is not an inherent or irreconcilable conflict of interests but to a *potential* for conflict.

For example, consumers might wish to see greater competition among legal services providers so that their ‘consumer interest’ in lower prices might be realised<sup>18</sup>. However, if competition and lower prices result in better-quality providers exiting the market because they are no longer able to generate an acceptable return, the public (and judicial) interest in, for example, sufficient and effective advocates to maintain and enhance the administration of justice might be compromised.

The consumer and public interests are clearly in tension, and acting in opposing ways – at least until the effects are perceived to be sufficiently detrimental to the consumer interest in access to justice and to competent advocates that the pendulum of ‘low price, high quality’ swings back.

Similarly, consumers might wish as clients that, in achieving their desired objectives, their advocates or legal advisers should pursue one of the professional principles – to act in the best interests of clients (section 1(3)(c)) – by deceiving, or hiding the full picture from, the court or another party.

But this would conflict with the legal representative’s wider public interest duty to act with integrity and also with their duty to the court to act with independence in the interests of justice (section 1(3)(a) and (d)).<sup>19</sup>

We must be careful not to set up a false conflict between the public interest and consumer interests, since it will also be in the public interest that, for example, consumers should be well informed, and more regular and confident, users of legal services.<sup>20</sup> The Legal Services Consumer Panel acknowledges that there are differences between the public and consumer interests, and say (2014: 8-9):

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15. Legal Services Act 2007, section 1(1)(a).

16. Legal Services Act 2007, section 1(1)(d).

17. Legal Services Act 2007, section 1(1)(e).

18. Davies (2013) rightly reminds us that the evidence of consumer research does not support the notion of “consumers being driven by price above else”; nevertheless, the assumption here is that regulation would otherwise maintain consumer protection in relation to competence and quality.

19. Although not as extreme as the deception posited here, Vaughan & Oakley (2016) nevertheless found in a study of City of London corporate finance lawyers that “they were largely unenthusiastic, disinterested and unconcerned about the ethics of what they and their clients were doing” (2016: page 74). Such ‘ethical apathy’, as Vaughan & Oakley describe it, is disturbing and perhaps raises questions in the context of large-firm corporate practice whether it is the lawyers who might need regulatory protection from the potentially over-bearing expectations of their more powerful clients. See also a similar study of in-house lawyers by Moorhead et al (2016).

20. Cf. Davies (2013); and the perceived lack of consumer information is a fundamental point arising out of the CMA’s market study (see Competition and Markets Authority (2016) and paragraph 3 above).

we accept that the former should always have primacy. For example, someone guilty of a crime may wish to escape justice, or a corporate client might ask its lawyer to behave unethically. There are also areas where members of the public have an interest, but which do not involve them acting as consumers. However, the dividing lines between citizen and consumer interests can be blurred, for example remuneration of lawyers doing legal aid work doesn't directly concern consumers, but a consumer representative has a legitimate interest in the possible knock-on implications that financial incentives may have on the quality of advice<sup>21</sup>.

The Panel has helpfully elaborated on the concept of 'the consumer interest'<sup>22</sup>, and this is explored further in LSR-1 on the rationale for legal services regulation (see LSR-1 2020: paragraph 3.3 and Annex).

There are also regulatory objectives to improve access to justice<sup>23</sup> and to increase public understanding of citizens' legal rights and duties<sup>24</sup>. Given the complexity of the underlying issues, and their interdependency with so many other social, economic and political factors, one might question whether it is always clear exactly where or with whom the responsibility for the discharge of these objectives lies – or even, indeed, whether they are entirely appropriate outcomes to impose on regulators (cf. CMA 2016: paragraph 6.15).

The eight regulatory objectives are also presented with no indication of an overarching purpose or of hierarchy among them, which then provides insufficient guidance to regulators seeking to balance competing aims.<sup>25</sup>

The Legislative Options Review (2015: paragraph 5.4(1)) and the CMA (2016: paragraph 6.15) share many of these misgivings about the Act's regulatory objectives.

### 4.3 The reserved legal activities

There are six reserved legal activities<sup>26</sup>, and they form the pivot around which the whole 2007 Act revolves. Thus:

- the regulators are approved in relation to one or more of the reserved activities<sup>27</sup>;
- those approved regulators then authorise individuals to practise one or more of those activities<sup>28</sup>;
- an alternative business structure (ABS) can only be licensed by a regulator in respect of a reserved activity<sup>29</sup>;
- each ABS must have an approved head of legal practice who must also be personally authorised as a practitioner in respect of at least one of the reserved activities for which the ABS is licensed<sup>30</sup>; and
- although the Legal Ombudsman can consider complaints about poor service in relation to *any* legal activity undertaken by a practitioner, the Ombudsman can only do so if that practitioner is authorised for one or more of the reserved activities<sup>31</sup>.

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21. The issue of financial incentives and their consequences was also picked up by Hunter et al (2018) in the context of judicial perceptions of advocacy: see LSR-4 2020, paragraph 4.3.7.

22. See Legal Services Consumer Panel (2014).

23. Legal Services Act 2007, section 1(1)(c).

24. Legal Services Act 2007, section 1(1)(g).

25. The Legal Services Board has published its view of what each of the objectives means and how it will interpret them in exercising its functions: see Legal Services Board (2017).

26. Legal Services Act 2007, section 12 and Schedule 2.

27. Legal Services Act 2007, section 20 and Schedule 4.

28. Legal Services Act 2007, sections 18 and 20(6).

29. Legal Services Act 2007, sections 71(1) and 85.

30. Legal Services Act 2007, Schedule 11, paragraph 11(2) and 3(b).

31. Legal Services Act 2007, section 128(1).

While this might appear at first blush to present a reasonable and even robust approach to regulation, the problem is that the six reserved activities are in fact largely an accident of history or the result of political bargaining<sup>32</sup>. There is no modern, risk-based foundation for what is reserved or not reserved.

Two of the reserved activities are broad, such as the exercise of a right of audience<sup>33</sup> and conducting litigation<sup>34</sup>. Two others – although often referred to as the conveyancing and probate reservations – are in fact incredibly narrow, and apply only to the *preparation of the instrument* of transfer or charge of property<sup>35</sup> and *preparing papers* on which to found or oppose a grant of probate or letters of administration<sup>36</sup>.

It is not therefore conveyancing and the administration of estates that are reserved. Arguably, these two reservations do not in themselves address the main risk for consumers, namely the potentially large amounts of money and assets involved in property purchase or the administration of a deceased's assets and liabilities.

The final two are notarial activities<sup>37</sup> (which none of the mainstream legal regulators are able to authorise) and the administration of oaths<sup>38</sup> (which, although a reserved legal activity, barely features – if it features at all – in the training programmes for any of the legal professions).

An outcome of the centrality of the reserved legal activities as described above might have been that the fundamental approach of the Legal Services Act should be activity-based. However, authorisation for a reserved activity typically follows from the award of a professional title (see paragraph 4.4 below).

Consequently, some of the real force of regulation in relation to certain (non-reserved) *activities* can only be achieved through a combination of regulating authorised persons – whether *individuals* or *entities* – as well as protected *titles*<sup>39</sup> because the regulators of authorised persons choose to extend their regulatory reach over their non-reserved activities.

The Act's structure does not therefore do much to address the 'regulatory maze' referred to in the Clementi Review: if anything, it replaces it with a regulatory patchwork.

Such a multi-focused framework leads to varied approaches to regulation resulting from multiple approved (front-line) regulators applying different requirements for the award of professional titles or for authorisation to conduct the same reserved legal activities.

Arguably, a major shortcoming of the current framework is not, as some would suggest, the perceived duplication caused by the *oversight* role of the LSB. Instead, it could be argued that it is the *overlapping* roles of the approved regulators – particularly where there might also be a disparity in the numbers of practitioners involved in the respective regulated communities and also in the size and resources of their approved regulators (cf. paragraph 4.6 below).

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32. See Mayson & Marley (2010).

33. Legal Services Act 2007, section 12(1)(a) and Schedule 2, paragraph 3.

34. Legal Services Act 2007, section 12(1)(b) and Schedule 2, paragraph 4.

35. Legal Services Act 2007, section 12(1)(c) and Schedule 2, paragraph 5.

36. Legal Services Act 2007, section 12(1)(d) and Schedule 2, paragraph 6.

37. Legal Services Act 2007, section 12(1)(e) and Schedule 2, paragraph 7.

38. Legal Services Act 2007, section 12(1)(f) and Schedule 2, paragraph 8.

39. Given the Act's focus on reserved legal activities and authorised persons, it is also strange that only some professional titles are protected rather than all the titles of those who are authorised to deliver reserved legal activities.

There is thus an absence of underlying coherence and consistency to the regulation of legal services which adds complexity and potential confusion to the regulatory framework. Given the importance of law and legal services to the public interest<sup>40</sup>, this is regrettable.

The CMA felt that, because most of the reserved activities are narrowly defined, their impact on competition is limited. This is primarily because they apply only to certain parts of the overall legal services sector, and because their narrow scope allows unauthorised providers to 'work around' them (2016: paragraph 5.64).

Even so, the very fact of a need to work around suggests that the reserved activities are in fact a barrier to competition by preventing unauthorised providers from being able to offer a complete service and so potentially avoid delay and increased costs for consumers (2016: paragraph 5.66).

Although the CMA found little evidence of unauthorised providers systematically undertaking reserved activities (which is a criminal offence<sup>41</sup>), they nevertheless noted that "the narrow reservation combined with consumers' belief that all providers are regulated would make it difficult to detect and sanction such offences" (2016: paragraph 6.63).

The Legislative Options Review referred to the provisions of the Legal Services Act that contemplate change in the activities that are or are not reserved, and observed (2015: Annex 2, paragraph 4(c)):

Although the LSA does contain provisions in sections 24-26 and Schedule 6 that would allow reserved activities to be added to or removed from the current list, that process has two further limitations. First, the LSB can only proceed on an activity-by-activity basis that is cumbersome in terms of setting a more coherent, proportionate and risk-based foundation for mandatory regulation. Second, the LSB's recommendation must be accepted by the Lord Chancellor, which introduces a perception of political influence on the substance of regulation and regulatory reach<sup>42</sup>.

The CMA's conclusion is that the arguments in favour of the current reservations are stronger for some (rights of audience and conduct of litigation) than others (probate activities and the administration of oaths), and that there is poor alignment with the actual risks of those activities to consumers that may, over time, result in greater consumer detriment (2016: paragraphs 5.86-5.88).

#### **4.4 The role of professional titles**

The Act requires that those who wish to carry on reserved activities for members of the public must first be authorised by an appropriate regulator. The Act was a product of its time, and the principal route to authorisation was, and remains, through the award of one of the professional titles<sup>43</sup>, such as barrister or solicitor.

In practice, the award of the title barrister and solicitor usually carries authorisation for five of the six reserved activities (that is, all save notarial activities) – as, indeed, does an ABS licence from the Solicitors Regulation Authority. This, and the continuing connection between the approved regulators and the professions from which they originate, perpetuates 'regulation by reference to title'.

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40. This is explored in more detail in LSR-1 (2020).

41. Legal Services Act 2007, sections 14 and 17.

42. The Review observes in a footnote: "Such perceptions can be significant causes for concern, particularly in the context of public and international assessments of the independence of lawyers and legal services from State or political interference."

43. This is not universally true because, for instance, the Council for Licensed Conveyancers is able to authorise licensed probate practitioners who are not licensed conveyancers or otherwise legally qualified.

While this might appear to be a benefit, given the complexities of modern legal practice, it is difficult to see that it is risk-based. There are, for instance, many litigators who would regard themselves as a liability if engaging in conveyancing transactions or applications for probate, as well as many corporate transactional lawyers who acknowledge that they would be well out of their depth in, say, clinical negligence litigation.

Whatever other professional obligations might be imposed (such as continuing professional development, and the duty to act in the best interests of clients), the *fact* of authorisation remains. The approach is different for chartered legal executives, and for most barristers who wish to conduct litigation, where title does not lead to authorisation and separate approval is required.<sup>44</sup>

In addition, there is the prospect of different title-based regulators having authority to regulate the same reserved legal activity. For example, both the Bar Standards Board (for barristers) and the Solicitors Regulation Authority (for solicitors with rights of audience in the superior courts) will be prescribing different routes to authorisation and applying different codes of conduct and discipline to advocates potentially appearing in the same courts and perhaps even in the same cases.<sup>45</sup>

Solicitors and licensed conveyancers could be on different sides of the same house purchase, but subject to different authorisation, conduct and discipline regimes. This potential for overlap, duplication and inconsistency could well be confusing for consumers. In addition, the CMA has noted that “the LSB’s ability to ensure consistency is limited” and that “it has no power to ‘call in’ existing regulatory arrangements” (2016: footnote 584).

On this, the CMA concluded (2016: paragraph 5.153):

The multiplicity of frontline regulators may lead to unnecessary duplication of fixed costs, inconsistencies in regulation across regulators, competition between regulators that results in a ‘race to the bottom’ and a reduced ability to prioritise resources according to risk. However, multiplicity can also have positive effects in terms of specialism and competition between regulators that results in reduced regulatory costs and the development of more proportionate regulation. While we have not found evidence that the risks that we have identified are currently having a significant impact on market outcomes, we consider that they might become more material in the future if regulation were to focus on risk to a greater extent.

Further, in new multidisciplinary businesses where practitioners from differing professional backgrounds come together in the same business entity (such as barristers and licensed conveyancers working alongside solicitors in firms regulated by the Solicitors Regulation Authority), firms may be dealing with several different regulators in relation to their legally qualified staff.

However, the CMA was satisfied that this does not pose significant additional compliance costs (2016: paragraph 5.135). Although there are memoranda of understanding between regulators and the LSB to resolve potential conflicts in regulatory approach, where there is a conflict between the individuals’ obligations to their personal regulator and those to the regulator of the entity within which they work, the entity regulator’s rules take precedence.<sup>46</sup>

Finally, once an individual is authorised as a barrister or solicitor for even just one of the reserved activities, their regulator will then assume jurisdiction over *all* of the activities

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44. See <https://www.cilexregulation.org.uk/practice-rights/about-practice-rights> and

[https://www.barstandardsboard.org.uk/media/1849621/guidance\\_on\\_conducting\\_litigation.pdf](https://www.barstandardsboard.org.uk/media/1849621/guidance_on_conducting_litigation.pdf).

45. Recent empirical research has suggested that the disparity in training and authorisation as between barristers and solicitor-advocates is the basis on which some judges conclude that most solicitor-advocates tend not to achieve the same standards of advocacy as members of the independent Bar: Hunter et al (2018), page 20.

46. Legal Services Act 2007, section 52(4).

carried out by that person, both reserved and non-reserved, even though Parliament has determined that *only* reserved activities *must* have regulatory attention<sup>47</sup>. Barristers and solicitors are therefore forced bear the burden and cost of all of their professional activities being subject to regulation where Parliament has not judged the inherent risks of all of those activities to require it.

The difficulty with the existing statutory structure therefore lies not so much with what it covers but with what it does not. There is a widespread consumer misconception<sup>48</sup>, as well as an expectation, that all legal services are specifically regulated to provide more than general consumer law remedies (cf. CMA 2016: paragraph 4.16; and see further LSR-2 2020: paragraph 2).

The current regulation of non-reserved activities is an incidental effect where those activities are provided by a person authorised to deliver one or more of the reserved activities. Such regulation is a consequence of the approved regulators' wish to regulate all of the professional activities of those who fall within their reach, but direct regulation of them is not a requirement of the Act.

As the CMA observe in their market study (CMA: paragraph 6.26): "The objective of regulation is to ensure that consumers are protected primarily from the worst consequences of poor-quality delivery, rather than seek to remove all risks that consumers or society may potentially face".

It is more than arguable that the stated justification for regulators currently claiming jurisdiction over the non-reserved activities of their regulated practitioners and entities treads too far into 'removing all risks' territory.

On regulation by reference to title, the Legislative Options Review stated (2015: Annex 4, paragraph 4(b)):

Future approaches to before-the-event regulation could separate the current regulatory link between title and authorisation<sup>49</sup>. In turn, this could result in risk-based, targeted and proportionate regulation focused on authorisation by regulators for specific legal activities – either by individual or entity – with the award of titles (and the education and certification of knowledge and competence required for the award of them) being a matter for professional or representative bodies rather than regulators. Care would however need to be taken as to the 'brand value' of such titles (i.e. the extent of willingness of consumers to purchase services from anyone without such a title), and whether the control of award of such titles by a professional body could become a practical barrier to entry and an impediment to competition.<sup>50</sup>

This view was reinforced in the CMA's conclusions (2016: page 14):

While the current regulatory framework is, in principle, well suited to title-based regulation, we are concerned that the current framework also appears to be insufficiently flexible to apply targeted, proportionate, risk-based and consistent regulation to reflect differences across legal services areas and across time. The issues we have identified may indicate that the current framework is not sustainable in the long run.

The CMA further said that (2016: paragraph 6.22):

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47. This follows from the previous approach to professional self-regulation effectively being preserved by the 2007 Act allowing the regulators under the Act (such as the SRA and BSB) to continue with the pre-existing regulatory arrangements: Legal Services Act 2007, section 21 and Schedule 4, paragraph 2.
  48. The same misconception can be found among lawyers, too.
  49. CILEx Regulation already operates such a model for chartered legal executives in relation to conveyancing and probate activities, and the Council for Licensed Conveyancers in relation to licensed probate practitioners.
  50. The Legal Services Board has expressed an identical view (2016: page 22): "We do not consider that regulation should in future be based on professional title – in other words, regulatory rules should not be targeted at particular practitioners solely on the basis of their professional titles."

an optimal regulatory framework should not try to regulate all legal activities uniformly, but should have a targeted approach, where different activities are regulated differently according to the risk(s) they pose rather than regulating on the basis of the professional title of the provider undertaking it.

Such a shift away from title-based regulation as envisaged by the CMA and LSB should therefore be considered as part of this Review, and explore what the potential alternatives might be. It is addressed more fully in LSR-3 (2020) on the focus of legal services regulation.

In anticipating such a shift, however, the Review also needs to reflect on the continuing role of self-regulation and, in particular, to examine whether and to what extent a legitimate role for self-regulation exists. The views expressed by the Legislative Options Review and the CMA as recorded above do not assume the disappearance of professional titles or of any need to regulate them, but rather a ‘de-coupling’ from authorisation to practise the currently reserved activities.

This raises questions about the role, function, scope and need for oversight for continuing self-regulation – and, indeed, whether the reduced role of self-regulation since the Legal Services Act 2007 might need to be reassessed.

#### 4.5 The regulatory gap

The distinction between the reserved and other (non-reserved) legal activities, combined with authorisation and regulation flowing from a professional title, creates a ‘regulatory gap’ – or, in other words, an unlevel playing field that potentially disadvantages qualified lawyers. Once a professional title is awarded to a qualified lawyer and an individual is in practice (with a valid practising certificate), then all of that practitioner’s activities are subject to regulation, even if he or she only practises in non-reserved areas.

On the other hand, because non-reserved legal activities do not require authorisation, someone who is not legally qualified can legitimately offer those services to the public for payment without being subject to regulation (other than the general law and normal consumer protections<sup>51</sup>).

The preparation of wills is often cited as an example. A solicitor advising on this would be regulated (with the attendant burden and cost – but also, of course, with the consequent protection and redress available to a dissatisfied client). The adviser who is not legally qualified does not need to demonstrate any training or certification, carry any indemnity insurance, or offer any prospect of redress should things not go to plan<sup>52</sup> – which, of course, in the case of a will might not be until many years later, when the client is dead and can no longer complain.

The coherence of a regulatory structure should perhaps be examined further where the unqualified are not subject to regulation – indeed, *cannot* be regulated by a front-line legal regulator even if they wanted to be – whereas those who are qualified cannot escape regulation even though Parliament does not mandate it and they might claim to be better placed to provide competent advice<sup>53</sup>.

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51. These are considered in LSR-1 2020: paragraph 2.

52. This is not intended to dispute or undermine the value of voluntary self-regulation that might offer protection to those who use providers of non-reserved activities (such as that offered, for example, by the Institute of Professional Willwriters or the Society of Will Writers, or by the Professional Paralegals Register).

53. The operative phrase here is ‘claim to be’: LSB research has shown issues with the quality of wills and customer service being provided both by solicitors and unregulated will-writers (see Legal Services Board 2013).

In seeking to encourage competition and innovation in the delivery of legal services, and in the expectation that this would lead to better service, better value and fewer service complaints, the Act has also created the possibility and prospect of some 80%<sup>54</sup> of legal services being provided by those who could not currently be regulated.

Absent the development of voluntary jurisdiction (which, by definition, will probably exclude the providers in respect of whom there are the greatest regulatory or consumer concerns), the Legal Ombudsman's jurisdiction is similarly hampered.

As the CMA observed (2016: paragraph 6.66): "the regulatory gap emerges not only in relation to the regulatory requirements to which providers are subject, but also in relation to access to redress mechanisms (ie only consumers using authorised providers can access the LeO)".

The extension of reserved legal activities, as envisaged by section 24 of the Legal Services Act, is a rather blunt (and possibly disproportionate) instrument for achieving the regulation of additional legal activities. Indeed, given that only a 'legal activity' can presently be considered for reservation, the assumption must be that the extension of the regulatory net through reservation can necessarily only be achieved on a piecemeal, case-by-case, basis (cf. paragraph 4.3 above).

The regulatory gap is one of the most problematic issues arising from the current structure of a mix of regulated activities, regulated individuals and entities, and regulated titles. If the public view is that all providers of legal services are or should be regulated in order to be able to offer legal advice and representation in return for payment (and that clients are therefore protected if something goes wrong)<sup>55</sup>, then the current regulatory gap leads to a situation where there is a mismatch between reality and public expectation about the extent and availability of protection and redress.

This leads to two important consequences. First, public and consumer confidence in legal services could be undermined by any lack of quality or service in unregulated legal services, and the absence of any protection in respect of them.

Second, consumers of legal services might be less inclined to make proper enquiry of the expertise and experience of providers before instructing them. Indeed, recent research suggests that, while consumers and small businesses do benefit from 'shopping around', only about a quarter actually do so<sup>56</sup>.

The CMA's conclusion on the regulatory gap expresses more concern for the future than the present (2016: paragraph 5.78):

While we are not presently concerned about the current regulatory gap, we believe that increased transparency in the legal services sector may result in an increased use of unauthorised providers for unreserved legal activities. As a result of the poor alignment between the reservations and the risks involved in the provision of legal services, we believe that over time this regulatory gap may grow and may result in greater consumer detriment. This possibility has consequences for the design of the regulatory structure and for the proportionality of regulatory costs.

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54. This percentage estimate is admittedly based on anecdotal rather than empirical evidence, but is nevertheless consistent across conversations with lawyers and law firms irrespective of nature of practice, size, and geography. Even in firms that specialise in, for example, conveyancing, or wills and probate, the nature of the reserved legal activity in each case is so narrowly drawn that the percentage of work conducted that is in fact reserved is still said to remain at about the 20% level.

55. Cf. <http://www.legalfutures.co.uk/latest-news/bringing-legal-advice-regulatory-net-may-resolve-consumer-confusion-says-lsb-chief> and <http://www.legalfutures.co.uk/latest-news/government-under-fire-will-writing-decision-few-express-faith-voluntary-regulation>.

56. See BMG Research (2018) for small businesses, Legal Services Consumer Panel Tracker Survey (2018), and YouGov (2020). However, it is worth noting that if the actions of the 25% who do shop around are sufficient to change the behaviour of providers, those who do not shop around might still benefit vicariously.

The CMA's assessment therefore suggests that the regulatory framework does not adequately match expectations and the scope of regulation, and this should be considered further. It remains an open question whether the goal should be to remove the regulatory gap, or increase the transparency to consumers of its existence (for example, by requiring all providers – whether authorised or not – to declare their regulatory status and the availability of any protection and redress available).

#### 4.6 The independence of regulation and regulators

The 2007 Act requires the functional separation of regulatory and representative activities<sup>57</sup>, but it does not require the structural, financial or material separation of the respective bodies carrying them out. The separation and independence between regulatory and representative activities is far from complete, and has given rise to some tension between them (particularly in relation to the SRA and BSB, as noted by the CMA (2016: paragraphs 5.146 and 5.147).

It has also led to perceptions from those outside the system that there is at least a prospect of 'regulatory capture' of the regulator by those whom it regulates.

Where a regulatory objective requires an independent legal profession (or, as I might prefer, independent legal advice and representation), independence from government and other representative interests is essential if public confidence in the administration of justice and in legal services is to be achieved.

This can be done if regulators are free from political influence, and from the influence of lawyers, legal services providers and consumers (and of those who represent those interests), and they do not 'self regulate' in the sense that all of those who serve on the regulatory bodies are members of the regulated community.

Under the current regulatory framework of the Legal Services Act, much headway has been made in establishing the LSB as independent from government, in introducing lay membership into the governance of the regulators, and in separating the representative and regulatory functions of the approved regulators.

However, the current separation between the representative and regulatory functions of some of the approved regulators (particularly the Law Society/SRA<sup>58</sup> and the Bar Council/BSB<sup>59</sup>) has in the eyes of some taken far too long and has not gone far enough.

This has manifested itself in public pronouncements in which the representative body has overtly sought to influence the regulator<sup>60</sup>, and in the funding and resourcing arrangements<sup>61</sup> of the regulatory function (which results in certain facilities being shared – and therefore

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57. Legal Services Act 2007, section 30.

58. The Legal Services Board has expressed formal concerns about this: see <http://www.legalfutures.co.uk/latest-news/sra-independence-still-concern-lsb-keeps-law-society-report-eases-demands>.

59. See, for example, <http://www.legalfutures.co.uk/regulation/solicitors/bar-council-fails-governance-test-again-while-law-society-goes-to-the-wire>.

60. See <http://www.legalfutures.co.uk/regulation/solicitors/plant-lays-bare-sralaw-society-tensions-caused-by-defective-legal-services-act> and <http://www.legalfutures.co.uk/latest-news/bar-council-faces-probe-undermining-independent-regulation-barristers>.

61. See, for example, <http://www.legalfutures.co.uk/regulation/solicitors/law-society-and-sra-unveil-deal-to-resolve-longstanding-governance-problems> and <http://www.legalfutures.co.uk/latest-news/revealed-law-society-sra-odds-regulators-budget>.

subject to negotiation<sup>62</sup>, change and the possibility of obsolescence and contestable access).

Even as recently as May 2018, the LSB concluded a formal investigation into the relationship between the Law Society and the SRA. It concluded that the Law Society's arrangements for oversight and monitoring of the SRA during the period under investigation were not proportionate or transparent, and that the SRA was not responsible (as it should have been) for designing and managing its own appointments process.<sup>63</sup>

In part, the ability to separate will be driven by more pragmatic considerations of the cost of independence. If a smaller approved regulator must pay for its own premises and supporting resources (without the benefit of some of the economies of scale or of sharing that arise under alternative arrangements), then the cost of regulation is likely to be higher for its regulated community.

This balancing of independence and cost-efficiency could potentially tend towards economy in preference to full independence, and must be scrutinised.

Similarly, the present arrangement under which appointments to the LSB, as well as rule-changes, are made or approved by the Ministry of Justice, gives rise to understandable perceptions from international observers and consumers that the regulatory structure in England & Wales is a creature of government and not therefore truly independent (cf. footnote 42 above).

Such perceptions are important in the context of the rule of law, given that independent legal challenge of government may be required to ensure that government itself acts within the law.<sup>64</sup>

It is also important in the context of distinguishing between regulatory decisions that are wrong (i.e. beyond the powers or remit of a regulator), unpopular (as judged, correctly or not, in 'the court of public opinion' or by the media) or politically inconvenient (when the scope for improper political or ministerial influence or interference might be strongest).<sup>65</sup>

The need for independence is accentuated by the significantly changed role of regulation and of regulators since 2007. Before the Act, front-line regulators focused their attention on the training, admission, and discipline of individuals, and they therefore had little or no experience of regulating entities. They also operated on a rules-based approach, and monitoring and enforcement focused on failure to comply with those rules.

There has now been a shift to outcomes-focused regulation, with a consequent emphasis on risk. Although the regulators claim to operate a risk-based approach to regulation generally and to ABS licensing in particular, it is still questionable whether they yet have either the numbers of staff or the expertise or experience to make meaningful, consistent and timely risk-based assessments and responses.

The consequences are that the regulatory process is often slower and less responsive than it needs to be, and that the approach seems to be risk-averse rather than risk-based and proportionate to the assessed risk.

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62. See <http://www.legalfutures.co.uk/latest-news/exclusive-sra-seeks-law-society-approval-for-22m-investment-in-new-it-system>.

63. See [https://www.legalservicesboard.org.uk/news/20180530\\_lsb\\_finds\\_that\\_the\\_law\\_society\\_broke\\_internal\\_governance\\_rules](https://www.legalservicesboard.org.uk/news/20180530_lsb_finds_that_the_law_society_broke_internal_governance_rules).

64. Bingham (2010), Chapter 6; Tamanaha (2004), pages 114-119.

65. Arguably such concerns have been heightened recently in relation to the actions of the Parole Board, the resignation of its chairman, and subsequent judicial comment: see *Wakenshaw v. Secretary of State for Justice* [2018] EWHC 2089 (Admin).

Further, the different histories, size and scope of the current approved regulators leads to relative disparity of approach and resourcing, as well as fragmentation and duplication of regulatory resource across the totality of regulated legal services. This potentially creates confusion for client and consumers, cost-inefficiencies in the provision of regulation (with costs borne differently by the regulated community and, ultimately, the fee-paying clients).

The relationships of the approved regulators among themselves, and with the LSB, have also sometimes been uncomfortable.

The need for a multiplicity of front-line regulators, and for an oversight regulator, would therefore bear revisiting given the potential inconsistencies, confusion, inefficiencies and costs involved and a perception that the current framework might be 'top heavy'.

The CMA's view on independence is expressed as follows (2016: paragraph 5.145):

As a general matter, we consider that independence of a regulator from the providers that it regulates is a key principle that should be taken into account in any review of a regulatory framework. We also recognise that an independent legal profession is important for securing many of the public interest concerns [relating to the rule of law, access to justice and consumer protection]. As such, preserving the profession's independence from government is also a key consideration in assessing any potential changes to the current regulatory structure.

Not surprisingly, therefore (2016: paragraph 5.152), "We consider that regulatory independence is a fundamental principle for the regulatory framework and consequently that a review of regulatory independence is a priority."

#### **4.7 The perceived 'mission' of regulators**

The Legal Services Act sets out its eight regulatory objectives in section 1 (see also paragraph 4.2 above). In his final report, Sir David Clementi said explicitly that (2004: 28): "In a regulatory body the public interest should have primacy". Thus, his view was very clearly that if any of the regulatory objectives is to be privileged over the others then it should be 'protecting and promoting the public interest'<sup>66</sup>.

However, the Act's objectives were stated at the time not to be in any order of priority, or to be interpreted or applied in such a way that some would have supremacy over the others<sup>67</sup>. Accordingly, the Explanatory Notes to the Act state (in paragraph 28) that: "The Act does not rank these objectives and principles in order of importance. The Legal Services Board, the Office for Legal Complaints and the approved regulators will be best placed to consider how competing objectives are to be balanced in a particular instance."

Subsequently, however, some regulators have appeared to privilege one regulatory objective over the others, by suggesting that they regulated 'in the interests of consumers', or to increase competition among providers<sup>68</sup>, or to achieve greater diversity in the legal professions.

For example, the Legal Services Board has said on its website, and in its business plan for 2013-14, that its goal was to "reform and modernise the legal services marketplace in the interests of consumers". If the notion of prioritising the regulatory objectives still remained unacceptable – as opposed to balancing those objectives when one conflicted with another

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66. This theme is picked up again in LSR-1 (2020).

67. See Hansard Official Report, HL Deb 9 January 2007 c. 129, Baroness Ashton of Upholland: "The Joint Committee recommended that the Explanatory Notes should make it explicit that the objectives were not listed in order of importance. We agreed with that, and the Explanatory Notes reflect it."

68. Boon & Whyte suggest that the Solicitors Regulation Authority's "regulatory strategy has gradually moved away from the policies of professionalism towards those promoting competition and corporate bureaucracy" (2019: pages 2-3); and cf. Boon (2018), chapter 10.

– then perhaps the LSB should have been (and should have declared itself to be) regulating consistently with *all* of the regulatory objectives rather than stating that its goal favoured one of them.

Further, as reflected in the quotation above, the LSB also expressed a goal of ‘reforming and modernising’ and, as part of that, conveyed a positive mission to increase competition in the marketplace. While a wish to see (and support) reform, modernisation and competition in the legal services sector is understandable, it is still open to question whether an oversight or front-line regulator should be setting these as its goals. One could assert that the regulatory objective is discharged by *enabling* the changes in regulation that the Act envisages (such as the separation of regulation and representation, the creation of the Legal Ombudsman and a better approach to complaints handling, and the licensing of alternative business structures).

Of course, these statutory changes and their consequential regulatory frameworks need to be implemented, and it is the LSB’s role to oversee this implementation. In this sense, the LSB should certainly oversee the changes in regulation that *permit* and *encourage* modernisation, competition and diversity. But the Act does not *require* modernisation, competition<sup>69</sup> and diversity such that these things become goals of the regulator in their own right. Whether or not modernisation, competition and diversity actually follow from regulatory reforms must surely be the outcome of independent actors (whether firms and individuals) choosing to take advantage of the reforms rather than the specific mission of an oversight or front-line regulator.

#### **4.8 Public confidence in legal services**

The public interest in an effective justice system and meaningful access to justice requires that people must have confidence not only in the administration of justice, and in courts and judges, but also in their ability to access effective legal advice and representation at the appropriate time and cost.

Judges have also expressed concern that poor advocacy (particularly poor preparation by advocates) has knock-on consequences that affect juries’ decision-making, the delivery of justice, and the protection of the public from harm (Hunter et al, 2018: page 20).

It is therefore impossible to separate the issue of confidence in legal services from the challenge of access to justice. The challenges can be systemic (particularly those issues affecting the criminal justice system), and personal (as in the performance of individual advocates and litigators) as much as regulatory (the question of who is allowed to act as an advocate, with what training, on what basis, and with what supervision).

It is also necessary to cast this question of access in broad terms. As an American commentator puts it (Gordon 2019: 178):

In the modern world, access to justice requires more than the capacity to litigate in courts. It requires help with navigating the mazes of bureaucratic government and filling out its forms, and with contesting adverse government actions. It requires help in planning for major life events, like founding a business, adopting a child, or divorcing a spouse. It requires effective assistance with challenging adverse actions of business corporations or professionals, say, as employees or

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69. Section 1(1)(e) refers to ‘promoting’ competition, not (as with access to justice in section 1(1)(c)) ‘improving’ or (as with citizens’ understanding in section 1(1)(g)) ‘increasing’: as such, the Act focuses on intent rather than achievement. I would also interpret ‘promoting’ in its enabling sense rather than its proselytising or marketing sense.

customers. It requires access to powerful decision-makers, or agents in a position to influence them.

Without this, trust in ‘the system’ and its agents will be jeopardised. According to research from the Legal Services Consumer Panel, public trust in lawyers declined from 47% in 2011 to 42% in 2016, but has recovered slightly since to 45% (similar to accountants, but lower than the 80% for doctors)<sup>70</sup>; but intriguingly those consumers who had used a legal services provider in the past two years were marginally less inclined to trust lawyers than those who had not.<sup>71</sup>

Confidence that consumer rights are protected when dealing with lawyers has been rising slightly over the years, but still sits just below 50% (and is higher for those who have better knowledge of what lawyers do).

In addition, it would also seem that there is a similar picture for small and medium-sized businesses (SMEs). In surveys for the LSB of some 10,000 SMEs<sup>72</sup>, about half of them choose to deal with legal issues on their own without seeking advice. This might be because only 11% agreed that lawyers provide a cost-effective way of resolving legal issues.

This broad lack of belief runs risks of reduced confidence of the public, consumers and clients in the legal system and those who support it. It also appears to lead to the ‘elective exclusion’ of many citizens and businesses from legal advice and processes, to the detriment of them protecting their interests or pursuing just claims.

This undermines the full participation of citizens in society and in UK plc’s economic success and growth. It is only in this way that the apparently persistent unmet need or latent demand for legal services can be met, unresolved disputes addressed, and full value to both the legal economy (and then to the economy at large) be realised.

If the cost (or at least cost-effectiveness) of legal services is such that clients and would-be clients do not seek legal advice and representation, then the cost structure of the sector probably needs to be addressed. This is a larger issue than can be explored in this review, but the critical issue would seem to be whether the extent, nature and cost of regulation plays any part in the ultimate cost of legal services to the consumer.

Part of the issue here lies in the balance between ‘before-the-event’ assurance of competence and quality of providers and ‘after-the-event’ redress when something has gone wrong.<sup>73</sup> The regulation and consequences of assurance are typically much more expensive than the structure and mechanisms for redress, suggesting that better targeted and proportionate regulation in relation to assurance could be beneficial.

It could also suggest a reconsideration of the scope of jurisdiction for after-the-event redress (as has been advocated by the Office for Legal Complaints<sup>74</sup>).

Finally, there is a need for the regulated providers of legal services to have confidence in the regulatory framework and regulators. If the regulated community believes that the regulators are introducing and enforcing impractical or inappropriate regulation, focusing on the wrong issues, under-resourced, out of touch, or too expensive, then confidence and, ultimately, compliance, will suffer.

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70. See Legal Services Consumer Panel (2016), (2018) and (2020).

71. See Legal Services Consumer Panel (2018).

72. See BMG Research (2018).

73. The distinctions between before-the-event, during-the-event and after-the-event approaches to regulatory intervention are considered in LSR-4 on the form of legal services regulation (2020: paragraph 4).

74. See [http://www.legalombudsman.org.uk/downloads/documents/press\\_releases/0613-Call-for-new-vision-meet-future-challenges.pdf](http://www.legalombudsman.org.uk/downloads/documents/press_releases/0613-Call-for-new-vision-meet-future-challenges.pdf).

This would further undermine public and client confidence in the regulatory framework for legal services, the rule of law, the reality of access to justice, and the administration of justice.

It is against this background that the CMA concludes (2016: pages 4 and 8, and paragraphs 3.238 and 7.1) that the sector is still not working well for consumers and small businesses, and that the current regulatory framework is not sustainable in the long run (2016: page 14, and paragraph 6.5).

Their report is also clear in its assessment that the framework does not meet the better regulation principles of accountability, consistency, proportionality, transparency, and targeting (2016: paragraphs 6.5, 6.69 and 6.73).

The failure of the sector to work well for members of society goes to the very heart of the public good of the rule of law and to whether citizens are able to fulfil their expectations of legitimate participation in society. This is more than a ‘nice to have’<sup>75</sup>: as explored in LSR-1 (2020), these are critical components of the public interest.

In this context, it might therefore be instructive (as well as disappointing) to conclude this assessment with some observations from the Rule of Law Index (World Justice Project 2020). We might believe that public confidence in our justice system is high, and that our legal system is the best in the world; but we should perhaps temper that assessment by noting that the UK’s position in the Index is only 13<sup>th</sup> – and that follows a fall of one place from the previous year

We should also be concerned that our rating for accessibility and affordability of civil justice is the lowest for any component of the Index, and well below the average for the region of the EU, EFTA and North America<sup>76</sup> (World Justice Project 2020).

This is very clear evidence – if any were needed – that as we prepare for a world outside the European Union, we have to attend to these issues of the rule of law and access to justice. If we do not, the UK cannot maintain its claim to a world-leading position; and although legal services regulation can play only a limited role in that, it is nevertheless critical that its part is played with maximum effectiveness and efficiency, and to the full.

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75. As Pleasence & Balmer put it (2019: page 140): “Neither abstract nor esoteric, civil legal problems ... contribute to the harshest episodes of people’s lives. They can diminish people’s capability to function effectively in society. This makes access to justice – the just and efficient resolution of civil legal problems in compliance with human rights standards and, when necessary, through impartial institutions of justice and with appropriate support – a matter of considerable importance.”

76. We might also take notice that even the ABA Commission on the Future of Legal Services (2016) observed that “Some individuals prefer less expensive alternatives to hiring a lawyer”, that “the public has been increasingly turning to a growing array of unregulated legal services providers”, and that “Indeed, many consumers are choosing these unregulated [legal services provider] entities over traditional law firms”. Such shifts in consumer behaviour reflect what another US commentator describes as “a slow bleed of business to nonlawyers” (Barton 2014, page 3079).

## 5. Conclusions

By the time of Sir David Clementi's review of the regulatory framework in 2003-4, law firms were already competing strongly among themselves for work and talent. However, that framework contained elements that inhibited the ability of others to compete with law firms (and would also have made it very difficult for law firms to compete for work and talent against those others or to raise capital). So, although the sector was by then internally competitive, it was nevertheless relatively closed and therefore under-developed compared to other markets for professional services.

At that time, and often since, there has been a discourse and underlying philosophy that competition and consumerism is beneficial, and that market forces will drive higher quality services and improved value for money. It is difficult to find the evidence that this is necessarily the case – and, arguably, there is much evidence from the global financial crisis that even regulated markets can do significant harm to society and citizens.

In summary, there are some significant shortcomings in the present structure for the regulation of legal services and those who provide them:

- inflexibility;
- competing and possibly inappropriate regulatory objectives;
- a pivotal set of reserved activities that are anachronistic and do not necessarily include all activities that ought to be regulated;
- title-based authorisation that results in additional burden and cost in relation to some activities being more heavily regulated than they need to be;
- the emergence and rapid development of LawTech (see LSR-3 2020: paragraph 2.3.2) that is capable of offering legal advice and services independently of any human or legally qualified interface or interaction, beyond the reach of the current framework;
- a regulatory gap that exposes consumers to potential harm and puts legally qualified practitioners at a competitive disadvantage;
- the unsatisfactory nature of the separation of regulation and representation;
- the potentially misconceived 'mission' basis of regulation and regulators; and
- insufficient public confidence in legal services regulation.

To complete this assessment, I should probably also add that Sir David Clementi finished his work on which the 2007 Act is based in 2004. The current structure therefore pre-dates the global financial crisis (which has led to austerity, shortfalls in the funding of legal aid and the wider courts and justice system, and then to a rise in litigants-in-person<sup>77</sup>). It also pre-dates a use of technology that has become more extensive and pervasive, as well as the rise of artificial intelligence in law.

The world that existed in 2004 simply does not exist in the same way now, and the inherent tensions in the 2007 Act are becoming increasingly apparent.

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77. Assy (2011) rightly reminds us: "The belief that [litigants-in-person] are poor is problematic because it implies an overly simplistic division between affluent, represented litigants and poor, self-represented-litigants; clearly not all represented litigants are well off and not all the self-represented are poor... There is not sufficient empirical information to establish a general claim that [litigants-in-person] choose to represent themselves out of financial necessity; financial considerations may be among the reasons for that choice, but financial considerations are not always tantamount to financial necessity."

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