



# **INDEPENDENT REVIEW OF LEGAL SERVICES REGULATION**

**The Focus of Legal Services Regulation**

**Working Paper LSR-3 | March 2020**

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# INDEPENDENT REVIEW OF LEGAL SERVICES REGULATION

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## THE FOCUS OF LEGAL SERVICES REGULATION

Stephen Mayson<sup>1</sup>

### 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 the third of five Working Papers that address 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 the author, and should not be taken to have been endorsed or approved by members of the Panel, individually or collectively.

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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 first Working Paper in this series (LSR-1 2020, *The rationale for legal services regulation*<sup>3</sup>) addresses the fundamental question of whether there is something special about legal services that requires sector-specific regulation. It concludes that there is, and posits that the public interest provides both the justification and the ‘moral compass’ for regulatory intervention in legal services.

This also then suggests that sector-specific regulation is particularly justified to ensure that the public good of the rule of law, the administration of justice and the interests of UK plc are preserved and protected, as well as to ensure appropriate consumer protection where incompetent or inadequate legal services or other consumer detriment could result in irreversible, or imperfectly compensated, harm to citizens.

The second Working Paper (LSR-2 2020, *The scope of legal services regulation*<sup>3</sup>) examines the scope of legal services regulation – that is, the legal services to which regulation should apply – on the basis that scope is fundamentally a policy issue, driven by a mix of political, social, economic and professional considerations. The outcome of balancing those considerations can place regulatory scope on a spectrum between ‘all’ and ‘none’.

The current scope of regulation represents an ‘intermediate’ approach between no regulation and full regulation of legal services, in that before-the-event authorisation to practise is limited by the Legal Services Act 2007 to the reserved legal activities. These activities are an historical feature of legal services regulation imported into the 2007 Act with no modern, risk-based reassessment of whether or not they provide the correct foundation for 21<sup>st</sup> century, post-Brexit, regulation.

Using the public interest rationale from LSR-1 (2020) as a criterion, the case for regulation is stronger for some of the current reserved activities than others, and there could also be alternative or additional candidate activities. LSR-2 (2020) suggested that the question of whether the notion of ‘reservation’ needs to be retained should be considered, given that what would be most important in the public interest is some form of before-the-event authorisation.

This, along with other forms of during-the-event and after-the-event approaches, could be applied to defined legal activities without necessarily needing to characterise them as ‘reserved’. This might also allow after-the-event regulation to be applied in some form to all legal activities, or at least to provide protection to individual consumers and small businesses where it is most needed.

Having considered *why* legal services should be regulated and *which* of those services should fall within the scope of regulatory intervention, this Working Paper turns to the potentially more challenging question of what should be the proper focus of that regulatory attention.

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3. Available, as updated, at: <https://www.ucl.ac.uk/ethics-law/publications/2018/sep/independent-review-legal-services-regulation>.

## 2. The challenge of regulatory focus

### 2.1 Background

Although the short title of the Legal Services Act 2007 refers to ‘services’, for the most part it applies to ‘legal activities’ (which are defined in section 12). This would perhaps lead to an expectation that the approach of the Act would be to regulate by activity. On the other hand, activities have to be carried on by an individual, and authorisation and sanctions are primarily attached to an individual. Regulation by reference to a person rather than an activity would be understandable.

However, the Legal Services Act added some complexity to this picture in two ways. First, it provided for the licensing of alternative business structures (ABSs) that gives an authorisation to an organisation, albeit that the authorised activity must in fact be carried on or supervised by an individual who is also personally authorised. In doing so, it added entities to the focus of regulation.

Second, the Act’s structure fundamentally retains the pre-existing approach of regulation by reference to professional titles. Thus, where authorisation is required to carry on a legal activity, that authorisation most often flows from an award of professional title. The CMA, in their legal services market study, emphasised the connection between current regulation and title (CMA 2016, paragraphs 5.90-5.92: see further paragraph 4.1 below):

The Legal Services Act therefore sets up potentially competing (and not entirely compatible) objects of focus for regulation: an *activity*; an *individual* carrying on an activity; and a *context* within which an activity is carried on by an individual (either as part of a profession, or as a participant in an entity). The question of whether regulation should attach primarily to any one of these objects has no straightforward answer.

The solution adopted by the 2007 Act is problematic because authorisation is connected primarily to the holders of a professional title (that is, to part of a context). This is an inevitable consequence of the authorisation process being operated by ‘approved regulators’ whose history lies in professional bodies (such as the General Council of the Bar and The Law Society) that conferred professional titles and then self-regulated the conduct of its members.

Even in recent developments, authorisations have derived from either the creation of new bodies conferring titles (such as the Council for Licensed Conveyancers) or – after the introduction of the 2007 Act – by approving new regulators that already conferred professional qualifications and then regulated those who hold a professional title (such as the Institute of Chartered Accountants in England & Wales).

Consequently, authorisation by reference to title is currently deeply rooted in the structure of the Act, the approved regulators, and authorised practitioners, as well as in the policy and culture of regulation.

Such an outcome was foreseen and accepted by Sir David Clementi in his Review. He reached his conclusion that the failings of the pre-2007 approach to regulation “should be tackled by reform starting from where we are, rather than from scratch”, in full knowledge that this would incorporate a “history of professional bodies with strong roots” that had “produced a strong and independently minded profession” (Clementi 2004: page 36). Nevertheless, this approach is under increasing challenge.

## 2.2 A shift away from title?

As part of the review of the Legal Services Act 2007 and related legislation, which led to the submission to the Ministry of Justice in 2015 of *Legislative options beyond the Legal Services Act 2007*, that submission stated (Legislative Options Review 2015: page 54):

Future approaches to before-the-event regulation could separate the current regulatory link between title and authorisation<sup>4</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.

The Legal Services Board then picked up this issue in *A vision for legislative reform of the regulatory framework for legal services in England and Wales* (LSB 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.

This view was reinforced when the Competition & Markets Authority, in its market study, concluded (CMA 2016: page 14) that:

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 report further said (CMA 2016: page 201) that:

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.

This review must therefore consider such a shift away from title-based regulation as envisaged by the CMA and LSB, and to identify what the potential alternatives might be.

To address the future as a choice between regulation by activity or by title perhaps reflects the contrast arising from where we have ended up under the Act, but potentially runs the risk of masking the real choice. This choice is as much about *who* (individual, entity, title-holder) should be regulated *by whom* (regulator) as it is about *what* should be regulated (activity).

For a title-based regulator, as now, the choice would be fairly clear: any individual or entity that met its requirements for qualification or licensing in respect of certain activities. As we know, this approach creates difficulties (the regulatory gaps and asymmetries explored in LSR-0 2020: paragraph 4.5, and LSR-2 2020: paragraph 2.2(5)) because those who do not hold a title (or employ those who do) fall outside the regulatory remit.

For an activity-based regulator, the activity or activities for which it was approved would also be clear, and any authorisation given by it to carry on one or more of those activities could attach to any individual, entity or title-holder meeting its requirements. If the correct activities are properly defined, there is arguably less scope for difficulty, gaps and asymmetries.

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4. CILEx Regulation already operates such a model for chartered legal executives in relation to conveyancing and probate activities, as does the Council for Licensed Conveyancers and its authorised probate practitioners.

### 2.3 The additional challenge of emerging technologies

Understandably, given the history of the professional and regulatory development of legal services, the current regulatory framework – and many recent considerations of possible alternatives to it – proceed on the basis that regulation must be applied to either an activity or a person (individual, title-holder or entity). However, developments in technology, and particularly in artificial intelligence, present potentially insuperable challenges to these approaches.

The emergence of such challenges was anticipated back in 2004 by Ribstein (2004: 324):

New technologies, particularly including computer software and the Internet, could fundamentally change the provision of legal advice. First, websites can convey large quantities of legal information directly to consumers. This reduces not only the need for legal advice, but also the information asymmetry between lawyer and client that provides the current rationale for [regulation].

Second, Internet services and computer software blur the line between information provision and legal advice. This is partly because of the potential for interactivity, where information is provided based on the user's particular need or question, just as in a traditional lawyer-client setting.

These new technologies force more precise delineation of the activities that require [regulation]. They also challenge [jurisdiction-based regulation] by permitting lawyers to interact with clients in [jurisdictions] in which the lawyers are not licensed. Firms and individuals exploiting the new technologies may try to reduce legal impediments to lucrative business opportunities. Moreover, the fact that Internet law practice can provide effective legal assistance on routine matters to a low-income clientele makes opposition by [representative bodies] politically unattractive. In general, these new business methods demand a clearer theory of the appropriate scope of regulation than is provided by the existing analytical framework.

More recently, an OECD paper on disruptive innovation said (2016: paragraph 74):

it is apparent that, even if legal professionals were able to maintain exclusivity, the market in which they operate will change dramatically. Some disruptive innovations that will impact the industry are being developed outside existing regulatory frameworks. But even regulatory compliant innovation may challenge market structure.... Online service provision allows legal professionals to scale their service offerings, which could lead to a reduction in the number of professionals serving markets and challenge other regulatory restrictions, such as limits on the number of professionals able to operate within a certain region. Finally, lawyers are taking advantage of reforms in legislation limiting the ownership of law firms to create new partnerships and business models involving other legal professionals or non-lawyers.

We should also not underestimate the likely influence of technology in legal practice<sup>5</sup>: the Ministry of Justice recently said that in 2018 the global legal technology sector was valued at \$15.9 billion.<sup>6</sup> The challenges of legal technology are accordingly widespread, whether they are technical, regulatory or jurisdictional.<sup>7</sup>

Technology presents challenges with both positive and negative dimensions. Semple puts it well (2019: paragraph 2.1):

Technological innovation in legal services should ideally be a robust, steady flame which creates heat and light. For consumers of legal services, technological innovation should deliver better quality, lower prices, and wider choice. Looking beyond consumer interests, technological innovation should also deliver broader public interest benefits such as stronger rule of law, and economic benefits from efficiency and exports.

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5. Hook has offered an illuminating taxonomy of legal technology (see 2019: Figure 2).

6. See: [https://www.gov.uk/government/news/tech-nation-to-support-growth-of-uk-lawtech-with-2-million-of-government-funding?utm\\_source=0f87c93d-d32b-4fdd-9ff0-8ccb1cb95016&utm\\_medium=email&utm\\_campaign=govuk-notifications&utm\\_content=immediate](https://www.gov.uk/government/news/tech-nation-to-support-growth-of-uk-lawtech-with-2-million-of-government-funding?utm_source=0f87c93d-d32b-4fdd-9ff0-8ccb1cb95016&utm_medium=email&utm_campaign=govuk-notifications&utm_content=immediate).

7. For further material, see: Akon (2017); Legal Services Board (2018); Solicitors Regulation Authority (2018); Singapore Academy of Law (2017); Sandefur (2019); Law Society (2019).

The flame of technological innovation can also be dangerous. It can scorch consumers with new kinds of deficient, exploitative, or monopolistic legal services. Technological innovation might also start wider conflagrations....

Innovation can be achieved in different ways, and we should anticipate that some of the outcomes will be profound and transformational (cf. Susskind & Susskind 2015; Furlong 2017).

The effects and timing of technological evolution and impact pose additional challenges for regulators in achieving the best balance that avoids over-regulation that stifles innovation as well as under-regulation that leaves consumers exposed to unacceptable risk (Semple 2019). In addition, Ford sounds a warning note that suggests that our experience of the Legal Services Act might not provide the most appropriate basis for the future we face (2017: page 139):

As we know, innovation seeps under, around, and through regulatory structures and undermines them and their boundaries in unanticipated ways. The most gameable kind of regulatory structure and the easiest to undermine is the kind of top-down, rigid, rule-based regulation....

### **2.3.1 Supportive legal technology**

For the purposes of this Review, it might be helpful to distinguish between two types of technology. The first can be described as ‘supportive’, in the sense that it supports providers of legal services either in the delivery of a legal activity (such as legal research and knowledge management, document assembly and review, e-discovery, deal rooms, matter management) or in the organisational environment in which those activities are delivered (such as case and practice management, time recording and billing, client relationship management).

The second is described as ‘substitutive’, and is addressed in paragraph 2.3.2 below.

In some of the supportive technology (the organisational, particularly), lawyers might or might not be personally involved in its use; in any case, the clients might not be aware that technology is being used as part of their relationship with the lawyer or the firm, and might not need to be aware, either.

The regulation of supportive technology presents few issues. There will normally be either individuals or entities (or both) subject to regulation, and the usual principles of competent and ethical practice can apply, as well as the duty to protect personal, confidential and sensitive information. To this can be added obligations and expectations of understanding the benefits and risks associated with the relevant technologies, with the consequent assumption of responsibility and liability for the adoption and use of specific technology.<sup>8</sup>

### **2.3.2 Substitutive legal technology**

Far more problematic for regulatory purposes is when technology does not simply support individual or institutional providers of legal services but actually substitutes for them. This can include, for example, chatbots, predictive case outcomes, document review and due

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8. This has been the approach, for example, in the United States, where the ABA Model Rule 1.1 on maintaining competence includes guidance to this effect (and this duty of technology competence has, as of December 2019, been adopted by 38 states).

diligence, intellectual property renewals, contract management, online dispute resolution and, perhaps, comparison websites<sup>9</sup>.

To some extent, of course, all technology ‘substitutes’ for humans, even that described above as ‘supportive’. The point here is that, from the consumer perspective, human beings – and lawyers in particular – are removed from their interaction with legal services. The increasing development and adoption of artificial intelligence and robotics in legal practice can only extend the opportunities for such substitution, as well as for the sophistication and processes involved.

The challenge for regulation and regulators lies not simply in the possibility of technological development and its potential. As Brownsword recently pointed out in a paper for the Legal Services Board (2019: paragraph 6.2.2.1):

even if we do not think that legal service technologies are likely to kill us, they could present very serious (and wholly unacceptable) risks to the financial interests of consumers; they could expose consumers to new vulnerabilities (where digital replaces analogue and paper); and there are more subtle threats to ‘humanity’ where we become over-reliant on technological tools. Indeed, some of the most insidious impacts might arise from technologies (such as AI-enabled digital devices) that are designed to assist humans but which, in human hands, lead to an over-reliance that is corrosive of human autonomy and human responsibility.

For the purposes of this Review, therefore, I am adopting the definition of ‘lawtech’ used by the Legal Services Consumer Panel in its May 2019 report on lawtech and consumers to refer to what is identified here as ‘substitutive’ legal technology.<sup>10</sup> In this meaning, lawtech provides self-service direct access to legal services for consumers. As such, it substitutes for a lawyer’s input, and can be experienced by the consumer without the need for any human interaction in the delivery of the service.

Where these technologies are adopted and used by individuals or entities that are otherwise regulated, the position will be the same as for supportive technology (paragraph 2.3.1 above): duties of ethical practice and effective supervision can still apply. However, these forms of technology can potentially be promoted by unregulated providers (individuals or entities) such that approaches to regulation based on individuals, titles or entities will not apply.

However, the ultimate premise of substitutive legal technology is that it can deliver a legal service with no necessary human involvement at the point of delivery. This is a paradigm shift in the delivery of legal services, and where evolution becomes revolution. Also, the client will very definitely be aware that the service is offered by or through technology. As always, there are potential benefits and disadvantages.

On the positive side, lawtech in some of these substitutive forms might well provide a route to addressing unmet and latent needs for legal services by offering both more accessible and more affordable options to consumers. Given that legal professions the world over have so far pretty well failed many such consumers, steps to prevent technological initiatives and innovations might, at best, appear to be unduly patronising or paternalistic and, at worse, be seen as self-serving protectionism.

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9. The risks here might be an undisclosed small comparison sample, undisclosed relationships between the website promoters and providers of legal services, or payments by providers for entry and preferment. Brownsword observes (2019: paragraph 4.1.4) that “while online reputation and rating systems might have some value in assuring consumers, they can also be ‘gamed’ and abused which then leads to a lack of system credibility.”

10. I am mindful of Hook’s concern that seeking to distinguish between ‘LawTech’ and ‘LegalTech’ might set up a false dichotomy and so “implicitly suggests that there might be a reason for them to be treated differently in regulatory terms”, leading to an oversimplified approach (2019: page 19). However, on balance, I do in fact wish to draw a distinction between supportive and substitutive technology, and the term is useful for that purpose.

On the negative side, though, these systems could come close to supplanting the rule of law, with technology becoming the regulatory tool. This could undermine the idea of justice not only being done but being seen to be done; and it could change our notion of ‘property’ and ‘property rights’ that form the basis of so much of what lawyers have historically created, protected and transferred.

For example, blockchain tokens indicating proprietary interests of ownership in or security over tangible and intangible assets (such as stocks, debentures, intellectual property) could be issued and transacted on a blockchain; such tokens could also be circulated like a transferable document, say, for an electronic bill of lading, or as a substitute for bearer instruments.

Of course, this technological innovation could also create new problems and costs for consumers – not least in them not knowing whether the lawtech products and services they buy or access are provided entirely by technology or with some form of human, qualified involvement in the background, whether the products or services are in some way licensed and subject to redress if something goes wrong, or whether these substitutions will offer the same framework of fiduciary and ethical benefits as practising lawyers.

It also places a responsibility (and something of a premium) on consumers being able to identify the right questions and enter the correct information such that the technology can come up with the ‘right’ advice.

It might be argued that if these forms of technology are in any way involved in carrying on a reserved legal activity, the providers will have to be authorised otherwise they will be committing a criminal offence under section 14 of the Legal Services Act. However, this begs the question whether the ‘provider’ is, or the ‘carrying on’ is undertaken by, say, anyone responsible for the input of any legal advice or analysis, the software designer, the developer or programmer, the software host, or the business that actually makes the technology available to the public. It also assumes, of course, that one or more of these individuals or businesses is within the territorial jurisdiction of a regulator.

The jurisdictional question is not, as Gillers points out, a purely theoretical one (2013: page 413):

Is there a point at which virtual presence can be the equivalent of physical presence so that a license from the jurisdiction is required?... Technology may be on a collision course with the geo-centric regulatory model.... But if virtual presence in a jurisdiction, no matter how substantial, does not require a local license, we must ask why physical presence should require one ...

The failure of the current framework to be able to regulate substitutive technology for non-reserved activities is, on the face of it, no different to the challenge presented by the existence of the regulatory gap (cf. LSR-0 2020: paragraph 4.5). In both cases, the carrying on of non-reserved activities by those individuals or entities not otherwise authorised can proceed with no regulatory oversight or supervision at all.

However, the ability of technology to reach a mass audience – where the non-reserved sector of the legal services market is thought to be about 80%<sup>11</sup> (roughly £28 billion a year) – should reasonably beg some rather uncomfortable questions about the scope and focus of regulation. These will be explored in relation to the options for focus discussed in this paper.

The American Bar Association’s Model Rules of Professional Conduct contain, in Model Rule 5.5, a prohibition on the unauthorised practice of law (UPL; cf. LSR-2 2020: paragraph 2.1). This rule raises an interesting question about whether substitutive legal technology might be considered UPL.

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11. Cf. LSR-0 (2020), footnote 54.

In 2015, a US court distinguished between tasks performed by machines and tasks performed by lawyers (*Lola v. Skadden, Arps, Slate, Meagher & Flom LLP*). It held that tasks that could otherwise be performed entirely by a machine could not be said to fall under the practice of law. As a result, tasks that were once regarded as the practice of law can now, through legal technology, no longer be treated as such.

Consequently, as in England & Wales, lawtech might increasingly operate outside and beyond the reach of the established framework for regulating legal services. Given the potential risks to consumers, to the rule of law, and to public confidence in legal services and their regulation, we must all question whether that is the right way to proceed.

One of the ways of testing regulatory implications of new technologies is through the idea of a 'sandbox'. In the same way that the health and pharmaceutical sector has clinical trials, and the financial services sector has, under the Financial Conduct Authority, its 'Project Innovate'<sup>12</sup>, so the legal sector now has SRA Innovate. This is an initiative that lets firms<sup>13</sup>

explore new ways of running your business and introducing original ideas. This is a 'safe space' for existing firms, as well as new entrants to the legal services market. It lets you test out ideas that are likely to benefit the public in a controlled way. Here we can work collaboratively with innovators to make sure the right protections are included when creating new products and services.

However, the idea of such sandboxes is not entirely unproblematic. In providing opportunities for otherwise unregulated business or activities to take place, a regulator might unwittingly provide quasi-regulatory 'cover' and perceived 'market approval' for necessarily unproven initiatives. Since not all innovation is necessarily beneficial, sandbox products and services might well create precisely the detriment to public or consumer interests that the regulator was established to guard against.

These legal technology developments can give rise to a number of consumer protection concerns. These were outlined by the OECD (2016):

83. New consumer protection concerns may arise from online legal services offerings. These concerns could include a lack of awareness among consumers regarding whether the online services they are procuring are being offered by licensed professionals or not. In addition, the introduction of legal services by non-lawyers can mean that lawyer-client confidentiality (a fundamental feature of legal systems under which lawyers' advice is privileged from disclosure in court), could be lost in some cases. The ability to obtain legal advice that is privileged with respect to court proceedings is a key component of the value of legal services and may not fit disruptive business models or regulations adapted accordingly.
84. Data protection concerns may also arise. Consumer data is emerging as a major asset for technology firms, and privacy concerns may be particularly pronounced when online services acquire significant amounts of personal data. In the context of an industry where lawyer-client privilege is a fundamental feature, data protection regulations may need to consider the range of information that can be held by online providers as well as the impact such information can have when improperly disclosed during legal proceedings. Similarly, businesses with offerings beyond legal services may attempt to leverage the consumer information they hold for other purposes, including for sale to other businesses, with attendant implications for legal procedures and consumer privacy.
85. In addition to concerns about consumer protection, regulators may continue to encounter challenges relating to legal service affordability in disrupted markets. Barriers to accessing legal services among low-income consumers may not be fully compensated for by reductions in the cost of these services following disruptive innovation. Given the fair functioning of the legal system is premised on equal access to justice, this may create policy challenges in the future. Adding to these concerns, measures requiring legal professionals to participate in legal aid schemes for low-income individuals may be challenged on the grounds that they

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12. See <https://www.fca.org.uk/firms/fca-innovate>.

13. See <https://www.sra.org.uk/solicitors/innovate/sra-innovate.page>.

impose costs on professionals, who face increasing pressure from disruptive entrants not bound by similar requirements.

86. Regulators may also find that certain other regulatory provisions will be called into question as a result of legal services market innovation.... As a result, there is a significant opportunity for low-cost providers to disrupt markets if permitted by regulation, and incumbents not accustomed to pricing pressures may be ill-prepared to respond.

The development of legal technology (particularly where it substitutes for those who are authorised providers) presents some significant challenges for the future of legal services regulation. It is especially relevant to issues relating to the focus and form of regulation discussed in this working paper, and leads to some fundamental regulatory questions for the medium term:

- (1) Who or what is actually engaged in *delivering* legal services in these circumstances? In other words, where is (or should be) the 'hook' for regulation, and where, when and on whom should liability settle?
- (2) Who should be responsible for machine algorithms, and any legal advice and actions they produce, including managing the risk of inherent or perpetuated programming bias and the supervision of machine learning? How transparent and auditable should those algorithms be?
- (3) Should it be the case that if technology is substituting for a legally qualified human being, there should be some form of regulatory intervention? And should that intervention control access into the market, or allow open access and then supervise disclosure, performance and redress?

These are undoubtedly difficult and challenging questions about whether, when, how and on whom regulation might be imposed.

Consistent with the broad thrust of this Review, the question of technological innovation and the need for regulatory response could be addressed through a focus on the risks arising from the adoption or substitution of technology. This would be in preference to targeting the technology itself. Such an approach would also be consistent with Schuett's recommendation (2019: paragraph 2.1):

Policy makers should not use the term "artificial intelligence" for regulatory purposes. There is no definition of AI which meets the requirements for legal definitions. Instead, policy makers should adopt a risk-based approach: (1) they should decide which specific risk they want to address, (2) identify which property of the system is responsible for that risk and (3) precisely define that property. In other words, the starting point should be the underlying risk, not the term AI.

## 2.4 Approaches to scope and focus

The conclusion of LSR-1 (2020) in relation to the rationale for the regulation of legal services is that regulatory intervention is justified where there are assessed risks to the public interest. This will usually be because the nature, importance or consequences of a legal activity to the public or one or more of the parties involved is such that authorisation should be required before that activity can be carried on (for reward), or that consequences should attach to the performance or outcomes where these are not as expected. As such, regulatory focus can fall on one or more of: the activity involved, or an individual or organisation who carries on such an activity.

In summary, the options for focus might be given as:

- (a) *activities* that are judged to meet the public interest threshold for regulation;

- (b) individuals who hold a professional *title* or qualification that is deemed to give them the necessary permission to provide regulated legal services;
- (c) *individuals* who provide regulated legal services, in whatever capacity or context they do so;
- (d) *entities* that provide regulated legal services; and
- (e) *providers* (whether individuals, entities, title-holders or technology) of regulated legal services.

The framework of the Legal Services Act 2007 is essentially built around option (b), with a necessary extension to option (d) in order to accommodate alternative business structures (ABSs) with the ownership, financing or management of those who do not hold a title or qualification within option (b).

The current structure is therefore fundamentally title-based: the pre-existing titles, such as barrister, solicitor, notary, chartered legal executive, and licensed conveyancer, provide the 'passport' to authorisation to conduct reserved legal activities, either as individuals or within regulated entities.

Additions to the framework in recent years have similarly been based on title, such as probate practitioners who are chartered accountants authorised by the Institute of Chartered Accountants in England & Wales, or as chartered certified accountants authorised by the Association of Chartered Certified Accountants. An exception to this approach has been probate practitioners authorised by the Council for Licensed Conveyancers (who do not need to be licensed conveyancers in order to seek authorisation).

For the moment, the paper will proceed by considering primarily: on *what* (activity) or on *whom* (individual, entity, profession) should regulatory intervention be focused? LSR-4 (2020) will turn to the issue of *when* regulation should be applied (before-the-event, during-the-event, or after-the-event). LSR-5 (2020) on regulatory structure will consider *where* and *how* regulation should apply.

This paper will therefore begin where LSR-2 (2020) ended, that is, with a consideration of whether the focus of regulation should be on those *activities* where regulatory intervention is justified, without limiting that intervention to a particular form (such as before-the-event authorisation). It will then move on to consider alternative types of focus, such as pre-existing professional titles or other qualifications, and the individuals and entities who carry on legal activities.

### **3. Activity-based regulation**

#### **3.1 Clementi's conundrum**

In his 2004 Review, Sir David Clementi addressed the difference between an 'inner circle' of the six reserved legal activities (preserved under the Legal Services Act and confirmed in section 12(1) and Schedule 2), and an 'outer circle' of all other legal services. He recognised that a precise definition of 'legal services' is not possible: "it needs some flexibility, given the need to accommodate the inevitable change which occurs over time in the boundaries of what is considered to be 'legal'" (Clementi 2004: pages 95-96).

He also referred to 'regulated services', acknowledging that the definition of this is more complex and "includes all inner circle services, plus those in the wider, outer circle which a lawyer is allowed to undertake in a professional capacity" (Clementi 2004: page 97).

As such, regulated services include legal services that are not reserved legal activities but are otherwise explicitly regulated (such as immigration, insolvency, and some elements of claims management: see LSR-2 2020). They might also include non-legal activities – such as financial services – that are regulated under a different framework or provided through an exemption.

More importantly for present purposes, Sir David also recognised the difficulty created by the approach of those who regulate title-holders: "a provider, such as a solicitor, who is authorised to provide one or more of the reserved, or inner circle, services will also be regulated in the provision of the unreserved or outer circle services" (Clementi 2004: page 98).

Such an approach to regulation derived from title creates an 'asymmetry of regulation' because "these services can also be provided by an unauthorised individual, and in this case would not be subject to regulation at all" (Clementi 2004: page 98). Regulation by activity rather than title would remove this asymmetry (often referred to as 'the regulatory gap'), and remove a source of potential confusion and difference in consumer protection.

Sir David suggested two approaches to addressing this asymmetry. The first would be to broaden the scope of the inner circle to bring a wider group of services within it, though he acknowledged that "increasing the number of reserved services may be unjustified and anti-competitive, making the delivery of such services too burdensome for the practitioner and, therefore, restricting their availability to the consumer" (Clementi 2004: page 98).

The second approach would be to limit the ambit of regulation purely to the reserved services. But this, he said, "would be to undermine one of the main principles on which the leading professional bodies operate – that all services provided by their members are done to the same high standard of care and concern for the client.

In short, it would be a dilution of professionalism and of the brand, and would be likely to add to confusion for consumers" (Clementi 2004: page 99). In any event, he felt that any change in the reserved activities should be a public policy decision for government.

The Clementi Review therefore pulled up short of changing the then reserved legal activities or suggesting a different foundation for the regulatory framework of what became the Legal Services Act 2007. He therefore also shifted the focus of regulation away from a purely activities-based approach to preserve a structure that primarily regulates activities through title-based authorisation.

There might, though, be a third approach. This would be to extend some form of regulation to all legal activities (whether currently reserved or not). As LSR-4 (2020) will explore, this need not necessarily lead to the 'full weight' of before-, during- and after-the-event regulation being applied to every legal activity. Instead, a differentiated approach to regulatory

intervention could be adopted, based on an assessment of the relative risks to the public good and consumer interests.

### 3.2 Regulatory criteria and professional standards

Sir David returned to the issue of asymmetry of regulation later in his report, suggesting that a possible solution to it (Clementi 2004: page 99):

requires the setting of a minimum consistent standard across the service type. However front-line regulatory bodies would be free to impose additional standards if they wished. This would permit competition between front-line regulatory bodies, whilst preventing erosion of important consumer protections.

He continued (also at page 99):

Increased consumer education, leading to a heightened awareness from the consumers' perspective when using legal services, is a further way of reducing the effect of these asymmetries. Subject to the public interest consideration of securing probity in the legal system, where customers are well informed the availability of providers regulated in different ways expands consumer choice: buyers can choose a more expensive service with regulatory protection or a cheaper service with limited protection.

Sir David is clearly contemplating here the idea of minimum regulatory standards alongside differing, higher or additional, professional standards being required by particular regulators. In doing so, he appears to have confused, or at least conflated, the 'proper' role of regulation and the maintenance of professional standards. This perhaps opens the door to a different possibility that could reflect both consistency and minimum standards, on the one hand, and choice and differential regulation, on the other, but without the need for multiple regulators of the same reserved activity.

The possibility of this distinction between minimum regulatory criteria and higher professional standards was raised by the CMA in its market study (CMA 2016: 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. When establishing whether regulation should be introduced to ensure additional protection above this minimal level, a targeted regulatory framework should balance the benefits of increased protection with its costs (direct and indirect, for instance in the form of reduced competition) that are likely to be passed on to consumers in the form of higher prices.

This is worth further exploration.

### 3.3 Reconceiving the 'proper role' of regulation

The better regulation principles and best regulatory practice are incorporated into the Legal Services Act 2007 (by section 28(3)): these require decisions on regulatory matters that are transparent, accountable, proportionate (including cost-effective), consistent, and targeted only at cases in which action is needed (that is, are risk-based).

One of the long-standing concerns about self-regulation is that it often results in the imposition of a 'gold standard' approach to the regulation of practitioners. This arises because the regulators of professions understandably wish to maintain the highest possible standards, both to control entry – and consequently competition – within the profession, and to control conduct and behaviour.

The proper role of formal regulation, on the other hand, is not necessarily to set the *highest* standards of performance, but rather to define the *minimum acceptable* level of competence

or performance required to meet the public interest objectives of State intervention in otherwise private transactions.

This difference of approach is evident from the CMA's recommendation to the Ministry of Justice (CMA 2016: page 17), namely, that regulation (as a mandatory minimum acceptable standard) should be applied directly in legal service areas where there is the highest risk to consumers; and therefore regulation should not be introduced, or it should be removed, when there is insufficient evidence of risk.

The 2007 Act does not perceive there to be sufficient risk either to the public interest or to consumers to require non-reserved activities to be carried on only by authorised persons. However, the Bar Standards Board (BSB) and Solicitors Regulation Authority (SRA) seek to regulate barristers and solicitors generally (rather than only those who are authorised in respect of a reserved legal activity). As a consequence, they are effectively imposing additional obligations on practitioners by requiring them to submit to regulation when they carry on non-reserved activities.<sup>14</sup>

As the CMA put it in their market study (CMA 2016: paragraph 5.55):

In finding high regulatory costs in this sector, a particular concern is that, as a result of title-based regulation, the costs of any excessive regulation will be spread across all activities undertaken by the authorised provider – including lower risk, unreserved legal activities. As a consequence, disproportionate regulatory costs may unnecessarily raise the cost of these unreserved services to consumers.

It is therefore debateable whether this approach is in fact consistent with the intention or language of the Legal Services Act (this point is explored further in paragraph 4.5 below).

### **3.4 A dual approach?**

A potentially different approach would be development from the current structure of reserved legal activities, which proceeds from some sense of activity-based regulation. However, such development would not necessarily need to retain the concept of 'reservation'. What might be envisaged, for example, would be, first, an activity-based regulator for specific legal activities that met the public interest threshold for regulation.

Such a regulator could set the minimum regulatory standards required for the carrying on of those activities and for monitoring their performance. The regulator could then authorise those who meet the required standards, either independently through various routes to authorisation and assurance of competence or, as now, as part of the award of a professional title.

This could then allow, second, the current (and future) professional bodies to maintain their own self-regulatory jurisdiction over the criteria for award and retention of title. It would also be in their interests to ensure that their criteria were sufficient to meet the minimum regulatory requirements of an activity-based regulator. However, they might also require higher standards for the award and retention of their titles than the regulator might impose for the carrying on of a particular authorised activity.

While this might be seen as allowing 'gold-standard' title regulation, to the extent that it is, it would not be a requirement of the formal regulatory structure. In this context, therefore, the professional bodies could seek to maintain higher or broader professional standards for the

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14. It is true, of course, that practitioners who object to this could voluntarily apply to be disbarred or come off the Roll so that they can carry on non-reserved activities outside the scope of regulation. They would then not be able to use their previous professional title, leaving consumers to decide how much – if anything – the additional cost and protection is worth to them.

professions of, say, barrister and solicitor than those required by an activity-based regulator for authorisation to carry on a specific legal activity.

Such a dual approach could help avoid a one-size-fits-all regulatory style, that in the eyes of some would be perceived as either levelling up or dumbing down standards. It might also reduce temptation for a regulator to be unduly prescriptive in its requirements by instead focussing attention on what the minimum regulatory standard should be.

This would then allow scope for competition, not between alternative regulators as in the current framework, but as between professional 'brands'. The respective professional bodies and their members could seek to persuade their target consumers of the merits of their different brands in terms of, say, price, quality, or additional protections over and above the regulatory minimum, based on what they believe their market will want and pay for.

Such a dual approach might, consequentially, mean that an activity-based regulator could withdraw authorisation from an authorised practitioner who could then no longer carry on that authorised activity but could nevertheless remain in practice using a professional title and conducting other legal activities in respect of which authorisation is still current.

Equally, the relevant professional body might choose to remove the professional title from someone (say) in the light of professional misconduct: while this might lead to the loss of authorisation that was previously based on title, it might not necessarily mean that the individual could not seek alternative authorisation for the exercise of a specific activity through a different route approved by an activity-based regulator.

Such an approach would give rise to some significant issues:

- (a) whether it would be acceptable, feasible and cost-effective to maintain a dual approach to authorisation for specific legal activities and the award of title;
- (b) the role of the professional bodies in the award and retention of a professional title, and the new self-regulatory approach that would need to be instituted (or reinstated) for that purpose;
- (c) whether such an approach is likely to increase or only redistribute the costs and burdens of the current system;
- (d) whether the obligation to promote and maintain adherence to the professional principles<sup>15</sup> should continue to be applied as a consequence of authorisation by an activity-based regulator, or whether one or more of those principles would be more appropriately required in the context of professional title;
- (e) the implications for legal professional privilege;
- (f) whether consumers would continue to favour the established professional titles in the (possibly questionable) belief that these offered a 'guarantee' of higher quality; and
- (g) whether consumers and the public would find it understandable and acceptable that a practitioner whose authorisation to carry on one or more activities, or right to use a professional title (though not both) had been withdrawn by one approval body but not another.

The idea of a dual approach to activity- and title-based regulation inevitably leads to a consequential consideration of the 'brand value' (or perceived value to clients, the public and the market) of professional titles. This is considered in paragraph 4.4 below.

Finally, it is perhaps worth noting that in the recent Scottish review of legal services regulation, the final report contains the following statement on activity-based regulation (Robertson 2018: page 41):

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15. The 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.

Activity regulation tends to proliferate the number of regulators and also can lead to inflexibility and a lack of agility. On the other hand it offers the chance to introduce more risk-based profiling. If there is effective individual and entity regulation in place, activity regulation will largely be captured by these groups.

Just as the current framework appears to many to introduce a surfeit of regulators and oversight regulation, it is not immediately clear (as Robertson suggests) how an activity-based approach would result in anything less complex. Activity-based regulation is not as obvious or straightforward as it might seem at first blush.

As we already know from the reserved activities (cf. LSR-2 2020), identifying the correct candidates and defining them robustly is challenging. In a modern, risk-based, technological and global world, flexibility within the framework to be able to update (by adding, removing or amending) the regulated activities will be desirable. The need to avoid both catch-all definitions (that would unduly widen the regulatory scope), and a very long list of finely differentiated activities (that would add to the complexity of regulation) will be a considerable task.

### **3.5 Legal Education and Training Review**

The extensive Legal Education and Training Review (LETR) looked very carefully at the concept of activity-based regulation. It helpfully summarised the advantages (LETR 2013: paragraph 5.7):

In principle, activity-based authorisation offers a number of potential benefits to consumers, regulators and trainees including:

- ensuring authorisation is linked more closely to demonstrable competence in a field of practice;
- aligning authorisation decisions more closely with an evidence-based analysis of risks to consumers, and with the regulatory objectives;
- aligning training more closely to the needs of employers and consumers;
- better ensuring that training or work supervision is conducted by a competent person (assuming the supervisor is also required to have a qualification or 'endorsement' in respect of the activity);
- providing practitioners with a demonstrable basis for claiming specialisation in an activity;
- providing a way for regulators to group and target risks that require similar regulatory oversight or intervention.

However, it made the following powerful observation (LETR 2013: paragraph 5.23):

The available evidence does not make a strong case for an across the board move to activity-based authorisation, though certain areas of activity such as advocacy, will writing and probate, where there is evidence of variable standards and clear potential for consumer detriment, may benefit from this approach. There is no published research on the use of activity-based authorisation in legal settings, or in the financial services market where the model is becoming quite well-developed. The health professions, which through their systems of specialisation perhaps come close to an activity-based approach, operate in a differently constructed training and practice environment, and the general practice qualification for doctors still precedes different areas and levels of specialisation.

In relation to the challenges of definition, it also noted (LETR 2013: paragraph 5.10):

There are also important boundary questions regarding the necessary scope of an 'activity'. 'Activity-based' authorisation, though a useful shorthand, needs to be considered more as a 'field of competence'. This is because the competencies required will often extend beyond the immediate (apparent) bounds of the activity. This is evident with will writing, for example. A simple will may require quite limited knowledge and skills, but for those with sophisticated financial arrangements, or complex family ties and responsibilities, competent will writing becomes a far more sophisticated task, requiring a good understanding of quite specialised elements of land law, trusts, tax and family law. If it is to be meaningful in providing protection to consumers,

authorisation may need to reflect different 'levels' of competence, which may add to the complexity as those levels need to be clearly task- or outcome- defined.

The case for activity-based regulation as a predominant focus for the regulatory framework is perhaps not as obvious or as straightforward as might otherwise be assumed. It leads to a number of challenging issues. It also begs a question whether the 'activity' in question should best be defined by reference to the activity of the legal representative (e.g. conveyancing, drafting a will) or of the client (e.g. buying or selling their home, preparing for death).

### **3.6 Activity-based regulation and substitutive legal technology (lawtech)**

Where a solution or product offered on substitutive legal technology is a legal activity for which (as defined) regulatory intervention is justified, the provider (at least) of that technology could be required to seek prior authorisation or submit to regulatory requirements for conduct or redress (depending on the appropriate form of regulation for the service involved).

This assumes, though, that the activity can be defined appropriately and in such a way that a substitutive product or service falls within that definition. It also assumes that there is an individual or entity within the jurisdiction on whom obligations can be applied and sanctions imposed in the event of non-compliance.

### **3.7 Summary**

The benefits and advantages of activity-based regulation are:

- it focuses attention only on those activities for which some form of regulatory intervention is justified, based on the assessed risks of that activity;
- it might provide consistency of regulatory requirements and standards in respect of the same legal activity, irrespective of who carries it on;
- it might provide a basis for distinguishing between (formally regulated) required minimum standards and (self-regulated) higher thresholds for practising under a professional title; and
- it is potentially capable of addressing the challenge of substitutive legal technology (lawtech).

The limitations and disadvantages of activity-based regulation are:

- the potential for significant volume and complexity of 'activities' for regulation;
- it requires robust definitions of the activities to be regulated;
- the activities and their definitions must fairly readily be capable of being updated (through addition, removal and amendment) as consumer behaviour or market developments, and the associated risks, are perceived to change;
- some retention of both activity- and title-based structures; and
- consequently, the challenge of explaining the regulatory position and consequences to consumers such that they are able to make informed decisions.

## 4. Regulation by title

### 4.1 Introduction

As the basis for much of the current regulatory framework, regulation by title will now be considered. This is a shorthand expression for the regulation of legal services and conduct that flows from the award of a professional title or qualification.

The CMA, in their legal services market study, emphasised the connection between current regulation and title (CMA 2016, paragraphs 5.90-5.92):

- 5.90 As set out in the introduction, regulation in legal services is focused primarily on professional titles. The scope of regulation in legal services is determined by regulated professional titles and the reservation of certain activities to providers with these titles. In addition, certain regulated professional titles, in particular solicitors, can only provide legal activities from within entities that have also been authorised to carry out reserved legal activities.<sup>16</sup>
- 5.91 Professional titles have the potential to distort consumer decision-making. Given their inability to observe quality directly, consumers may choose to rely on title (eg ‘solicitor’) when navigating the market as an indicator of quality. While title can be a useful and practical way for consumers to ensure at least a minimum level of quality, it may distort competition if it results in consumers avoiding unauthorised providers completely, regardless of the level of quality and consumer protection these providers may offer and the value for money that could be obtained by the consumer. This consumer behaviour may result in a barrier to entry for unauthorised providers.
- 5.92 While professional titles have the potential to distort consumer decision-making, the link between regulation and professional titles is not straightforward. As a starting point it is important to note that titles may be self-regulated and would be highly likely to continue to exist independently of regulation. This means that professional titles would continue to be a factor in consumer decision-making even if statutory regulation did not focus on title. However, the current regulatory framework also restricts the entities within which certain professional titles can be employed. In particular this means that unauthorised providers are restricted in their ability to employ solicitors.<sup>11</sup>

This confirms the fundamental position that results from the Legal Services Act, and points out some of the benefits and disadvantages of that position (which are also considered within paragraph 3 above). As recorded in paragraph 2.1 above, Sir David Clementi explicitly respected the “history of professional bodies with strong roots” (Clementi 2004: page 36).

One must be careful not to attach only negative or unwanted consequences to an historical approach to the regulation of professional legal services. There are bound to be benefits and disadvantages in any approach to regulation, and we must not abandon positive aspects arising from years of professional self-regulation in a dogmatic pursuit of an alternative that gives rise to unintended consequences.

Equally, we should not persist with elements of a philosophical or historical style of regulation if that inhibits the development or implementation of a broader, more modern, risk-based and consumer-accessible regulatory framework.

This paragraph will therefore first attempt to set out an assessment of how and why we have reached a certain state in our approach to the regulation of the legal professions, given the nature of the strong roots acknowledged by Clementi.

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16. In November 2019, the SRA introduced rule changes that allowed individual solicitors to carry on non-reserved activities from within an unauthorised entity.

## 4.2 The nature of a profession: professionalism vs. consumerism<sup>17</sup>

The traditional notion of the lawyer-client relationship might be characterised as:

- founded in historical power: this was based on the lawyer's special knowledge and position in society;
- influenced by socio-economic, educational and political trends: this includes the historical imbalance in relative social and educational opportunities, and the attainment of those who became lawyers as against those they often advised, combined with a political climate that was willing to sustain the privileges of professional men<sup>18</sup>;
- now confounded by technology and social media: instant accessibility to information and comparative recommendations from a wide range of sources increases transparency and reduces social and economic barriers to seeking technical or professional advice; and
- suffused with ethos, passion and emotion: there are strong views (from both lawyers and clients) about how each side of the relationship should see itself in relation to the other; for lawyers, this can strike at the heart of their self-identity and what it means to them to be 'a lawyer'.

In addition, in the minds of lawyers, the nature of the relationship with clients is also inextricably linked to whether they see law primarily as a profession ('we advise or represent clients') or as a business ('we serve our customers').

The professional-client relationship traditionally assumed that a client needed help and that the professional knew more than the client – and, indeed, knew better than the client what was best for the client. This was a relationship in which the client was relatively passive, and the professional adopted a somewhat protective, even paternalistic, position.

In these senses, the traditional relationship and the regulation of it was based on the hierarchical power of the lawyer. This stemmed from the lawyer's superior or advantageous knowledge, expertise and experience (described by economists as 'information asymmetry': cf. LSR-1 2020: paragraph 3.3).

An implicit consequence of this asymmetry was the view that the professional was better placed than the client to define the content, timing, delivery and price of the lawyer-client engagement.

A further element of this traditional conception was that it was supported by the State through a 'bargain' under which the State allowed the professions to regulate themselves and determine who could be admitted, and then prevented anyone else from practising within these protected boundaries.

The potential for professional self-interest in this monopolistic bargain was supposedly tempered by the duties to act as officers of the court<sup>19</sup>, to act in the best interests of clients, and to uphold high ethical standards.

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17. This paragraph is drawn substantially from Mayson (2014).

18. This traditional notion also generally pre-dates the admission of women to the ranks of practising lawyers.

19. Interestingly, Cohen (2000: pages 349 and 387) suggests that analysis of the term 'officer of the court' "reveals that it has surprisingly little content", "points to a role ... as agent whose obligations to the court are almost identical to those owed by non-lawyers", and "is based on little more than self-serving rhetoric". Gaetke (1989) had previously advanced a similar view, but does at least offer some thoughts about 'invigorating' the role.

### 4.3 The decline of professional supremacy

From at least the mid-1980s, the historical 'supremacy' of professionals came under growing pressure. Self-regulation was increasingly seen to have led to self-interest and complacency, protectionist behaviour and unjustified barriers to entry. Indeed, in the minds of many practising lawyers, there was often a greater sense of affinity and accountability to the profession itself than to any particular client or even the organisation in which they practised.

Self-regulation was also perceived as providing insufficient incentives for innovation in client service, in organisational structures and management, or in fee arrangements. Much of this was evidenced by increases in the number of complaints by clients and an apparent unwillingness on the part of lawyers (solicitors, particularly) to deal with those complaints appropriately or quickly.

The political mood also changed at this time as Thatcherism took root. Greater emphasis was placed on individual freedom of choice, 'the free market' as a guiding hand to public and private interactions, the retreat of the State from private activity, and a consequent 'deregulation agenda'.

The sub-text of this political shift was that professionals were really nothing special – that they were engaged in economic exchanges much like any other service providers, and that the old compact of protected professional territories and self-regulation was no longer justifiable.

Thus, a new age of markets, competition and consumerism arrived in professional services. It reflected and supported the rise of the educated, informed, sophisticated consumers who would make their own choices about content, timing, delivery and cost.

This, in turn, changed the expectations and role of clients from passive to active: they should decide when to use (or not use) lawyers and on what basis, and should use their new freedom to shop around. These changes inevitably over time have driven a greater need for cost-efficiencies, processes and structures in law firms and in their relationships with their clients.

As a consequence of these developments, there has been a gradual shift in power in the relationship from the lawyer to the client. There has also been a shift in power, influence and participation as between individual lawyers and their organisational or managerial setting. In all senses, the status and autonomy of the individual practitioner has been eroded.

The eventual political outcome of this fundamental change was the conclusion that self-regulation had failed to keep pace or remain appropriate. It was these shifts in public and political opinion that led to the review of legal services regulation by Sir David Clementi (2004), and then to the Legal Services Act 2007.

With these developments came a new regulatory settlement that significantly curtailed self-regulation, and introduced alternative business structures with external owners and investors, as well as a new structure for handling complaints.

The greater separation of regulatory and representative functions brought about by the 2007 Act might have paved the way for a more nuanced response by the regulators to the asymmetry of regulation noted by Sir David Clementi (cf. paragraph 3.2 above). The current, 'all-inclusive', approach flows from a broad interpretation of 'regulatory arrangements'.

As a consequence, the maintenance and supervision of the brand value of professional titles falls by default to the regulatory bodies rather than to the professional bodies. I shall return to this in paragraph 4.5 below and consider whether this should be required by the

regulatory framework, but will first explore the issue of the 'brand value' that is often ascribed (or assumed to attach) to professional titles.

#### **4.4 The brand value of titles and associated protection**

As recorded in LSR-0 (2020: paragraph 3), solicitors are the authorised providers most often used by consumers, and research shows a high degree of trust in them, with solicitors being regarded by consumers as the most qualified and trustworthy of professional legal advisers (CMA 2016: paragraph 3.49; see also YouGov 2020: paragraph 5.6 on main advisers).

Trust and loyalty would seem to be closely correlated, thus creating some potential 'brand value' in the title solicitor. In this context, though, as the LETR observed (2013: paragraph 5.3): "The risk associated with a reliance on titles is that they may create a perception, for consumers, regulators and professionals, that standards are assured when in fact assurance mechanisms are relatively weak".

The CMA's market study said this about brand value (CMA 2016: paragraphs 5.97 and 5.98):

our consumer survey found that the majority of consumers currently assume that all legal services providers would be regulated and do not check whether this is the case. This is corroborated by qualitative research by the SRA which found that consumers were not aware of how to tell the difference between an authorised and unauthorised provider. This evidence suggests a general lack of understanding of the significance of regulatory titles.

Despite this lack of understanding, consumers appear to rely to some extent on regulatory titles to navigate the market. The SRA research found general familiarity and confidence in the term 'solicitor', and that solicitors were generally regarded as better qualified than other providers within the sector<sup>20</sup>. Similarly, in our consumer survey, consumers expressed a preference in principle for using authorised providers because of the higher quality and adherence to minimum standards this might imply. While this evidence does not directly indicate a lack of trust in unauthorised providers, it suggests that there is some preference for solicitors, and that trust in quality standards is a relevant factor in consumer decision-making. This evidence suggests that consumers rely on regulatory titles to some extent without having a clear understanding of the significance of these titles. As a result, there is the potential for consumers to avoid using unauthorised providers even in situations where they might benefit from using them.

This led the CMA to the following observations about the role of title (CMA 2016: paragraph 6.87):

we consider that, in a more competitive legal sector, with appropriately scoped risk-based regulation, title might cease to be subject to statutory regulation. Instead, relevant professions could be responsible for the title. However, in the short to medium term, it would be preferable that titles continue to remain subject to regulation. This is because, as noted [earlier], professional titles play an important role in the current market: the majority of legal services are provided by authorised legal providers, mainly solicitors.

It appears from the CMA market study and other research that consumers have a notion that the brand of 'solicitor' (particularly) is associated with clear notions of legal qualification, competence, trustworthiness and regulation, but that this brand label and its attributes might also be applied by consumers on a 'catch-all' basis to other providers of legal services who hold a different title (or indeed no title at all).

The basis of such brand value is therefore somewhat suspect – especially when consumers cannot also identify accurately the consequences that then follow (or do not) to the particular

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20. SRA research also showed (CMA 2016: paragraph 3.50) that: "respondents 'were very familiar with the term "solicitor", and there was a general tendency for recent purchasers to describe providers as solicitors, as a "catch all" term for those providing legal services'."

relationship into which they have entered or are contemplating entering. As the CMA stated (CMA 2016: paragraph 4.18, emphasis supplied): “We consider that consumers’ reliance on certain professional titles to select a legal services provider is not a cause for concern *provided that they understand what they are getting for the solicitor brand, and the title is an accurate proxy for high-quality advice and service delivery and the availability of redress.*”

However, as the Legislative Options Review suggested (2015: Annex 4, paragraph 4):

‘badging’, as a barrier to entry, can also limit the availability of services, result in higher quality and performance standards than are necessary relative to the public interest risks posed by the service in question, lead to higher prices, and stifle innovation. It can also generate false consumer – and practitioner – confidence in a provider’s abilities across a broad range of legal activities if there are not sufficient safeguards in place (... in relation to continuing competence and the need for periodic reaccreditation).

On the available evidence, it is questionable whether the terms of the CMA’s emphasised proviso above are met. First, it appears that consumers have a rather vague notion of the brand rather than an accurate and full understanding of what they are getting.

Second, the SRA’s approach to authorising all holders of the solicitor title to conduct all of the reserved legal activities for which the SRA is an approved regulator undermines the proposition that all solicitors can uniformly and consistently provide high-quality advice in relation to such a wide range of those reserved activities (let alone the much larger range of non-reserved legal activities that the SRA then also allows solicitors to offer).

The CMA’s line of thinking had also been picked up by the LSB’s Vision Statement (LSB 2016: page 22):

64. The current framework offers authorisation following from title, such as barristers’ rights of audience or solicitors’ rights to conduct litigation. Economic literature suggests that professional titles can play an important role in driving standards up and developing consistent behaviour among providers.

65. 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. However, some – although not all – legal professional titles currently have extremely strong brand power for consumers (eg solicitor and barrister) in a market where there are few other signals to help consumers choose between providers. Title therefore acts at the moment as a barrier to sustainable entry to many parts of the market for legal services because a prospective market entrant without the title in question may find it difficult to gain market share.

66. We are concerned that, at present, handing control of the award of protected titles (where this is not already the case) to representative bodies could result in gold-plating of entry standards, less competition and choice for consumers, and might even provide opportunity for de facto rolling-back of liberalising reforms in the market. On the other hand, there are benefits in consistency in the longer term in the handling of protected titles across different professional groups where this is possible (for example, clarity for consumers).

67. In light of the issues above, we believe that transitional arrangements for handling award of title will be required as part of the move to activity-based regulation. Award of professional title should therefore continue to be the responsibility of the regulatory arm of the approved regulator for the time being, where this is currently the case. We do not anticipate additional titles becoming the responsibility of any regulator(s), where this is not currently the case.

The facets of brand value that are usually relied on by those who hold a professional title are claims to delivering a higher or more reliable level of ‘quality’ to the consumer, and the additional protections available to the consumer as a consequence of having engaged a regulated provider.

In principle, neither the quality of service nor the price of services should be affected directly by whether certain activities are regulated or not. However, in practice, regulated practitioners (where regulation stems from their authorisation to conduct one or more of the reserved activities) will claim that their quality is assured to a higher level than that of

unregulated providers. These unregulated providers are presumed to have no similar regulatory or professional obligations, and will therefore (it is asserted) pursue only profit at the expense of quality.

Additionally, so this argument runs, such unregulated providers will be able to undercut regulated practitioners on price because they do not bear the direct or opportunity costs and burdens of regulation and can therefore charge less and still potentially make the same margins.

There is some substance in these views of regulated practitioners – more so historically when the SRA’s separate business rule prevented them from unbundling their non-reserved activities. There is undoubtedly a direct and opportunity cost to regulatory compliance that, without more, will probably result in higher prices or lower margins.

It is also arguable that there is indeed a higher yardstick of quality attaching to those who have regulated status accorded by a professional title and authorisation, and who then become subject to expectations from the State, the public at large, clients and regulators that they will discharge their professional functions exceptionally well.

However, what this view often gives insufficient value or credence to is that, in the eyes of consumers, quality is a multi-faceted concept that, as well as technical competence and accuracy, incorporates functional dimensions (engagement and ease of use) and utility (practical usefulness and comprehensibility of advice given). Lawyers are often judged to have fallen short on functional quality and utility of advice.

Nor does it allow much scope to acknowledge that innovation, alternative approaches to resourcing, and process improvements can drive down the costs of service without inevitably compromising quality (in all of its dimensions).

Finally, these views also ignore the commercial imperative on all providers to achieve an acceptable service (whatever that might mean to individual consumers) at an acceptable price for the value delivered, otherwise market forces and reputation will most probably reduce the demand for any given provider’s services.

There are thus normal business expectations that will often lead providers (even those offering non-reserved activities outside the scope of current regulation) to offer a good quality of service, charge accordingly, and possibly even with some voluntary element of conduct codes and indemnity insurance.

Where providers do not offer high quality, this is not inevitably because they set out to dupe customers into accepting a poor (or low) quality service at a low price: it could also be because market research and business experience suggest that consumers do not inevitably want gold-standard (or even high) quality at high prices.

As the CMA observed in their market study, there is a risk of poorly targeted regulation if it is “derived from an assumption that higher quality of service was always in the consumer interest rather than recognising that consumers may legitimately make trade-offs between quality and the price of services” (CMA 2016: paragraph 5.42).

In summary, the current regulatory framework has an indirect effect on quality and price by framing both practitioner and client expectations in certain ways, and perhaps by reinforcing an ambivalence towards innovation.

While there is undoubtedly some brand value in professional titles and some protection for consumers, it is still questionable whether this presents an overwhelming case to preserve those elements of a regulatory framework that are built on the foundations of professional titles.

However, what an alternative approach might miss is, first, the cultural (or ‘soft’) side of regulation that can shape behaviour and attitudes through strong and pervasive professional identity and norms and, second, the usual corresponding emphasis of self-regulation on the fitness, suitability and integrity of the individual to be and remain a professional person<sup>21</sup> as well as on their technical competence and ability.

Blond et al put it this way (2015: page 18, emphasis in original):

virtue in the professions concerns the overarching conduct of professionals – *what* they do and *how* they do what they do, but also *why* they do what they do in the ways they do it.... From this perspective, professionalism is intimately connected to the ethos with which professionals fulfil their responsibilities. For a profession to be virtuous involves building professional *capacity* (beyond instrumental competence) such that professionals habitually make the right choices, because their choices are based on *integrity* underpinned by the ethical principles embodied in the good practices of the profession. Therefore, a virtuous profession embodies the principles that underpin rules. However, unlike rules, principles require judgment before acting and not just the application of abstract, formal standards. No amount of rules and codes of conduct defined by professional bodies or the state can determine *what professionals actually do at the point of contact or service with the users and citizens*.

Where these factors contribute to the high degree of consumer trust referred to earlier, it is important that any future changes to the regulatory framework are assessed to determine whether or not they might undermine that basis of trust. If there is such a risk, it could create a corresponding detriment to consumer confidence or weaken a signal to some occasional or vulnerable consumers about the availability or reliability of legal services.

Further, title-based regulation has had to adapt in modern circumstances to the growth of law firms and chambers, with the consequent imperative to recognise – and impose regulatory obligations and consequences to – the organisational context in which law is now practised. This has been achieved through entity regulation, such that title-based regulation is now a mixture of regulation of individual title-holders (cf. paragraph 5 below) and of the entities within which those title-holders work (cf. paragraph 6 below).

## **4.5 Has the Legal Services Act been generously interpreted?**

### **4.5.1 Introduction**

To the extent that a regulator seeks to extend its regulatory remit to non-reserved legal activities carried out by those whom it authorises for one or more of the reserved activities, it seems at least arguable that such a regulator might have stepped outside the *necessary* scope of the Legal Services Act 2007.

The 2007 Act does not perceive there to be sufficient risk either to the public interest or to consumers to require non-reserved activities to be carried on only by authorised persons. However, the BSB and SRA seek to regulate barristers and solicitors for all they do, rather than only in respect of their authorisation to carry on a reserved legal activity.

As a consequence, they (particularly) are effectively imposing additional obligations on practitioners by requiring them to submit to regulation when they carry on non-reserved activities. In doing so, the regulators are imposing a regulatory and cost burden on practitioners – and therefore a competitive disadvantage – that Parliament does not allow to be imposed on those who are not legally qualified.

In relation to the regulatory objectives in section 1 of the Act, this distorts rather than promotes competition, and arguably does not promote the interests of consumers or improve

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21. See also Arthur et al. (2014: page 8): “it is the actions and choices of individual lawyers that set the boundaries of their practice and, therefore, individual character and virtues matter”.

access to justice (because it increases the costs of non-reserved legal activities). It is also not targeted and risk-based (cf. the approved regulator's duty under section 28(3)(a)), because Parliament has by definition perceived that there is insufficient risk to justify regulation of such activities when carried on by those who are not legally qualified or authorised (and with stronger reason when carried on by those who are so qualified).

To argue that regulating all activities of a title-holder is necessary in order to maintain the conduct and quality of those title-holders is to assert a position on maintaining a professional 'brand' (cf. paragraph 4.4 above). This arguably goes beyond what is necessary for achieving and maintaining authorisation (cf. paragraphs 3.3 and 3.4 above).

To claim that such a position is necessary to avoid confusion for consumers who might not understand why some activities of a title-holder are regulated while others are not is now less easy to sustain.

First, Parliament itself has drawn the distinction between reserved and non-reserved activities, and determined that the latter do not in principle require regulating. Second, solicitors are now allowed to offer non-reserved activities to the public from an unregulated entity, and the regulatory consequences are different.

In other words, the potential for consumer confusion already exists. This is not thought to be outweighed by the risks to consumers, and can probably be addressed by improved communication, transparency and informed purchase.

Nevertheless, the regulatory framework must still recognise the challenge of conveying clearly to consumers the structure and consequences of regulation. It must also do so in a way that – for all the merits of disclosure and transparency – does not create information or cognitive 'overload' such that consumers' ability to make an informed decision is jeopardised.

A similar conclusion might be reached in relation to a regulator's imposition of conditions for the award of a professional title. The current approach of some of the approved regulators appears to conflate two distinct processes. The first is the award of a professional title, and the second is authorisation to conduct one or more of the reserved legal activities in England & Wales (with the regulatory consequences that then flow from that authorisation).

As a general principle, if a regulator wishes to attach conditions and obligations in relation to the award of a title (as opposed to authorisation for, and the exercise of, reserved and other activities) under the statutory authority of the 2007 Act, one might expect that authority to be direct and explicit.

#### **4.5.2 Authorisation and title**

Given the timing of the Act's passage through Parliament, it refers to the professional bodies (such as the Law Society and the General Council of the Bar) as an 'approved regulator'. This recognises their regulatory remit over the reserved legal activities of (as appropriate): the exercise of a right of audience, the conduct of litigation, reserved instrument activities, probate activities, notarial activities, and the administration of oaths (section 20, and Schedule 4, paragraph 1(2)).

As a transitional matter, those who were qualified at the time were automatically deemed to be authorised persons in respect of those activities (section 18, and Schedule 5).

The Legal Services Board and approved regulators must ensure that the exercise of an approved regulator's regulatory functions is not prejudiced by its representative functions, and that regulatory decisions are taken independently from representative ones.

The Legal Services Board seeks to achieve this separation of regulation from representation through its internal governance rules (section 30; cf. rules 4 and 8 of the LSB's Internal Governance Rules 2019; see further LSR-5 2020: paragraph 5.2.2). The newly created regulatory bodies, such as the SRA and BSB, then 'inherited' the pre-existing regulatory functions, as delegated by their 'approved regulator'.

Under the Act, an approved regulator's 'regulatory functions' are "any functions ... under or in relation to its regulatory arrangements" (section 27(1)). 'Regulatory arrangements' are then defined in section 21, and include "authorising persons to carry on reserved legal activities" and 'qualification regulations' (section 21(1)(a) and (f)). Qualification regulations are further defined in section 21(2) as (emphasis supplied):

- (a) any rules or regulations relating to –
  - (i) the education and training which persons must receive, or
  - (ii) any other requirements which must be met by or in respect of them,*in order for them to be authorised* by the [approved regulator] to carry on an activity which is a reserved legal activity.

Crucially, therefore, both authorisation and qualification are explicitly framed in terms of carrying on a reserved legal activity, rather than the holding of a professional title.

Any regulatory body's claim to regulate a professional title is for a much broader regulatory remit than authorisation. If not voluntarily delegated by the appropriate professional body as an approved regulator, the justification for this claim must rely on other parts of section 21.

In it, the Act introduces the expression "regulated persons", referring to "any class of persons" (such as solicitors or barristers) "which consists of or includes persons who are authorised by the [approved regulator] to carry on an activity which is a reserved legal activity" (section 21(3)).

From this, the regulatory body's authorisation of persons to carry on one or more reserved legal activity, and consequently becoming 'regulated persons', then brings into regulatory scope:

- (a) any additional "education and training requirements" imposed on them as regulated persons (included as part of the qualification regulatory arrangements by virtue of section 21(2)(c));
- (b) "any other requirements which must be met by or in respect of them" as regulated persons (also included as part of the qualification regulatory arrangements by virtue of section 21(2)(c)); and
- (c) the conduct, discipline and practice rules applying to regulated persons (which are part of the regulatory arrangements by virtue of section 21(2) and (3)).

The Act therefore confirms a set of regulatory arrangements that apply to authorised persons as a result of the regulatory body inheriting those broader functions from the approved regulator as part of the initial transitional arrangements in the Act.

However, it is arguable that the Act only continues to support such a position if, once anyone is authorised to carry on a reserved legal activity and becomes a 'regulated person', the rules and regulations applying to them as such are consistent with the rest of the Act's regulatory objectives and principles (see further paragraph 4.5.3 below).

Part of a regulatory body's difficulty in using these provisions to claim jurisdiction over title and non-reserved activities is that, as with other provisions in the Act, section 21 is framed in terms of authorisation for reserved activities, not explicitly for all legal activities nor for the award of a title.

Further, the definition of ‘regulated persons’ is not aimed solely at or limited to authorised persons, let alone title-holders. Section 21(3)(b) and (4) makes it clear that the definition includes unauthorised persons who are employees, as well as managers of an ABS (who might well not hold a legal professional title).

It seems clear, therefore, that the explicit terms of the Act are not directed to title-holders as such. While the existence of a title might justify authorisation for a reserved activity, the terms of the Act address authorisation, not title.

It is arguable, therefore, that in the implementation of the Act a widespread assumption has been made that regulation of title (and then of non-reserved activities carried on by title-holders) fell within the terms of the Act, but that this assumption was not in fact a *necessary* consequence of the statute.

Such an interpretation would not, of course, negate the terms of any delegation actually given to a regulatory body by an approved regulator. It is not that regulatory bodies might have been acting beyond their powers. Rather, it is an argument that the approved regulators delegated more than was necessarily required by the Act.

Some support for the argument advanced in this paragraph can be found in the statement to Parliament by the justice minister, Lucy Frazer QC MP, on 6 February 2018:

Currently there is no statutory basis for much of the regulation of individual barristers or entities by the BSB. Barristers are regulated under a non-statutory regulatory regime, with barristers in effect consenting to be bound by the BSB’s rules and thus establishing a contract between them.

Such a statement would have been unnecessary had the explicit terms of the Act already applied to the profession or title of barrister. The statement was made during the approval of a statutory instrument to extend the Bar Council’s/BSB’s powers<sup>22</sup> and put them on a statutory basis. However, those new powers apply mainly to disciplinary and compensation issues, and do not relate to the award of title which, as section 207(1) of the Act confirms, continues to reside with the Inns of Court.

In relation to solicitors, the position is complicated by the Solicitors Act 1974, where the right of admission rests with the Law Society along with powers to make certain regulations (Solicitors Act 1974, sections 3 and 28), that is, with the approved regulator.

However, the same analysis can be applied to suggest that the regulatory remit and arrangements under the Legal Services Act 2007 that had to pass to the relevant regulatory body (SRA) are only those – and to the extent required – that are necessary to address training for, and the authorisation of, carrying on one or more of the reserved legal activities for which the SRA is approved.

#### **4.5.3 Risk and proportionality**

The argument explored in paragraph 4.5.2 above is undoubtedly tendentious. However, we might still return to the starting point in paragraph 4.5.1 above that the 2007 Act does not perceive there to be sufficient risk to require non-reserved activities to be carried on only by authorised persons. Consequently, a regulator seeking to regulate practitioners for all they do, rather than in respect of their authorisation to carry on a reserved legal activity, imposes additional obligations and a competitive disadvantage.

Even if the whole structure of title regulation has been passed legitimately to regulatory bodies, those bodies still have the obligation (arising from section 28) to act in a way that is compatible with the Act’s regulatory objectives, and have regard to “the principles under

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22. The Legal Services Act 2007 (General Council of the Bar) (Modification of Functions) Order 2018 No. 448.

which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed”<sup>23</sup> as well as to “best regulatory practice”.

As explored in paragraph 4.5.2 above, the terms of the Act do not explicitly refer to the regulation of practitioners as a professional group or as the holders of any particular professional title. Nor do they refer to the education and training of title-holders as such.

The closest references to any such position are in section 21 to those regulatory arrangements described above in respect of ‘regulated persons’, which arise *only as a consequence* of being a class of persons who are authorised to carry on a reserved legal activity.

The primary emphasis throughout the Act is on ‘authorised persons’, namely those who are authorised to carry on a reserved legal activity, and on the education and training of persons who are, or wish to be, authorised.

Further, the LSB’s own powers for assisting in the maintenance and development of standards in relation to authorisation and education and training are also expressed in section 4 of the Act to apply only to “persons authorised ... to carry on ... reserved legal activities”; again, there is no reference to professional groups or professional titles.

This emphasis in the Act strongly suggests that any regulation aimed at matters other than authorisation, or education and training sufficient to justify or maintain authorisation, is to be considered consequential or incidental to authorisation.

If this is correct, it would follow that the primary focus of a regulatory body’s activities should be on *authorisation* to carry on one or more of the reserved legal activities, and the educational and other requirements necessary for *authorisation* to be granted, maintained or withdrawn.

Any broader claim to regulate title-holders (and everything they do), and the education and training required for the award of a title, arguably over-steps the bounds of what is necessary, risk-based and proportionate to meet the regulatory objectives required for authorisation.

#### **4.5.4 Conclusion**

The premise of this paragraph is that, in the transition from the former regulatory framework to that under the Legal Services Act, the approved regulators (and, where they exist, their regulatory bodies) have assumed that all regulation that previously applied to the holders of their relevant professional titles was transferred and became the responsibility of the regulatory bodies under the Act.

This paragraph reflects an argument that the *necessary* transfer applied only to those aspects of regulation that pertained to training for, and authorisation in respect of, the right to carry on a reserved legal activity.

This would leave a potential residual regulatory role for the approved regulators in relation to the award and retention of title and the carrying on of non-reserved legal activities. Arguably, this would also allow or reflect a more risk-based and proportionate approach to the regulation of legal activities carried on by those who hold a professional title. Indeed, it would already be more consistent with the expressed longer-term preferences of the CMA and LSB (cf. paragraph 4.4 above).

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23. The Legal Services Board in its regulatory standards framework has added a ‘gloss’ on these principles by requiring approved regulators to regulate on an outcomes-focused basis which is based on risk and evidence.

#### 4.6 Title-based regulation and substitutive legal technology (lawtech)

It seems clear that title-based regulation cannot of itself adequately address the need to regulate substitutive legal technology (lawtech). As Hook explains (2019: page 40):

those regulators whose scope of regulation is limited ... to those holding particular titles, can only control the involvement of those whom they regulate. In the Netherlands, for example, the College of Supervisors can only exert any control over those online platforms which involve lawyers and not the ones that don't. The risk of this approach – and hence the driver towards some accommodation with online legal services platforms in the Netherlands, is that lawyers are marginalized from the benefit of technological developments and consumers are potentially exposed to less good.

Nevertheless, where there are individuals or entities involved in the design or provision of a technological product or service on whom regulatory obligations could be applied (because, for some commercial reason, they have decided to adopt substitutive technology themselves), there could well be a basis for regulating such persons.

As Semple writes (2019: paragraph 3.4, emphasis supplied):

The LSA Regime applies to providers of legal services. It does not directly apply to the technologies that providers use, or to the third parties who create those technologies. The assumption is that it is sufficient to hold the provider responsible for any deficiencies in the technology deployed. This assumption is shared with legal services regulatory regimes elsewhere in the world....

Legal services providers subject to the LSA regime may rely on artificial intelligence or algorithms to make predictions regarding legal outcomes, or assemble documents for their clients. Such technologies are often 'black boxes' in the sense that grounds for their decisions are secret. Indeed, *the grounds for the decisions may not be known to anyone*, including the creators of the technology. Automated legal services used to be 'hand-coded' – a human would tell the system how to respond to various user inputs. However, some artificial intelligence now engages in 'unsupervised learning' – sifting autonomously through data in order to identify patterns which are then used to make predictions.

As Semple observes, the policy of adopting a profession-centric standpoint, and attaching lawtech regulation only to those who are already regulated, is common. In the United States, for example, a duty of technology competence imposes obligations and expectations of understanding the benefits and risks associated with relevant technologies, with the consequent assumption of responsibility and liability for the adoption and use of specific technology (cf. paragraph 2.3.1 above).

But as Semple points out, this approach will be self-limiting if practitioners might not know – or even *cannot* know – sufficient about the relevant technology to satisfy this duty (2019: paragraph 3.4, emphasis supplied):

The technology provider may not be able to explain why it has reached this conclusion. It simply emerges from patterns in the data. If so, *the legal service provider that accesses this service and passes the information on to a client cannot understand the basis for it either*. If the technology fails, large numbers of consumers might be exposed to risks. If such a technology succeeds 'too well,' it could undermine the public interest....

More problematic than this for the future is the high probability that, by definition, there will not always or necessarily be an individual involved who holds any professional title. Consequently, title-based regulation could not, alone, offer a solution to regulating substitutive technology (lawtech). Nor would it be consistent with market or competition objectives if a requirement were to be imposed that there must be a title-holder involved in the provision of legal services through such technology in order to introduce a regulatory 'hook'.

## 4.7 Summary

The benefits and advantages of title-based regulation are:

- it sustains strong, historical and cultural values among members of a profession;
- it is consistent with consumers' recognition of brand titles (particularly those of solicitor and barrister); and
- it provides a basis under current practice for the entirety of a title-holder's activities and behaviour to be overseen by a regulator.

The limitations and disadvantages of title-based regulation are:

- a professional title does not, of itself, fully convey what activities a title-holder is authorised and competent to offer (such as higher court advocacy by solicitors, the conduct of litigation by barristers, advocacy and litigation by chartered legal executives, or probate activities by licensed conveyancers);
- it creates barriers to entry to the sector for those who do not hold a title;
- it leads to multiple regulators and standards for the same legal activities carried on by holders of different titles;
- it potentially results in a 'gold standard' approach to regulation that underpins the highest professional standards rather than the minimum necessary regulation;
- it currently extends regulation to legal activities that Parliament does not require to be carried on only by authorised persons;
- it therefore perpetuates the regulatory gap, and adds to costs, if market entry requires all authorised providers to undergo training for the right to use a title;
- it encourages multiple authorisation for all reserved activities for which the title regulator is approved, irrespective of current or continuing competence (and potentially then generates false confidence among consumers); and
- it cannot deal adequately with substitutive legal technology (lawtech).

## **5. Regulation of individuals**

### **5.1 Differential regulation for activities**

The essence of regulation of individuals is that they would be authorised or licensed to carry on those legal activities for which such authorisation is required. A regulator would determine what training or qualifications were sufficient to satisfy its requirements for authorisation.

Such an approach could still mean that an individual who holds a professional title or qualification (such as barrister, solicitor, chartered legal executive) could be authorised for a given legal activity on the basis of that title or qualification. Unlike the current position, however, it would not be the single title leading to multiple, automatic or 'passported' authorisation for a number of activities. Instead, one or more regulators would be giving specific authorisation on an activity-by-activity basis.

For example, currently an individual who wishes to exercise rights of audience must in effect decide whether they wish to:

- undertake the extensive process of qualifying as a barrister in order to secure all available rights of audience; or
- undertake the extensive process of qualifying as a solicitor in order to secure most available rights of audience, subject to further qualification and authorisation if he or she wishes to exercise rights of audience in the higher courts; or
- seek only the more limited rights of audience available in defined circumstances to those who qualify as, say, chartered legal executives (with the further requirement for a certificate in civil, criminal or family proceedings), patent and trademark attorneys (with a higher courts advocacy certificate), or costs lawyers (in relation to costs proceedings).

If regulation of individuals were conceived differently, in addition to the choices above (which can remain available), an individual might be able to seek authorisation to exercise a right of audience by meeting only the relevant requirements for one or more of those rights without needing a more general professional qualification as above. The relevant regulator would still need to determine how extensive the training should be in order to warrant the authorisation for the right(s) in question, but this might not need to be as extensive as that required for the award of professional titles.

### **5.2 The question of competence and aptitude**

The current regulators have grappled with the issue of what legal practitioners should be required to know and demonstrate on 'day 1' of practice. It has long been the case that no-one holding a professional title as a barrister or solicitor knows or has even studied all aspects of the law on which they will need to advise or represent their clients during their working lives.

The central question is whether they have sufficient understanding of the legal concepts and foundations that will avoid them missing relevant and fundamental legal issues by being too narrowly focused or specialised (cf. paragraph 3.5 above).

It is also important that they have the ability and aptitude to carry out the necessary analysis, research and application. They should also have developed the experience to convey the outcomes of that both orally and in writing in ways that are clear to their clients and persuasive to courts and other authorities who need to make decisions.

Additionally – at least in relation to those who make representations in court or to other authorities, though arguably more generally – authorised individuals should be capable of acting with integrity<sup>24</sup> and with an understanding of ethical issues and how to tackle them.

In respect of any particular legal activity, and the requirements of the public interest and of clients, regulators would therefore need to balance the appropriate breadth and depth of knowledge, expertise and aptitude to secure the objectives of regulation with the lowest acceptable degree of burden and cost to actual and prospective practitioners in meeting them.

Such an approach might pave the way for regulated authorisation of certain individuals who at the moment do not hold a professional qualification but who do have extensive (and sometimes specialised) experience in an activity. This might apply, for instance, to certain social and care workers, police officers, professional McKenzie Friends, and paralegals.

### 5.3 Clarity of authorisation

Under the current title-based approach, there is inconsistency among title holders about what any given individual is in fact authorised to do – and therefore the potential for confusion in the minds of consumers. For example, a ‘solicitor’ is authorised as an individual to carry out all of the reserved activities except notarial activities.<sup>25</sup> In addition, a solicitor might not be authorised to conduct higher courts advocacy.

The SRA’s new approach to a more differentiated regulation of solicitors as individuals, as implemented in November 2019, allows it to distinguish its regulatory requirements as between solicitors who work:

- in a regulated firm (with the solicitor able to carry on both reserved and non-reserved activities with full regulatory cover);
- in an unregulated firm (with the solicitor still regulated as an individual but only able to offer non-reserved activities, and with more limited regulatory cover available to clients, who must be made aware of those limitations);
- on a self-employed, freelance, basis (providing reserved and non-reserved activities, but not able to hold client money); or
- as an in-house solicitor.

Given these permutations of practice settings in which the title ‘solicitor’ can be used, the label ‘solicitor’ alone adds to the inherent lack of clarity and does not convey immediately and explicitly what it is that the individual concerned is authorised and regulated to do.

Similarly, a ‘barrister’ might or might not be authorised to conduct litigation, and so the title does not of itself indicate the degree or range of authorisation<sup>26</sup>. Likewise, a ‘chartered legal executive’ might or might not be authorised in respect of any (or only some) of the rights of audience for which a civil, criminal or family proceedings certificate is required.

It follows, therefore, that perhaps the regulation of individuals in respect of specific activities could achieve some opening up of the scope for provision of regulated legal services (by allowing authorisation that is not principally limited to those who hold a professional title or

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24. To be clear, the requirement for integrity extends beyond dealings with courts and other authorities. It is important that legal practitioners should be able to rely on each other (which is why, for example, the obligation on solicitors and licensed conveyancers to fulfil their formal undertakings is absolute). But it is also important that an individual has the personal and professional integrity to ensure that his or her competence is maintained over time through continuing professional development.

25. Whether any particular solicitor should be regarded as currently competent and up-to-date to carry out all of those activities is a separate, but also potentially confusing, factor.

26. In the case of barristers, there might be no authorisation to practise at all, given that the title ‘barrister’ is conferred at the time of Call to the Bar, with pupillage and a practising certificate to follow (or not).

qualification). It could then potentially make it clearer to consumers exactly what it is that any given individual is authorised to do. Indeed, arguably the use of descriptions such as 'authorised advocate/ litigator' might be more helpful to consumers than (or in addition to) the current professional titles.

As explored in paragraph 3.4 above, the authorisation (and possible description) given to an individual envisaged here would lie with a regulator. It might be that the individuals and professional bodies concerned would then seek to compete on the difference or competitive advantage that an 'authorised advocate and litigator' who was also a barrister was thought by them to have over a similarly described advocate and litigator who also held a different professional title (or indeed no title at all).

#### **5.4 Regulation of individuals and substitutive legal technology (lawtech)**

As with regulation by title (cf. paragraph 4.6 above), there is no inevitability that legal services provided by or through substitutive legal technology would involve individuals (they might, for instance, be provided contractually only through an entity). However, as with regulation of individuals generally, there is at least the prospect that there would be an individual involved in some such ventures, and the necessary combination of individual and entity regulation might provide a basis for the effective regulation of substitutive technology.

#### **5.5 Summary**

The benefits and advantages of regulation of individuals are:

- it is better for circumstances where the skill and integrity of individuals are key to the regulated activity (perhaps, say, for advocacy and notarial activities);
- it allows for the authorisation of individuals with specialist skills without requiring a more broadly based professional qualification;
- it provides a basis for increasing the provision of regulated legal activities by individuals who do not hold a professional title; and
- it makes it clearer to consumers exactly what legal activities any individual is currently authorised and competent to carry on.

The limitations and disadvantages of regulation of individuals are:

- it ignores organisational or contextual influences, pressures and obligations unless it is also combined with entity regulation;
- it might lack the additional influence of professional norms, conduct and behaviour that often results from being a member of a profession; and
- by itself, it cannot adequately address the regulation of substitutive legal technology.

## 6. Regulation of entities

### 6.1 Background

Historically, the approach of the regulatory framework in England & Wales to the regulation of entities has been mixed. Barristers in self-employed private practice were prevented from practising other than personally (with their chambers not being structured or treated as a business entity). Similarly, until relatively recently, solicitors were required to practise either alone or in a general partnership with unlimited liability.

The approach to legal services regulation was therefore focused for many centuries on the regulation and obligation of individuals, and paid little or no attention to the organisational context in which private practice was carried on (though the position of in-house lawyers was later addressed in the relevant codes of conduct).

Licensed conveyancers were able to adopt incorporated business entities from their creation in 1985, and other legal practitioners have gradually been allowed to practise from any form of legal entity. Most other jurisdictions around the world now also allow private practice from incorporated entities.<sup>27</sup>

The American Bar Association offers the following assessment of the potential advantages of entity regulation (2016: page 6):

First, entity regulation encourages regulators to devote resources to (1) improving the management and culture of the entity as a whole and (2) preventing public harm, rather than focusing on individual conduct and discipline after the fact. Second, entity regulation means that everyone at the company has a stake in compliance since entity discipline affects all company employees. Third, entity regulation could remove the potential unfairness of holding one employee in a firm responsible for system failures where others in the firm, or the firm itself, could just as well be made accountable. Fourth, entity regulation avoids the problem of identifying the individual who committed the alleged misconduct.

In addition, the policy decision to allow the creation of alternative business structures (ABSs) as part of the reforms introduced by the Legal Services Act 2007 meant that regulatory attention needed to shift further. ABS regulation requires not merely that the entity provides a context within which authorised practitioners carry on regulated legal activities but that the entity itself needs authorisation to carry on those activities.

Whereas, historically, the ownership of the business entity (whether a general or limited liability partnership, or a corporate body) within which lawyers practised was restricted to those who were professionally qualified and themselves working in the practice, ABSs introduced new permutations.

Formerly, with limited exceptions usually relating to internationally qualified lawyers, a solicitors' practice could not have owners who were differently qualified (even as barristers or licensed conveyancers). ABSs now allow the potential of ownership among those who are differently qualified (legal disciplinary practice) or, indeed, not legally qualified at all (multidisciplinary practice).

Where the 'non-lawyer' threshold is exceeded (currently at 10% of ownership or control), an ABS licence is required for an entity providing legal services to the public if the entity wishes to provide one or more of the reserved legal activities. There are exemptions for certain types of 'special body' entities such as trade unions and law centres (cf. LSR-4 2020: paragraph 4.5).

The regulation of entities therefore provides a different basis of regulatory focus for the delivery of authorised legal services. The complication with entity regulation, however, is

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27. Cf. LSB (2016), Annex 3.

that legal services are still predominantly delivered by individuals. Accordingly, therefore, even where the entity itself is licensed, the reserved legal activities that it carries on must nevertheless be delivered or supervised by an individual who is personally authorised in respect of the reserved activity in question.

Further, the ABS entity must also appoint an approved Head of Legal Practice who is individually authorised for at least one of the reserved activities for which the ABS holds a licence.

## 6.2 The purpose of entity regulation

It would seem that the principal purpose of entity regulation for ABSs lies less in the wish that entities should be authorised to carry on regulated legal activities than in the need to be able to attach some regulatory reach to an organisation that might be wholly owned by those who are not themselves subject to regulation as individuals.

As such, it moves in the direction of ‘provider-based’ regulation (see further paragraph 7 below), in the sense that the legal entity is authorised to provide certain legal services. Further regulatory requirements then specify the conditions for that authorisation as well as for the provision or supervision of regulated services on behalf of the entity by individuals who are themselves authorised.

This in turn has led to a regulatory anomaly (and a consequence of the ‘regulatory gap’ previously recognised: see LSR-0 2020: paragraph 4.5). As a result of an individual being authorised to carry on one or more of the reserved legal activities, there already exists a regulatory ‘hook’ on which regulated provision can be based, with the consequent protection for the clients of that authorised individual.

The question then reasonably arises why it is necessary to require further authorisation of the business entity within which that individual practises. The answer lies in the distinction between reserved and non-reserved activities.

Where, say, a solicitor practises within a law firm, both the individual and the firm are subject to the regulatory jurisdiction of the SRA. However, until recently, although the SRA’s regulation of the individual covers both the reserved and non-reserved legal activities carried on by that individual, if a business other than a law firm wished to offer only non-reserved services to a fee-paying clientele, a solicitor could not contemplate working for that business *as a solicitor*.<sup>28</sup>

This led to the rather strange outcome that an unregulated business could employ individuals who were not and never had been legally qualified to provide non-reserved activities for payment (with all the risks of competence, quality and consumer detriment that this might entail).

But that same business could not employ a solicitor to provide those same services for payment with whatever degree of reassurance and protection that might otherwise have flowed from the individual being regulated.<sup>29</sup> The business could not be regulated as an

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28. An individual who had qualified as a solicitor could offer those non-reserved services (as can anyone else who is not legally qualified), but could not hold themselves out to the client as a solicitor. There are similar restrictions that apply to barristers, though not to chartered legal executives, licensed conveyancers or chartered accountants.

29. The CMA market study rightly notes (CMA 2016: footnote 566): “There are some situations where unauthorised firms can employ solicitors and promote their activities to the public. ‘Non-practising solicitors’ have long been a part of the current legal services sector. Non-practising solicitors do not possess a practising certificate and are thus unable to offer reserved legal activities to consumers. However, these solicitors remain on the roll and, as a result, are within the SRA’s regulatory scope and subject to

ABS entity because it did not wish to provide reserved activities to the public; and regulation as a non-ABS entity is not available.

### 6.3 A new approach

The SRA changed its Handbook in November 2019 to allow solicitors to work within a non-regulated entity, providing non-reserved services to the clients of that entity. However, it still remains the individual solicitors who are subject to regulation and not the entity.

These developments have been controversial<sup>30</sup>, largely on the basis that the protection available to consumers in these circumstances is not the same as that available to clients of regulated law firms and ABSs. There have therefore been expressions of concern relating to the potential for confusion for consumers about the exact nature of the applicable regulation, as well as about the nature and extent of any protection available to them. This has resulted in what some assert is a ‘two-tier’ solicitors’ profession.

The CMA addressed in its market study what was then the prospect of this change in regulatory approach. In expressing its overall support, it said (CMA 2016: paragraphs 5.102-5.116):

- 5.102 In addition to its focus on title, the current regulatory framework also restricts the entities within which certain professional titles can be employed. This is the case particularly for solicitors, who are restricted from working in unauthorised firms, even when carrying out only unreserved legal activities.
- 5.103 We consider that a lack of access to regulated titles may restrict the ability of unauthorised firms to compete given the impact that these titles have on consumer decision-making and trust<sup>31</sup>....
- 5.104 Another more direct consequence of the restriction is that unauthorised firms may be less able to harness the expertise of solicitors. This may directly affect the services that unauthorised firms can offer and reduce their ability to compete. This is relevant as unauthorised firms may employ different innovative business models or may be able to offer the same services that solicitors offer in relation to unreserved legal activities more cheaply than authorised firms. As a result, we consider the restriction may unnecessarily reduce the availability of lower cost options in the market.

#### *Current SRA proposals on ‘individual solicitors’*

- 5.105 As part of its Handbook review, the SRA proposes to allow solicitors to provide unreserved legal activities to the public while working in unauthorised firms. These ‘individual solicitors’ would operate under different regulation than would be the case if employed within an SRA-regulated firm. In particular, they would not be subject to mandatory [professional indemnity insurance (PII)], legal professional privilege would not apply to their communications and complainants would not have access to the SRA compensation fund. The reforms would also establish a greater distinction between the personal regulation of solicitors based on their individual title alone and entity regulation of solicitor firms. The SRA is proposing that this distinction be reflected in two separate codes of conduct....

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disciplinary action. There are roughly 30,000 non-practising solicitors in England and Wales. While some non-practising solicitors are retired, others may still actively provide non-reserved legal activities to consumers as part of an unauthorised entity or as a sole practitioner. In addition, certain non-SRA regulated businesses (for example Peninsula and Which? Legal) employ solicitors to provide legal advice to consumers via phone. This is permitted via Rule 4.14 of the Practice Framework Rules 2011, a rule which also enables the sending of a ‘follow up letter’ to the enquirer when necessary.”

30. See, for example, the Law Society’s letter to the LSB opposing the SRA’s changes to the Handbook:

<https://www.lawsociety.org.uk/news/stories/law-society-opposes-sra-handbook-changes/>.

31. Cf. paragraph 4.4 above.

- 5.106 The SRA proposal would address the competition concerns raised [above]. We consider that access to regulated titles would improve the ability of unauthorised providers to compete in two ways:
- (a) Through the impact that these titles have on consumer decision-making and trust. This means that consumers may be more willing to use unauthorised providers which employ practising solicitors, in situations where they might benefit from using them; and
  - (b) Through the ability of unauthorised firms to harness the expertise of solicitors in innovative and lower costs business models.
- 5.107 This is likely to have a positive impact on consumers by generating greater competitive pressure on price, and creating new routes and choice for consumers to access advice from qualified solicitors.
- 5.108 However, at the same time, there might be risks to consumer protection if the change led to consumers using providers which offered lesser regulatory protection on an uninformed basis.
- 5.109 In the following paragraphs we consider the possible effects of the SRA proposal and the risks that consumer protection concerns might arise. The implications of the SRA proposal for consumers who chose to use solicitors working in unauthorised firms would depend on whether they would have otherwise used an unauthorised provider or an authorised provider.
- 5.110 Consumers who would have purchased legal services from an unauthorised firm would benefit from additional protection. As a result of the changes, they would have access to the [Legal Ombudsman (LeO)]. In addition, solicitors working in unauthorised firms would need to follow the minimum standards and ethical codes in the 'Code of Conduct for Solicitors'.
- 5.111 Consumers who would have purchased from an authorised firm but, as a result of the changes, now chose to use a solicitor working in an unauthorised provider would have less protection. As noted above, unauthorised providers who employ solicitors will not be subject to mandatory PII and consumers would not benefit from legal professional privilege. Consumers using solicitors in unauthorised providers would also not have access to the SRA compensation fund.
- 5.112 The differences in regulatory protection between providers are of concern if they are unknown to consumers when they choose a provider, as it is important that consumers are able to choose providers which offer protection appropriate to their needs. As noted above, consumers rely on titles to some extent but often do not understand differences in regulatory protection. It is therefore possible that consumers who decide to use solicitors in unauthorised firms might suffer harm in certain situations as a result of the more limited regulatory protections. In addition, there is a possibility that those consumers who are more aware of regulatory protections might assume that solicitors working in unauthorised firms would have in place the same protections that apply to solicitors working in authorised firms.
- 5.113 The benefits to consumers from these additional regulatory protections can be important, but are limited to certain situations. We note that many unauthorised providers already elect to have PII without a regulatory obligation to do so. Access to the compensation fund becomes relevant when an SRA-regulated firm owes money to a consumer in circumstances where the provider misappropriated funds or did not have PII. This leaves potential for consumers to be exposed to greater risks from using solicitors in unauthorised firms particularly in situations involving the handling of client money. As noted in paragraph 5.76<sup>32</sup>, the scope of the reserved legal activities in conveyancing and probate may not effectively cover the handling of client money resulting in the potential for regulatory gaps.
- 5.114 We similarly recognise that the lack of legal professional privilege for 'individual solicitors' working within an unauthorised entity is a potentially significant factor that might in certain

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32. See LSR-2 2020: paragraph 2.5.

situations have an influence on the consumer's purchasing decision, if known to the consumer in advance.<sup>33</sup>

- 5.115 For these reasons, we believe it would be important for consumers to be advised of differences in regulatory protection immediately prior to purchasing legal services from an 'individual solicitor' within an unauthorised firm. In this regard, we note that the SRA proposal contains provisions that are aimed at enabling consumers to make informed choices, such as the obligation on 'individual solicitors' to inform consumers about differences in regulatory protection. We consider that these provisions may be important in mitigating the consumer protection concerns identified and that their effectiveness should be monitored.
- 5.116 Overall, on the basis of the evidence set out above and provided that the measures that the SRA puts in place to mitigate the consumer protection risks are effective, we believe that the benefits to competition of removing the restriction would be likely to outweigh the consumer protection concerns identified.

Having an element of entity regulation within the framework presents an opportunity to adopt a more differentiated approach (cf. LSR-4 2020: paragraph 4) under which:

- higher-risk activities that require personal competence, skill or integrity might be subject to before-the-event authorisation at an individual level;
- other activities with lower assessed levels of risk might be subject to during- or after-the-event regulation (or both), at either the individual or entity level; and
- other, more process-based or contextual regulation might be attached at entity level (such as handling client money).

#### **6.4 An unsatisfactory state?**

In its current state, the regulation of entities seems a rather unfulfilled halfway house. It applies to firms regulated by most of the principal approved regulators, and to ABSs that meet the necessary criteria in respect of reserved activities and 'non-lawyer' authorisation. The position of special bodies is left in an unresolved position.

However, business entities that are not otherwise regulated for legal services and that wish only to carry on non-reserved legal activities for the public, cannot be regulated within the current framework at all. There is not, therefore, a coherent or consistent approach to the regulation of entities that wish to offer legal services to the public.

Entity regulation might possibly be better used as a vehicle for attaching regulatory requirements and consequences to the organisational environment in which individuals practise. In this way, challenges such as process-based delivery of legal services, and the handling of client money, might be most effectively addressed as business entity responsibilities, irrespective of the individual authorisations for the personal delivery of legal activities.

#### **6.5 Regulation of entities and substitutive legal technology (lawtech)**

As with regulation of individuals (cf. paragraph 5.4 above), there is no inevitability that legal services provided by or through substitutive legal technology would involve entities (they might, for instance, be provided contractually only through individuals). However, as with regulation of entities generally, there is at least the prospect that there would be an entity involved in some such ventures.

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33. It might be questionable, however, whether many consumers would in fact be aware in advance of the availability or consequences of legal professional privilege.

The necessary combination of individual and entity regulation might provide a basis for the effective regulation of substitutive legal technology – except where, in the current framework, the technology provides advice or documents only in relation to non-reserved matters and there are no authorised individuals otherwise involved.

## 6.6 Summary

The benefits and advantages of regulation of entities are:

- it attaches regulation to the organisational context in which individuals carry on legal activities;
- it enables the carrying on of regulated legal services when the provider through which those services are offered is not an otherwise authorised individual;
- it offers a route to the regulation of those activities and processes of a law firm that are more appropriately conducted at an entity or organisational level (such as accounting, and handling client money);
- it encourages regulators to devote resources to improving the management and culture of the business as a whole and to preventing public harm, rather than focusing on individual conduct and discipline;
- it means that everyone within the entity has a stake in compliance because regulatory sanctions on the entity will affect all staff within it;
- it offers an alternative to the potential unfairness of holding one individual in a firm responsible for system failures where others in the firm, or the firm itself, could just as well be made accountable; and
- it might avoid the challenge of a client or complainant needing to identify a specific individual responsible for perceived misconduct or poor service.<sup>34</sup>

The limitations and disadvantages of regulation of entities are:

- it cannot address the very personal services that require human interaction, skill or integrity unless it is also combined with individual/title regulation;
- services can only be ‘delivered’ by individuals, process and/or technology, and so it requires that delivery necessitates a requirement for supervision by an individual to whom regulatory accountability can be attached (such as an authorised person or Head of Legal Practice);
- it struggles with the distinction between regulated and unregulated activities; and
- it provides an incomplete approach to the regulation of substitutive legal technology.

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34. The final four benefits here are borrowed from ABA Commission on the Future of Legal Services (2016).

## **7. Regulation of providers**

### **7.1 A question of scope**

Rather than seeking to differentiate between professional titles, or between individuals and entities, an alternative focus for regulation could be a broader notion of a 'provider'. This description could be defined in such a way that all forms of the provision of legal services could be captured. Once it is decided that a legal activity should be within the scope of regulation, any form of provision by any provider could then fall within the regulatory framework.

This would render it unnecessary to distinguish different sources of provision or provider. The principal issue therefore arises from what falls within the scope of regulation, rather than who or what provides the regulated activity.

The benefit of an approach based on regulation of providers is that it can incorporate all of the positive aspects of regulation of individuals and entities within one regulatory arrangement, since all providers – whether individuals, entities or title-holders – would be subject to the same requirements.

Depending on how widely the scope of regulation is framed, regulatory focus on providers could allow different forms of regulatory intervention, of varying degrees and at different points in time, to be applied to all legal services within that scope (cf. LSR-4 2020).

### **7.2 Regulation of providers and substitutive legal technology (lawtech)**

In a framework in which the nature or type of provider does not need to be differentiated, any provider of substitutive legal technology could readily be brought within scope. Of all options for focus, therefore, this would appear to be the simplest for bringing substitutive legal technology within the practical reach of regulation.

The remaining challenge here would relate only to jurisdiction: who or what is the 'hook' within England & Wales on which regulatory responsibility and consequences can attach? This might be one or more of the developer or development process, the provider, the software host, the user, or the location of any relevant activity.

### **7.3 Summary**

The benefits and advantages of regulation of providers are:

- it offers flexibility in relation to the scope of regulation (from all legal activities provided within the jurisdiction to only some targeted, higher-risk activities);
- it offers greater flexibility in relation to the form of regulation to be applied (cf. LSR-4 2020);
- it avoids the need for parallel approaches for individuals and entities; and
- it might come closest to a form of activity-based regulation by attaching to all forms of provision of legal services, including substitutive legal technology.

The limitations and disadvantages of regulation of providers are:

- (depending on scope and form) potentially an extension of the scope of regulation by bringing within the regulatory 'net' providers and activities not currently subject to regulation.

## 8. Conclusions

The question of regulatory focus is far from straightforward. It would seem that the current framework has two structural constraints. The first is that a narrow set of reserved legal activities does not ensure that all of the activities that should be regulated in the public interest are identified, and the application of reservation is accordingly inadequate.

The second structural constraint is that providing for regulated entry into the legal services sector through authorisation, resulting primarily from a professional title, for one of those limited activities, creates a barrier and cost for potential market entrants.

The combination of these constraints creates further consequences. The first is that new entrants who only wish to operate in non-reserved areas are forced to (i) operate in a non-regulated environment; (ii) incur unnecessary (and, in a business context, artificial) costs of becoming qualified or authorised for reserved activities that they do not wish to offer; or (iii) submit to voluntary regulation that might leave their clients less well protected.

The second consequence is that there is no current route to consistently regulating lawtech or substitutive legal technology. This creates an additional dimension to the existing regulatory gap.

Under the current regulatory framework, title-based authorisation leads to before-the-event authorisation for one or more of the reserved legal activities, and during- and after-the-event regulation then flows for all that the authorised person does.

There is no scope for more risk-based, targeted and proportionate intervention that would allow for the separate imposition of before-, during- and after-the-event regulation as appropriate to different public interest needs and consumers' circumstances.

However, it is not clear that the present mix of regulating activities, titles, individuals and entities can obviously give way to a simpler, coherent alternative.

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