



# REFORMING LEGAL SERVICES REGULATION BEYOND THE ECHO CHAMBERS

Stephen Mayson





# **REFORMING LEGAL SERVICES: REGULATION BEYOND THE ECHO CHAMBERS**

**FINAL REPORT OF THE  
INDEPENDENT REVIEW OF LEGAL SERVICES REGULATION**

**June 2020**

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## CONTENTS

<b>Preface</b>	ix
<b><i>In a nutshell</i></b>	ix
<b>Acknowledgements</b>	xii
<b>Glossary</b>	xiii
<b>Preamble</b>	<b>1</b>
<b>Chapter 1: Introduction and summary</b>	<b>7</b>
1.1 Back to the future	7
1.2 Regulation of lawyers, mainly for lawyers	9
1.3 Regulation of legal services	10
1.4 Summary of findings	12
1.5 Summary of issues to be addressed and proposals	14
1.6 Summary of long-term recommendations	16
1.7 Summary of short-term recommendations	23
1.8 Summary of benefits	24
<b>PART 1: THE CURRENT STATE OF THE LEGAL SERVICES SECTOR</b>	
<b>Chapter 2: The legal services sector</b>	<b>27</b>
2.1 Who works in the sector	27
2.2 Economic value of the sector	28
2.3 Legal services and legal need	29
2.3.1 <i>Help for legal issues</i>	29
2.3.2 <i>Failure to seek help and unmet need</i>	30
2.4 Consumer experience and confidence in using legal services	32
2.4.1 <i>Seeking professional help</i>	32
2.4.2 <i>Competition and unregulated providers</i>	33
2.4.3 <i>Search and transparency</i>	35
2.4.4 <i>Confidence and trust in lawyers</i>	36
2.5 Consumers, legal knowledge and regulation	37
2.6 Conclusions	39
<b>Chapter 3: Findings and issues</b>	<b>41</b>
3.1 The Clementi reforms	41
3.2 Competition and consumerism	43
3.3 Consumer expectations and regulatory reality	46
<i>Viewpoint 1: A personal consumer experience</i>	48
3.4 The reserved legal activities	50
3.5 Differentiation of approach	51
3.6 Professional titles	52
3.7 Flexibility, cohesion and independence	54
3.7.1 <i>Regulatory flexibility and the need for cohesion</i>	54
3.7.2 <i>Regulatory independence</i>	55
3.7.3 <i>Is greater separation of regulatory and representative functions desirable?</i>	58
3.8 Public confidence in legal services and their regulation	60
<i>Viewpoint 2: Public confidence in complaints and redress</i>	62

## CONTENTS (continued)

3.9	Regulated and unregulated providers	65
3.10	Summary of issues that need to be addressed	70
3.11	Political risks	71
3.11.1	<i>Where's the harm?</i>	71
3.11.2	<i>Political appetite</i>	74
3.12	Conclusion	77

## PART 2: LONGER-TERM REFORM

<b>Chapter 4: Risk and scope</b>	<b>81</b>	
4.1	Introduction and objectives	81
4.2	Public interest foundations	82
4.2.1	<i>A primary regulatory objective</i>	82
4.2.2	<i>Subordinate regulatory objectives</i>	83
4.3	Addressing the regulatory gap	84
4.3.1	<i>The nature and consequences of the gap</i>	84
4.3.2	<i>Closing the gap</i>	86
4.3.3	<i>Alignment: extend the reserved activities</i>	86
4.3.4	<i>Alignment: public legal education</i>	87
4.3.5	<i>Alignment: increase the scope of regulation</i>	89
4.4	Widening the gateway to regulation	91
4.5	A differentiated approach	94
4.5.1	<i>Introduction</i>	94
4.5.2	<i>Application</i>	95
4.5.2.1	<i>Entry into regulation</i>	95
4.5.2.2	<i>Higher-risk services</i>	96
4.5.2.3	<i>Assurance of competence</i>	99
4.5.2.4	<i>Limited licensing?</i>	102
4.5.3	<i>Differentiation, risk and vulnerability</i>	103
4.5.3.1	<i>Introduction</i>	103
4.5.3.2	<i>A starting point</i>	104
4.5.3.3	<i>Assessing risk</i>	105
4.5.3.4	<i>Defining risk</i>	108
4.5.3.5	<i>Vulnerability</i>	110
4.5.3.6	<i>Conclusions on risk</i>	112
4.5.4	<i>Comparative approaches</i>	113
4.6	A revised definition of 'legal activity' or 'legal services'	114
4.6.1	<i>The challenges of definition</i>	114
4.6.2	<i>Alternative dispute resolution</i>	116
4.6.3	<i>Not quite activity-based regulation</i>	120
4.7	A focus on providers	121
4.7.1	<i>Complexity and convenience</i>	121
4.7.2	<i>The meaning of 'provider'</i>	121
4.7.3	<i>Individuals and entities have distinct characteristics</i>	124
4.7.4	<i>Fit and proper persons, and fitness to practise</i>	125

## CONTENTS (continued)

4.8	Public registration	126
4.8.1	<i>The fear of over-regulation</i>	126
4.8.2	<i>The risk of under-regulation</i>	127
4.8.3	<i>A public register of providers</i>	128
4.8.3.1	Mandatory registration	128
4.8.3.2	Benefits of public registration	130
4.8.3.3	Fit and proper persons and prohibited individuals	132
4.8.4	<i>The future of alternative business structures</i>	133
4.9	The challenge of LawTech	134
4.9.1	<i>The nature of LawTech</i>	134
4.9.2	<i>Regulatory responses to LawTech</i>	136
	<i>Case Study 1: LawTech</i>	140
4.10	Innovation, waivers and sandboxes	141
4.11	Law centres, law clinics, charities and pro bono provision	143
4.11.1	<i>Introduction</i>	143
4.11.2	<i>Independent not-for-profit provision</i>	144
4.11.3	<i>Law firm and in-house pro bono provision</i>	147
4.12	Corporate legal departments and in-house lawyers	147
4.12.1	<i>The growth and challenge of in-house provision of legal services</i>	147
4.12.2	<i>Separate registration</i>	149
4.13	Multidisciplinary businesses	152
	<i>Case Study 2: MDPs and structural contortion</i>	154
4.14	Summary	156
<b>Chapter 5: Activity and title</b>		<b>159</b>
5.1	Introduction	159
5.2	Before-the-event regulation	159
5.2.1	<i>The purpose of prior authorisation</i>	159
5.2.2	<i>The future basis of prior authorisation</i>	160
5.2.2.1	Public good authorisation	161
5.2.2.2	Consumer protection authorisation	163
	<i>Case Study 3: The regulation of tax advice</i>	166
5.2.3	<i>Conclusions on authorisation</i>	167
5.3	After-the-event regulation	167
5.3.1	<i>Setting the minimum</i>	167
5.3.2	<i>A revised role for a legal services ombudsman</i>	171
	<i>Viewpoint 3: A consumer view of more effective regulation</i>	175
5.4	During-the-event regulation	176
5.4.1	<i>General proposition</i>	176
5.4.2	<i>The case of costs lawyers</i>	177
	<i>Case Study 4: The veiled challenges of costs law</i>	179
5.4.3	<i>The case of will-writing and estate administration</i>	180
	<i>Case Study 5: Will-writing detriment</i>	181
5.5	The future role of professional titles	182
5.5.1	<i>A change of emphasis</i>	182
5.5.2	<i>The continuing importance of professional titles</i>	183
5.5.3	<i>The continuing role of professional titles</i>	184

## CONTENTS (continued)

5.6	Future routes to regulated practice	186
5.6.1	<i>Introduction</i>	186
5.6.2	<i>Before-the-event authorisation</i>	186
5.6.3	<i>Specific specialist approvals</i>	187
5.6.4	<i>McKenzie Friends and others</i>	192
5.6.5	<i>Recognising the realities of practice</i>	194
5.6.6	<i>Multiple registration</i>	195
5.7	Co-existing regulation	199
5.7.1	<i>Introduction</i>	199
5.7.2	<i>Claims management</i>	199
5.7.3	<i>Insolvency practice</i>	200
5.7.4	<i>Immigration advice and services</i>	200
5.7.5	<i>Notarial activities</i>	203
5.7.6	<i>Money-laundering</i>	205
5.8	Summary	207
<b>Chapter 6. Structural issues</b>		<b>209</b>
6.1	Introduction	209
6.2	A single regulator	209
6.2.1	<i>Current constraints</i>	209
6.2.2	<i>A new approach</i>	210
6.2.3	<i>Appointment, reporting and accountability</i>	212
6.2.4	<i>Decision-making and transparency</i>	215
6.2.5	<i>Consumer representation and complaints</i>	218
6.2.6	<i>The future of front-line regulators</i>	219
6.2.6.1	<i>Background</i>	219
6.2.6.2	<i>An integrated approach</i>	220
6.2.6.3	<i>Internalisation</i>	221
6.2.6.4	<i>Delegation</i>	223
6.2.7	<i>Conduct and discipline</i>	227
6.3	Regulatory independence	230
6.3.1	<i>Balancing regulation and professional titles</i>	230
6.3.2	<i>Is any element of self-regulation still legitimate?</i>	231
6.3.3	<i>Regulator responsibility for title</i>	231
6.4	The continuing role of professional bodies	235
6.4.1	<i>Introduction</i>	235
6.4.2	<i>Award and removal of title</i>	235
6.4.3	<i>High professional standards</i>	236
6.4.4	<i>A new freedom</i>	239
6.4.5	<i>A sound future</i>	241
6.4.6	<i>A continuing contribution</i>	243
6.4.7	<i>The 'permitted purposes'</i>	243
6.5	Areas of regulatory overlap	245
6.5.1	<i>The issue</i>	245
6.5.2	<i>A sector-wide approach?</i>	246
6.5.3	<i>Alternative regulatory arrangements</i>	247
6.5.4	<i>Legal professional privilege</i>	249
6.6	Summary	251



**PART 3: FOR THE SHORT TERM**

<b>Chapter 7: Proposals for shorter-term reform</b>	<b>255</b>
7.1 Introduction	255
7.2 What are the short-term regulatory issues?	257
7.3 Addressing structural flaws	258
7.3.1 <i>Bringing the unregulated within scope</i>	258
7.3.1.1 <i>Change the reserved legal activities?</i>	260
7.3.1.2 <i>A parallel approach</i>	262
7.3.2 <i>Extending the Legal Ombudsman’s jurisdiction and powers</i>	265
7.4 Persistent concerns about quality and standards	267
7.4.1 <i>Will-writing</i>	267
7.4.2 <i>Criminal and youth court representation and advocacy</i>	269
7.4.3 <i>Immigration advice and services</i>	271
7.4.4 <i>McKenzie Friends and others</i>	272

**PART 4: CONCLUSION**

<b>Chapter 8: Final thoughts</b>	<b>277</b>
8.1 Introduction	277
8.2 How the proposals are intended to address the issues identified	277
8.3 Benefits	282
8.4 The CMA’s practical questions	283

<b>References</b>	<b>289</b>
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<b>Appendix 1: The Review and its terms of reference</b>	<b>297</b>
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<b>Appendix 2: Advisory Panel</b>	<b>305</b>
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<b>Index</b>	<b>307</b>
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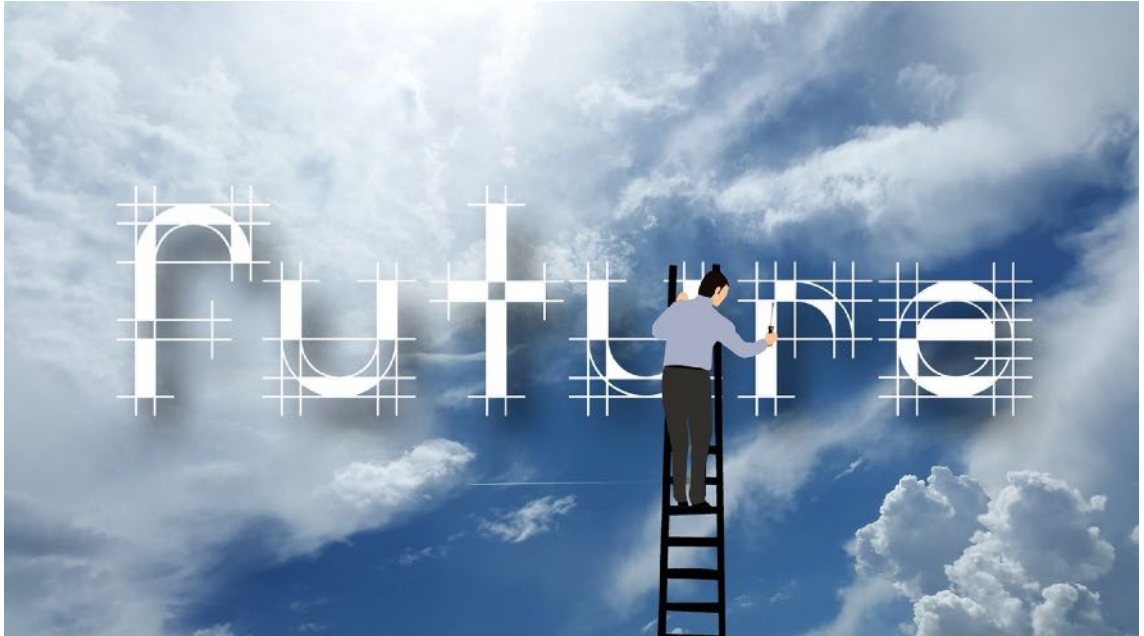
**Viewpoints and case studies**

<i>Viewpoint 1: A personal consumer experience</i>	48
<i>Viewpoint 2: Public confidence in complaints and redress</i>	62
<i>Viewpoint 3: A consumer view of more effective regulation</i>	175
<i>Case Study 1: LawTech</i>	140
<i>Case Study 2: MDPs and structural contortion</i>	154
<i>Case Study 3: The regulation of tax advice</i>	166
<i>Case Study 4: The challenges of costs law</i>	179
<i>Case Study 5: Will-writing detriment</i>	181

**Figures and tables**

<i>Figure 2.3: UK legal needs and access to justice: summary</i>	30
<i>Figure 3.3: Representation of the current regulatory framework</i>	46
<i>Figure 4.4: Representation of an alternative regulatory framework</i>	92
<i>Figure 4.14: Summary of the difference in approach</i>	157





“Change the status quo. Or become it.”

Mark Shayler (*Do Disrupt*, 2013)



## Preface

This is the final report of the Independent Review of Legal Services Regulation. The Review was established in July 2018, with the terms of reference in Appendix 1.

The report sets out my findings, conclusions and recommendations. It draws on the work of the six working papers and the interim report, and reactions and responses to them.

The report also reflects meetings with more than 340 interested parties. These were with current and former regulators in the legal sector and beyond, and professional bodies (including some from outside England & Wales), but also included consumers and consumer bodies, unregulated providers and their representative bodies, senior judges, practitioners and in-house lawyers, academics, and Parliamentarians.

This report has been submitted to the Lord Chancellor.

It confirms the issues that will need addressing in any future regulatory settlement. It does not presume that readers will be familiar with any of the six working papers or the interim report and there may, therefore, be some overlap in content.

In relation to thoughts about future approaches to regulation, this report offers some long-term recommendations that could form the foundations for a reformed regulatory framework. It then deals with the further issues that would arise as a consequence of such reform.

I am sure that the necessary long-term change cannot be achieved within the framework of the Legal Services Act 2007. During the process of conducting the Review, I remained open-minded on the question of the timing of reform. However, as I approached the end of that process, I became increasingly convinced that some change is needed sooner rather than later.

In the end, therefore, I have not confined this report to longer-term reform, but have also included some recommendations for the immediate future. On the question of whether the necessary reform can be incremental or needs to be radical, I have concluded that we need to contemplate both.

In this report, I do not seek the perfect future system of regulation. No regulatory approach can ever be perfect. Nor can it eradicate all risks to the public interest or to consumers. But I am sure that we could do better.

### *In a nutshell*

The current framework for the regulation of legal services in England & Wales has its origins in the self-regulation of the legal professions. As a result, it is superbly (and rightly) designed to preserve and protect those legal services that are critical to the rule of law and the administration of justice, and the integrity of the practitioners who provide them.

The downside is that this regulatory approach is then applied to all other legal services and all other providers. In practice, lawyers have consistently estimated that on average only about 20% of their work falls into the category of services that are 'reserved' exclusively to them – though it will be higher for most barristers.

A YouGov survey of almost 30,000 adults published earlier this year reported that about one-third of the 60% of them who had faced a legal issue in the past four years did not receive any help. Of the two-thirds who did receive help, just under half of them received it from a regulated lawyer.

On this basis, where only 20% of the work done by regulated lawyers has to be provided by someone who is regulated, then less than 10% of all work done for those who receive help and about 6% of all legal issues faced by our fellow citizens needs the type of regulation for which the current system is designed. The image of a sledgehammer and a nut is difficult to avoid.

The conclusion of this Review is that the regulatory framework should better reflect the legitimate needs and expectations of the more than 90% of the population for whom it is not currently designed.

The current arrangement of ten front-line regulators, plus an oversight regulator, is cumbersome. Nor does it enable consumers or society to benefit from the full range of provision and protection they deserve. This arises from the 'all or nothing' effect and cost of legally-qualified practitioners being regulated for everything they might conceivably do, while otherwise capable, but 'unregulated', providers are excluded.

With this in mind, this report proposes that we should in future **allow the registration and regulation of all providers of legal services**, whether legally qualified or not. Registration and regulation should be the responsibility of **a single, sector-wide, regulator** to ensure a common, consistent and cost-effective approach, **subject to a statutory duty to apply only the minimum necessary regulation**.

The nature of the regulation applied to registered providers would be **founded on the public interest** of furthering the rule of law and administration of justice. It would also focus on protecting consumers from harm or detriment caused by poor or inappropriate provision of legal services.

Regulation would also **proceed from an assessment of the risk** to the public interest or to consumers (particularly those who are vulnerable) in the services provided. This would allow it to be targeted on the risks of what practitioners actually do, and to be **proportionate in burden and cost** to that risk. Higher-risk activities would attract additional regulatory requirements and attention.

These risks should be broadly conceived and not over-specified. In this way, regulation could **reflect the circumstances, vulnerability and challenges inherent in the life-events of consumers** seeking legal advice and assistance.

It could also recognise the reality of the bundling of related services by law firms and other providers as they respond to clients who, for example, are going through a family break-up, moving house, dealing with the death of a loved one, losing their job or home, or starting a business.

In turn, such an approach would allow regulation to align better with the way in which clients and consumers approach a legal issue, namely, pursuing an opportunity or dealing with a problem in life. For them, law is a means to an end, often at a challenging or difficult time. They are not really interested in the law itself.

The proposals would, however, see the 'ownership' and award professional titles remaining with the established professions and professional bodies, though subject to requirements set by the single regulator and no ability to impose regulatory requirements of their own. This would **not prevent professions from maintaining and promoting higher professional standards** than those required by the regulatory minimum where they believe that it is in their best interests to do so.

A more inclusive approach to regulation would also offer the prospect of **investigation and redress for all individual consumers and small businesses** who have unresolved complaints or concerns about their provider of legal services. Interestingly, many people already assume that all providers of legal services are in some way regulated and that relevant protection is available. They are mistaken.

Finally, while the principal focus of the report is on longer-term reform of the regulatory framework, recent events have accelerated the need for change. Covid-19 has transformed the way we live, work, relate to each other, and travel. Its effects have been immediate and profound, but will also be with us for some time.

This has led to changes in legal needs. We have seen an increase in writing wills, the unfortunate and unexpected need to administer the estates of those whose lives have been lost to the disease, an increase in relationship issues and domestic abuse for those forced to live in lockdown, the loss of jobs and businesses, and so on.

Even before the pandemic, consumers were turning to online providers of legal advice and help. They also used other providers who can lawfully provide legal services that are not 'reserved' to lawyers but who cannot currently be regulated for them. This use is likely to increase, and presents significant risks for the unwary.

At a time of such change, the legal market itself has had to adapt rapidly and face emerging risks. Principally, it has had to shift to remote and virtual working with greater reliance on technology (for which many law firms and practitioners were not fully prepared), and face a fall-off in available work or its postponement leading to financial challenges.

The prospect of increased use of the 'unregulated' at a time of personal, social and economic instability in the lives and circumstances of both consumers and regulated providers suggests a need for short-term reform to regulation. The report therefore also recommends a 'parallel' structure that would leave the currently regulated untouched, but **bring 'the unregulated' (including those who provide online services) within a short-term version of registration and access to ombudsman investigation and redress.**

**Stephen Mayson<sup>a</sup>**

5 June 2020

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a. Professor Stephen Mayson has carried out the Independent Review. He is an honorary professor in the Faculty of Laws, University College London and professor emeritus at the University of Law. He was the chairman of the regulators' Legislative Options Review submitted to the Ministry of Justice in 2015. He was called to the Bar in 1977 and is a Bencher of Lincoln's Inn.

## Acknowledgements

I wish to acknowledge and express my gratitude and thanks to all those who have contributed to the Review, and supported it during the past two years.

I have held face-to-face meetings (and some videoconference and telephone meetings) with 347 people, either representing their organisations or expressing personal views. They have been incredibly generous with their time and thoughts, and have engaged constructively with the issues being considered. In addition, 108 other people signed up for the public meetings held at UCL on 12 March and 9 October 2019.

I have also received a large number of written responses during the course of the Review, including 46 detailed submissions to the interim report and consultation.

It was never my intention that the substance of any conversations held during the Review would be made public. Nor did I intend that any written submissions made in response to the interim report and consultation would be published.

I am aware, though, that some organisations chose to publish their submissions. These include the Legal Services Consumer Panel<sup>b</sup>, The Law Society of England & Wales<sup>c</sup>, and the joint response of the Chartered Institute of Taxation and the Association of Tax Technicians<sup>d</sup>.

I must also thank the members of the Advisory Panel (see Appendix 2). They have provided invaluable personal advice and insight from their very different perspectives. This has allowed me to consider aspects of legal services regulation, and the experiences of consumers, practitioners and regulators, in a much more considered way than would have been possible otherwise.

Significant thanks are due to the Centre for Ethics & Law in the Faculty of Laws at UCL for being so supportive of the Review. I am particularly grateful to Professor Richard Moorhead (formerly of UCL) and Professor Iris Chiu (director of the Centre) for their early encouragement and help in setting it up.

I have also been greatly helped by Ellie Forward and Jessica Luong (respectively Faculty communications manager and assistant), Natasha Downes (UCL media relations manager), and Lisa Penfold (Faculty events manager, for organising the public meetings at UCL).

Despite these varied and considerable sources of help, the final product reflects my views. I acknowledge that I will not have thought of everything, and that any remaining mistakes and misunderstandings are mine.

## SWM

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b. Available at: <https://www.legalservicesconsumerpanel.org.uk/wp-content/uploads/2019/12/2019-12-18-Interim-Report-Response-Mayson.pdf>.

c. Available at: <https://www.lawsociety.org.uk/policy-campaigns/consultation-responses/independent-review-of-legal-services-regulation-response-to-interim-report/>.

d. Available at: <https://www.tax.org.uk/policy-technical/submissions/independent-review-legal-services-regulation-'findings-proposals-and>.



## Glossary

The following terms and abbreviations are used in this report.

ABS	alternative business structures (licensed bodies under Part 5 of the Legal Services Act 2007), not wholly owned or managed by lawyers and authorised for one or more of the reserved legal activities
ATE	after-the-event
BSB	Bar Standards Board, the regulatory body for barristers
BTE	before-the-event
CILEx	Chartered Institute of Legal Executives, the professional body for chartered legal executives
CLC	Council for Licensed Conveyancers, the regulatory body for licensed conveyancers
CMA	Competition & Markets Authority
Consumer Panel	see LSCP
CPS	Crown Prosecution Service
DTE	during-the-event
HMRC	Her Majesty's Revenue & Customs
ICAEW	Institute of Chartered Accountants in England & Wales, the professional and regulatory body for chartered accountants
lawtech	technology that provides self-service direct access to legal services for consumers by substituting 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
LeO	Legal Ombudsman, established by the OLC to operate the ombudsman scheme rules in accordance with section 115 of the Legal Services Act 2007
LSB	Legal Services Board, the oversight regulator for legal services established by section 2 of the Legal Services Act 2007
LSCP	Legal Services Consumer Panel, established by the LSB under section 8 of the Legal Services Act 2007 to represent the interests of consumers
LSRA	Legal Services Regulation Authority, proposed in this report as a new overarching regulator
non-reserved activities	legal services that are not reserved legal activities (see RLA)
OISC	Office of the Immigration Services Commissioner, established by section 83 of the Immigration and Asylum Act 1999 to regulate immigration advisers
OLC	Office for Legal Complaints, established by section 114 of the Legal Services Act 2007 to administer the LeO ombudsman scheme

## ***Glossary (continued)***

PCF	practising certificate fee, the amount payable each year by a regulated individual to the appropriate regulator in return for a licence to practise
reserved activities	see RLA
RLA	reserved legal activities, as defined in section 12 of the Legal Services Act 2007, namely: the exercise of a right of audience; the conduct of litigation; reserved instrument activities; probate activities; notarial activities; and the administration of oaths.
SDT	Solicitors Disciplinary Tribunal, the independent statutory tribunal established under section 46 of the Solicitors Act 1974 to adjudicate on alleged breaches by solicitors of professional standards
SRA	Solicitors Regulation Authority, the regulatory body for solicitors
STEP	Society of Trust & Estate Practitioners, a professional association of practitioners who specialise in family inheritance and succession planning

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## PREAMBLE

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### Reforming legal services: regulation beyond the echo chambers

**ech·o cham·ber**

*/ˈekō ˌCHāmbər/*

*noun*

1. an enclosed space where sound reverberates.
2. an environment in which a person encounters only beliefs or opinions that coincide with their own, so that their existing views are reinforced and alternative ideas are not considered.

We have much to celebrate about legal services in England & Wales. Our judges are among the best in the world, their independence and integrity beyond doubt. Our legal system, lawyers and law firms are admired globally. Our belief in the rule of law remains strong and steady.

Yet there are concerns. Faced with a legal issue, too many of our fellow citizens do not recognise it as such, cannot access legal advice and representation, or do not believe that the law or lawyers will help them deal with it. We have more lawyers than ever before, but more (and rising) instances of legal problems not being addressed.

The regulation of legal services is not the cause of these concerns. But this report shows that sometimes it reinforces them, and sometimes it stands in the way of alternatives that could make a difference. It is time to reconsider.

There is no doubt that there are some strongly-held views about retaining or reforming the regulatory framework introduced and implemented under the Legal Services Act 2007. I accept these feelings and the strength of them.

Even so, it is difficult sometimes not to be bemused that some of the proponents of the 'no change' views are often the same institutions that lobbied just as vigorously at the time to resist the 2007 reforms that they now support!

In fact, there is a fascinating loyalty to a complex regulatory structure (that many within it do not fully understand), with its burdens and costs, and about which so many practitioners otherwise complain. This might explain why I have also received submissions from practitioners supportive of the proposals in the interim report that are at odds with the views of their 'representative' bodies.

More than this, there is a very clear gulf between the views of (many, but not all) incumbent, regulated providers when compared to the views expressed to me by those who are currently excluded from regulation but would welcome it.

The claims from those who are regulated that they are necessarily and inevitably better placed than others to provide competent and ethical legal services, and offer better protection, are often difficult to sustain in practice.

So, too, is the view that there is no need to extend the opportunity to be regulated to those who currently are not because those others do not want it.

In fact, many consumers would attest that competence and ethics are not better when provided by qualified lawyers. And many would-be providers of legal services – whether in person or through technology – would say explicitly that they would very much welcome the opportunity to enter the regulated sector.

The legal profession's echo chamber is a comfortable and comforting place for many of its members and representatives. The reverberating belief is that all is fine, that citizens are best served by qualified lawyers, and that the world would be a better place if all providers were like them – in fact, better still if they were the only providers.

Their ideal future would have more qualified lawyers, more public funding to meet lawyers' fees in times of need, and extensive education of the public so that people and businesses could understand better why they should value and pay for lawyers and avoid the 'unregulated'.

The worldview from within this chamber is distorted by language and measures of success. There is talk of lawyers versus the rest – 'us' and 'them' – where the latter are variously described as 'non-lawyers', the 'unregulated', 'para-legals', and 'support staff'. In short, they are labelled by reference to *not* being lawyers.

The individuals who provide legal services in law firms are more likely to be introduced as 'fee-earners' rather than as legal advisers, who will work 'chargeable' hours. They do so in order to generate 'profit per equity partner'.

The insidious consequence of this language is that employees appear to clients to be engaged to baffle them with technicalities and to earn money from them rather than advise; to maximise time that can be charged to clients (often at the expense of developing relationships, support, and meaningful and timely communication); and to charge for the input of time, irrespective of the value of the outcomes of that effort.

The problem with the lawyers' echo chamber is that its beliefs and opinions are shared by so few others. It matters not whether those beliefs and opinions are 'right'.

I should make it clear though that, in leaving the lawyers' echo chamber, I am not minded to believe that different echoes are necessarily more compelling. There are other chambers with their own rumbling choruses of 'more regulation', 'deregulation', 'more competition', 'cheaper services', 'more public spending and legal aid', 'more access to justice', 'more technology', and so on.

I am not for or against any of these as a matter of guiding principle or belief. Instead, at the end of this Review, I am left with the overwhelming sense that the current regulatory approach is dated. It is aimed at the regulatory issues, problems and assumptions of an era that has now passed.

To adopt the thinking of Thomas Kuhn, we face a paradigm shift, driven by three external factors. We should note his judgement that there are only rare circumstances in which two paradigms can coexist peacefully. But perhaps more importantly, we should be most mindful of his comment that “external conditions may help to transform a mere anomaly into a source of acute crisis” (Kuhn 1996: page xii).

The first factor only arose during the preparation of this final report. It was unknown before the end of 2019, but already holds the potential to reshape the legal services sector more than anything else in history. It is coronavirus Covid-19, and is a paradox in regulatory terms.

Covid-19 has no respect for national boundaries, international treaties or the rule of law. Its effects mean that our personal and social relationships, and our working lives, have been reconfigured. Professional life has changed, probably forever. Twenty-first century legal services and dispute resolution will no longer be provided only or mainly on a one-to-one basis, in person, face-to-face, by human beings.

The second factor is the continuing progress of information technology, its increasing availability and reach, and the speed of its adoption and application of machine learning and artificial intelligence. As Webley recently observed (2020: page 15): “digital technologies ... are already challenging our conception of what it is to be a lawyer and the way in which lawyers practise law”.

Our current regulatory framework currently lacks a sufficient or timely response to these developments. They will profoundly reshape the way we work and live (whether as lawyers, clients or consumers), how we access and use services, and how legal services will need to be delivered.

The third factor is the exit of the United Kingdom from the European Union. The challenges to establishing a revised legal order based again primarily on national law, and a managed transition away from EU laws, institutions and practice rights, will test the boundaries, resilience and attractiveness of our regulatory framework.

It will also test our ongoing commitment to the rule of law, and the continuing attraction of the law of England & Wales as the pre-eminent choice as the governing law for international transactions and arrangements.



If anything, Covid-19 intensifies further the rupture with the past already heralded by technology and Brexit. Now, more than ever, the underpinnings of the rule of law matter, as does the ability to rely on relationships established and enforced by law. These must be supported by the targeted, proportionate and cost-effective regulation of those who are competent to advise and represent us.

Applying only the logic and criteria of a previous era or paradigm cannot lead us effortlessly to a modern, appropriate, flexible, or sustainable basis for protecting the things we should hold dear. Nor does it hold the solutions to more pressing needs laid bare by a sudden, unwelcome and destructive pandemic.

Much of our description of change following defining events is often expressed in terms of being 'post': post-industrial, post-War, post-GFC (global financial crisis), post-Brexit, post-pandemic, and so on. These events become important turning points because they represent a break with the previous 'normal'.

If too much of that previous normal is fixed in statute, with its associated assumptions, circumstances and expected consequences, regulatory powers can be frozen in time. They are anchored to the wrong circumstances. The new or emerging 'normal' can be left detached, unreachable, possibly out of control.

Regulatory flexibility, not prescription and constraint, is required to minimise the potential for unforeseen damage. This was recognised in a recent Government white paper (Department for Business, Energy & Industrial Strategy 2019: page 14):

Prescriptive legislation can provide clarity for businesses today but in the longer term can lock in outdated approaches to achieving policy outcomes and hinder innovation. It is poorly suited to the complex settings – with a range of actors and fast-paced technological change – that characterise the Fourth Industrial Revolution.

This report focuses mainly on the longer-term future for legal services regulation. However, the exceptional circumstances we are now facing call for more immediate action. Proposals for the short term are therefore offered in Chapter 7 of this report as well as, and in a way that would be a transition towards, longer-term reform.

I would urge policy-makers and government to stand clear of the echo chambers, and to approach the prospect of reform with an open mind.

The preferred view of the traditional professional interests might well be that it is others who should change. Those others are portrayed as consumers who do not understand law or lawyers well enough, or cannot afford lawyers; and as a government that should put its hands deeper into the public purse to fund more public legal education and legal aid.

There is something deeply uncomfortable about the current regulatory approach that says, in effect: "Law is too complex for ordinary citizens, and too important to society, to allow anyone other than qualified lawyers to be regulated for its provision".

Even if we continue to stretch the boundaries of what we might mean by 'lawyer' in this context, it is still ultimately an exclusionary and protectionist position.

Worse still, that same approach also says: “But if you cannot afford a regulated lawyer, then we are prepared to leave you to your own devices.” At this point, presumably, the law is no longer to be regarded as ‘too complex or too important’.

We are then knowingly driving people into doing nothing, or representing themselves, or having to rely on hard-pressed and precariously funded providers of pro bono or voluntary services, or engaging someone who is not regulated.

I recognise that for many currently regulated practitioners change might be unwelcome, inconvenient, possibly disruptive, and perhaps have some cost attached. But restricting legal services regulation (and its associated protection for consumers) to the legally qualified will, in current circumstances, increase risks.

The risks and limitations of the regulatory framework are clear. In the end, we must find a way of regulating differently so that we do not knowingly continue to prejudice the legal rights and regulated support of millions of our fellow citizens. But we must also do that without sacrificing the best of what we already have.

*“The current regulatory structure provides an incomplete and limited framework for legal services regulation that is not able in the near-term and beyond to meet the demands and expectations placed on it.”*





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## CHAPTER 1

### INTRODUCTION AND SUMMARY

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#### 1.1 Back to the future

My thoughts about the future are heavily influenced by the past. But I do not mean this in the sense simply of preserving tradition. Let me start with a Government green paper of 1989 (Lord Chancellor's Department 1989:

The Government believes that access to legal services by those who need them is fundamental to the rule of law and the preservation of liberty. It is important to recognise, however, that such access does not necessarily mean access to a lawyer....

Most services which are 'legal', in the sense that a lawyer often performs them in the ordinary course of his practice, may also be performed by non-lawyers.

I hope that the first sentence is as true today as it was in 1989: the rule of law is an organising principle without which civil society cannot peaceably exist.

There is also no doubt that the other two sentences remain true – and note 'most' legal services rather than 'some'.

Yet, 30 years on, we still have regulation that assumes that access to legal services of constitutional and personal importance is through lawyers. Whereas the green paper openly acknowledged the role of 'non-lawyers', the Legal Services Act 2007 ignored them as possible providers of legal services (though it did acknowledge them in the context of the ownership and management of alternative business structures: see paragraph 3.1).

The complexity of modern personal, business and social relationships and circumstances leads inevitably to more complex law and regulation. Citizens stand little chance of understanding all of the legal intricacies.

In the context of legal services regulation, we need to be honest about another issue, too: no lawyer knows all the law, either.

In addition, respect for the rule of law is increasingly hard to maintain if new laws are introduced for which there are insufficient resources or opportunities for implementation, enforcement or adjudication.

When our best judges and lawyers are scorned in public debate, media coverage and political reaction in a way that tolerates descriptions of them as 'enemies of the people', our claim to valuing the rule of law is on a slippery slope.



The rule of law is also undermined where the ‘tyranny of law’ prevails. This includes the exploitation of vulnerable, inexperienced, or unrepresented consumers by large, powerful, legally advised, organisations.

This tyranny is readily demonstrated by long, complex terms and conditions offered on a take-it-or-leave-it basis to consumers and online users. It would be disingenuous to describe acceptance of these terms as ‘informed consent’.

The modern world, not least through technology, presents opportunities for mass exploitation and manipulation of consumers. Our understanding of ‘market failure’ needs to be extended accordingly.

Paradoxically, as the number of lawyers has continued to increase (see Chapter 2), so has the volume of unmet need and self-representation among citizens. These instances of no help or self-help do little to sustain belief in the rule of law or in the contribution and value of lawyers to society. In fact, this total or partial exclusion of citizens from the legal system can only undermine its legitimacy.

Nor do they support the claim that the answer to unmet need is yet more lawyers. It is time to make a regulatory reality of the 30-year-old statement that ‘most services which are legal may also be performed by non-lawyers’.

## 1.2 Regulation of lawyers, mainly for lawyers

As law has become more extensive and complex, and the number of lawyers has increased, respect for the rule of law and its supporting institutions has weakened. At the same time, exclusion from legal advice and representation – whether for financial, social or cognitive reasons – has also increased.

If there is any connection between these developments and regulatory constraints, action is required.

The foundations of our current approach to legal services regulation rest entirely on the core notion of certain legal activities that are ‘reserved’ to lawyers. And those lawyers must be members of the legal professions, because the organisations (regulators) that authorise them to practise are overwhelmingly attached to professional titles.

It cannot be surprising, then, that lawyers remain the dominant providers of regulated legal services, whatever the underlying truth of the government’s statement in 1989 that ‘access to legal services does not necessarily mean access to lawyers’. There is a disconnect. As Leitch observes (2017: page 690), “reference to ‘unrepresented’ ... presupposes that the continuing norm is legal representation”.

As we shall see in Chapter 2, regulated lawyers are not in fact the dominant source of help for legal services. They are chosen by a little under one-third of individuals who face a legal issue.

This leaves two-thirds of those who seek advice turning to sources that are not regulated in the same way, or to the same extent, as lawyers. Admittedly, some of these sources will be family members and friends, and we should not expect these to be regulated at all.

But there is, still, a large contingent of providers of legal services who fall outside the reach of current legal services regulation.

Should this be regarded as disappointing or as a matter of concern? Should access to someone trained as a specialist in law and legal practice be both expected and welcomed by those seeking advice and representation? The answer, as suggested by the green paper in 1989, is ‘not necessarily’.

The proposition that legal services are best provided by lawyers would be correct if two further propositions were borne out. First, that lawyers were universally the best providers; and second, that lawyers were universally accessible by all those in need. Unfortunately, neither is the case.

*“we still have regulation that assumes that access to legal services of constitutional and personal importance is through lawyers”*

There is no doubt that England & Wales – and the United Kingdom generally – has some of the finest lawyers in the world. They are part of a vital and still largely respected legal infrastructure (some would say ‘ecosystem’). This includes the globally recognised independence, quality and integrity of our judges and courts.

These contribute to a respect for the rule of law and the administration of justice, and to our standing in the world, as well as to our economy.

But just as climate change is altering the ecosystem of the natural world, so there are changes in the justice climate. The increasing complexity of modern life, and of the law and regulations that apply to it, lead to a need for specialisation. Sometimes, this specialisation can come from lived experience rather than professional qualification.

### **1.3 Regulation of legal services**

Regulating lawyers – the ‘law of lawyering’<sup>1</sup> – has the almost inevitable effect of restricting regulation to those who are qualified lawyers. It focuses on the process and conditions for qualification and for practice.

However, there are circumstances in which the legal knowledge and practical experience of a will-writer, paralegal, social worker, employment adviser, planning consultant, and so on, can be much more accurate and current than that of a qualified lawyer.

The application of technology has also been shown to be quicker, more accurate, and more cost-effective in certain circumstances than a human being.

Should we seriously be saying to the public that such alternatives – and others – cannot safely be made available to them? That the best we can do is to leave those alternatives in a regulatory hinterland where any meaningful protection and redress is a matter of chance? That in all circumstances we must somehow pretend that a human qualified lawyer will always provide the best, most reliable, legal advice and representation?

In many cases, the quest for ‘the best advice’ is misguided. On occasions, ‘good enough’ might be better in the circumstances than ‘the best’ – whether that best is provided by a lawyer or not. In too many instances, we are simply making the wrong comparison.

For many people, the choice is not between the best advice and good enough advice. It is between *some* advice and none at all. We must be careful that our approach to regulation does not inadvertently or unjustifiably remove the ‘some’ from the sector.

As the twenty-first century unfolds, we should be concerned that self-lawyering is increasing – whether this is the result of exclusion for one reason or another, or from choice. We should also be concerned if citizens feel forced into it, or have to make a choice between self-representation and the use of unregulated providers.

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1. As described by Perlman (2015).

We can no longer afford to take an ‘inside-out’ approach to legal services regulation. Looking at regulatory issues primarily from the perspective of lawyers (from within the echo chamber of this report’s subtitle) misses too many other relevant perspectives and factors.

In fact, as Leitch observes (2017: page 701), the increase in self-representation must call into question the wisdom and sufficiency of relying on a professional regulatory framework that depends on a *professional’s* knowledge and understanding of it.

As we shall see in Chapter 2, seeking help from regulated lawyers accounts for a little under only one-third of all sources (with solicitors taking 22%). With those numbers, it is difficult to justify a regulatory framework that is built around the expectations and practices of a minority group of providers.

The experience and expectations of ‘non-lawyer’ providers also need to be taken into account.

More importantly, the experiences of clients and consumers in navigating and using the legal services sector do not suggest that the current regulatory approach comfortably meets their needs and expectations (see Viewpoints 1 (page 48) and 2 (page 62)). Their perspectives also need to be respected.

For me, the legitimate participation of citizens in society is a key element of the public interest (see paragraph 4.2.1). That participation is enabled and underpinned by the rule of law and access to meaningful and cost-effective legal advice and representation. At the moment, the framework of legal services regulation does not facilitate the best outcomes.

It is time to move regulation from the law of lawyering to the law of legal services.

*“In too many instances, we are simply making the wrong comparison. For many people, the choice is not between the best advice and good enough advice. It is between some advice and none at all.”*

## 1.4 Summary of findings

My findings are set out more fully in Chapter 3. I should, however, preface them by saying that, whatever the criticisms and concerns expressed in this report about the reforms introduced by the Legal Services Act 2007, I continue to welcome and support them. The Act heralded a more modern and liberal approach to the regulation of legal services in England & Wales. We now need to go further.



In summary, the findings in this report are:

**Finding 1 (page 50):** There is a discrepancy between consumer expectations of regulatory scope and protection, and the current reality of that scope and protection.

**Finding 2 (page 51):** The justification for the reservation to lawyers of the current legal activities is stronger in some cases (such as rights of audience and the conduct of litigation) than it is in others (such as the narrowly defined probate activity). While there might remain a need for before-the-event authorisation of providers in respect of certain public interest or high-risk legal activities, the continuing need for the concept of 'reserved' legal activities in the regulatory framework is questionable.

**Finding 3 (page 51):** There is merit in legal services being assessed for risk to the public interest, with a 'differentiated' approach to regulation under which an appropriate mix of before-, during, and after-the-event regulation would be applied.

**Finding 4 (page 53):** The link between the reserved activities and authorisation through professional titles creates inflexibility and constraints in the current regulatory framework.

**Finding 5 (page 54):** The current regulatory framework is insufficiently flexible to apply targeted, proportionate, risk-based and consistent regulation to reflect differences across legal services areas and across time.

**Finding 6 (page 54):** The requirement for flexibility, consistency, coherence and coordination across regulation within the legal services sector necessarily leads to a single regulator.

**Finding 7 (page 57):** The nature of the separation and independence of regulatory functions from representative functions remains unsatisfactory. The current approach and requirements of regulation and the internal governance rules make the desirable cooperation and collaboration between regulatory and representative functions problematic to achieve.

**Finding 8 (page 60):** The same body cannot simultaneously carry on both representative and regulatory functions, and the removal of 'approved regulator' status from representative bodies is now necessary.

**Finding 9 (page 64):** There are persistent concerns about variability in the competence and quality of:

- will-writing services;
- criminal representation and advocacy;
- youth court representation and advocacy; and
- immigration advice and services.

**Finding 10 (page 64):** The Legal Ombudsman has struggled in different ways almost since its formation to deliver a stable, timely and cost-effective process for dealing with consumer complaints.

**Finding 11 (page 65):** The structure and processes under which the Legal Ombudsman must investigate and resolve consumer complaints do not permit the most comprehensive, coherent, consistent or cost-effective outcomes, whether for individual consumers, or the sector generally. Opportunities for more efficient investigations, shared learning, thematic reviews and market feedback are excluded.

**Finding 12 (page 73):** There is sufficient known or potential detriment to the interests of consumers and providers of legal services, and to society at large, arising from the shortcomings in the current regulatory framework to justify further reform.

**Finding 13 and conclusion (page 78):** The current regulatory structure provides an incomplete and limited framework for legal services regulation that is not able in the near-term and beyond to meet the demands and expectations placed on it.

*“it would be misguided to construct a regulatory framework for the future on the questionable assumption that only lawyers need to be regulated for the provision of legal advice and representation”*

## 1.5 Summary of issues to be addressed and proposals

Arising from these findings, a number of issues require addressing in any consideration of future reform. This Review identifies and confirms a number of significant shortcomings and challenges arising from the present structure for the regulation of legal services and those who provide them (see further paragraph 3.10).

In summary, they are:

- inflexibility arising from statutory prescription;
- competing and inappropriate regulatory objectives;
- a pivotal set of reserved legal activities that are anachronistic and distort the approach to activities that ought to be regulated;
- title-based authorisation that leads to additional burden and cost in relation to some activities being more heavily regulated than they need to be (resulting in higher prices to consumers);
- the unsatisfactory nature of the separation of regulation and representation;
- the existence of unregulated providers who cannot be brought within the current regulatory framework (with an expectation that their numbers and activities will increase);
- the emergence and rapid development of lawtech<sup>2</sup> that is capable of offering legal advice and services independently of any human or legally qualified interface or interaction, at scale, and is beyond the reach of the current framework;
- a regulatory gap that exposes consumers to potential harm when some activities are not regulated when they ought to be, and puts legally qualified practitioners at a competitive disadvantage;
- increasing costs of legal advice and representation, reducing further the availability and affordability of legal services for many; this encourages either greater self-lawyering and litigants-in-person, or nudges increasing numbers of citizens into the world of unregulated providers or lawtech;
- consumer confusion, caused by the existence of both regulated and unregulated providers for the same legal activities, and a profusion of differently regulated professional titles;
- concerns about variability in the competence and quality of legal services, particularly in relation to will-writing, immigration advice and services, and criminal and youth court advocacy and representation;
- inadequate or incomplete consumer protection, that is not consistent with a widespread consumer expectation that all legal services and those who provide them are subject to some form of regulation and protection;

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2. For the purposes of this Review (see further, paragraph 4.9), 'lawtech' is technology that 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.



- concerns about the competence and quality of responses made by front-line regulators and the Legal Ombudsman in relation to complaints by dissatisfied and aggrieved clients and consumers; and
- as a result of all of these issues, the risk of falling public confidence in legal services and their regulation.

The recommendations for the long term in this report aim to address these issues through the following principal proposals:

- (1) The overriding objective of regulation should be the public interest, whether relating to the rule of law and the administration of justice, or the protection of consumers from harm and detriment.
- (2) The scope of regulation should be extended to include all 'providers' of 'legal services', including those who are currently unregulatable as well as providers of lawtech. There should be limited exemptions or exclusions in relation to most self-representation, family and friends, information-only services, and public officers.
- (3) There should be an independent, single, sector-wide regulator of legal services, though with the power to delegate the exercise of defined and limited regulatory powers to other bodies. The current Legal Services Board, approved regulators and regulatory bodies would be replaced.
- (4) The regulator would maintain a public register of providers, and apply regulatory conditions for before-, during-, and after-the-event regulation. These would be applied, monitored and enforced on a sector-wide basis, irrespective of provider, and as appropriate to the importance and risk of particular legal services or to the relative vulnerability of the clients concerned.
- (5) Minimum conditions of registration would require common standards and disclosure, as well as access to complaints investigation and redress and to protection through indemnity insurance. A revised and more extensive ombudsman scheme would act as a single point of entry for complainants who are individual consumers or micro-organisations.
- (6) The current reserved activities should be replaced with a requirement for prior authorisation in order to secure the public interest. Where this is required for public good services (principally the exercise of rights of audience or the conduct of litigation), there would be a dedicated regulatory body as part of the single regulator.
- (7) Professional titles should not be the only route for entry by individuals into legal services regulation. The single regulator would establish the conditions for the award and removal of titles, but the professional bodies would actually confer or remove title. Professional bodies would also play a role in education and training, in forms of specialist accreditation required by the regulator and, where they wished to, in promoting professional standards above those required by regulation.

A summary of the specific long-term and short-term recommendations now follows.

## 1.6 Summary of long-term recommendations

The following is a summary of the recommendations offered in Chapters 4 to 6 of this report as prospective solutions or improvements to address the findings and issues identified. These are suggested in the context and expectation of longer-term reform of the regulatory framework for legal services. Shorter-term recommendations are summarised in paragraph 1.7.

In summary, my long-term recommendations are:

**Recommendation 1 (page 82):** The primary objective for the regulation of legal services should be promoting and protecting the public interest.

**Recommendation 2 (page 89):** Consumer expectations and regulatory reality should be aligned by at least allowing access to after-the-event redress for all consumers of legal services offered to the public commercially or for reward.

**Recommendation 3 (page 89):** All legal services should be capable of falling within the regulatory framework, irrespective of who provides them.

**Recommendation 4 (page 91):** Professional title and authorisation should no longer be the basis for entry into legal services regulation. There should be an alternative or additional form of entry into regulation for those who do not hold a legal professional title.

**Recommendation 5 (page 94):** A regulator should be enabled to apply a risk-based approach to the imposition of regulatory requirements. A future regulatory framework should therefore allow the differential application of before-, during- and after-the-event regulation to reflect the importance or risk of any particular activity or circumstance.

**Recommendation 6 (page 95):** A future regulatory framework should define those legal services to be regarded as low risk. These need not be set out and fixed in statute, but should be identified and revised (according to experience and changed risk assessments) by the regulator.

**Recommendation 7 (page 96):** The highest-risk activities should be subject to before-the-event conditions, as well as to during- and after-the-event requirements. Before-the-event conditions would require that providers have prior authorisation to carry on those highest-risk activities before they are allowed to offer their services to clients.

**Recommendation 8 (page 96):** In addition to the after-the-event requirements that would apply to all providers, intermediate-risk services should be subject to such during-the-event practice conditions as the regulator assesses to be appropriate, based on the risk attaching to specific services, groups of services, or vulnerability of the clients.

**Recommendation 9 (page 99):** The regulator should determine what qualification or assurance of initial and continuing competence, experience and integrity should be demonstrated by any provider of particular legal services, whether for before-the-event authorisation, or for other requirements that would be applied on a during- or after-the-event basis to providers of those services.

**Recommendation 10 (page 115):** Regulatory scope should apply to advice, assistance, representation and document preparation in pursuance of or in connection with legal rights and duties arising under the law of England & Wales.

**Recommendation 11 (page 119):** In principle, assisting a party to a dispute for which the governing law is that of England & Wales in reaching or progressing a resolution of that dispute (other than through judicial or quasi-judicial determination or arbitration) should be regarded as a legal service. This would include mediation and conciliation, and online dispute resolution.

**Recommendation 12 (page 122):** The future primary focus of regulation should be the 'provider' of legal services, whether an individual, entity, title-holder, or technology.

**Recommendation 13 (page 124):** Before-the-event authorisation should only be available to individuals, and not to entities.

**Recommendation 14 (page 128):** The application of regulatory requirements should be supported by the existence of a public register of who is regulated and for what. Accordingly, before-, during- and after-the-event regulation and mandatory registration should apply to all 'legal services' offered by 'providers' on a commercial basis or for reward.

**Recommendation 15 (page 129):** For the purposes of a future single register of providers of legal services, the registration should be in the name of the entity, partnership, business unit or individual within the jurisdiction providing the relevant services or with which a client has terms of engagement.

Where the registered provider is not an individual, there must also be an identified 'registered manager' (an individual who is a member, director or partner of the registered provider) within the jurisdiction who is personally accountable to the regulator for the compliance of the registered provider.

**Recommendation 16 (page 138):** Lawtech should fall within a future definition of 'legal services', and an appropriate person must be registered as a 'provider'.

**Recommendation 17 (page 143):** The regulator should have powers to grant waivers and to establish and maintain a regulatory sandbox to allow regulated and supervised exploration of suitable initiatives beyond the strict scope of the regulatory framework. Such permissions should be subject to appropriate and published criteria, decision-making and authorisation processes, registration and disclosure requirements (consistent with the need to protect proprietary and confidential information), and time limits.

**Recommendation 18 (page 146):** A law centre or other similar not-for-profit organisation should become a registered entity or unit for regulatory purposes, and the body responsible for compliance with during- and after-the-event requirements. Individuals within such a registered in-house unit should also be registered personally if they carry on activities for which before-the-event authorisation or personal accreditation would otherwise be required. If there are no such obligations, it should be sufficient that individuals are otherwise covered by the entity registration.

**Recommendation 19 (page 147):** The pro bono activities of a law firm or in-house legal department can be provided without a need for separate registration where the organisation is registered and those activities comply with the Joint Pro Bono Protocol.

**Recommendation 20 (page 151):** An in-house legal department should be capable, for regulatory purposes, of being registered as a distinct business unit, so that the department's delivery of legal services would be subject to the same regulatory obligations as any other registered provider.

Individuals within such a registered in-house unit should also be registered personally if they carry on activities for which before-the-event authorisation or personal accreditation would otherwise be required.

**Recommendation 21 (page 155):** The legal services practice of a multidisciplinary business must be registered either as a separate legal entity or as a distinct business unit, so that its delivery of legal services would be subject to the same regulatory obligations as any other registered provider.

Individuals within such a registered entity or business unit should also be registered personally if they carry on activities for which before-the-event authorisation or other personal accreditation would otherwise be required.

**Recommendation 22 (page 160):** The current list of reserved activities should be reviewed. This process should identify clearly the public interest basis of the need for before-the-event authorisation. This need should be established by reference to public good or consumer protection and should be explicitly articulated, to confirm that the current reservation can continue to be justified.

Other high-risk activities should also be reviewed against these same criteria to see whether prior authorisation should in the future be extended to them.

**Recommendation 23 (page 162):** Rights of audience and rights to conduct litigation should be linked, in the sense that, if the conduct of litigation in certain defined proceedings does not fall within the definition of legal services or is subject to an exemption from it, the same exclusion should generally apply to the exercise of rights of audience in those same proceedings.

**Recommendation 24 (page 162):** The regulator should be required both to consult and to receive the formal approval of senior judges in relation to the regulatory conditions proposed by the regulator for public good legal services, as well as to any exemptions from them proposed by the regulator.

**Recommendation 25 (page 168):** The minimum conditions for ATE regulation should include:

- (a) requirements for accreditation (if appropriate and as determined the regulator) in relation to one or more of the legal services offered by a provider;
- (b) access to consumer complaints investigation and redress;
- (c) requirements for disclosure and transparency in relation to regulatory status, terms of engagement, pricing (as appropriate), and complaints;
- (d) compliance with standards of conduct, set out in a code of conduct applicable to all regulated legal services, and against which a provider's conduct and service can be assessed;
- (e) a minimum level of professional indemnity insurance; and
- (f) power for the regulator, as a result of any formal complaints investigation, professional disciplinary proceedings, or other comparable evidence, to issue a prohibition order removing a provider from the register.

**Recommendation 26 (page 173):** There should be a revised legal services ombudsman service, established by and reporting to the Office for Legal Complaints, with jurisdiction to receive all complaints from consumers and other interested parties in respect of all registered providers of legal services. However, powers of redress should continue to be restricted to complaints from those within the current ombudsman scheme rules.

**Recommendation 27 (page 173):** There should be powers for the legal services ombudsman to:

- (a) establish a process for receiving from anyone expressions of concern, short of a formal complaint, about a registrant;
- (b) exercise 'own-initiative' powers to investigate providers in respect of whom the Ombudsman is aware of expressions of concern (whether or not these are manifested in one or more formal complaints);
- (c) exercise a power, if it wishes, to make a group determination of several complaints in relation to the same provider and to connected circumstances; and
- (d) refer any complaint about the competence or conduct of a registrant to the regulator for investigation and appropriate disciplinary action.

**Recommendation 28 (page 176):** There should be a new general statutory duty on the regulator to apply only the minimum necessary regulatory requirements to address identified risk, in order to keep the burden and cost of regulation as low as possible.

**Recommendation 29 (page 187):** The regulator should have and retain the flexibility to grant authorisation on as broad or narrow a basis as the particular circumstances of the legal service in question and of the provider justify.

**Recommendation 30 (page 188):** The regulator should have power to approve appropriate routes to authorisation and accreditation for specific or specialist services. It could, as appropriate, confer regulatory approval on the basis of a pre-existing title, or through separate qualification or accreditation. The latter could be available both to those who already have a professional qualification and to those who do not.

**Recommendation 31 (page 203):** There should be an exemption from the future definition of 'legal services' in respect of immigration advice and services, as defined in section 82 of the Immigration and Asylum Act 1999. The Law Society, the Chartered Institute of Legal Executives, and the Bar Council should cease to be designated qualifying regulators for the purposes of section 84 of that Act. All immigration practitioners should be regulated by the Immigration Services Commissioner, irrespective of their professional qualification.

**Recommendation 32 (page 205):** There should be an exemption from the future definition of 'legal services' in respect of notarial services. Regulation of notaries should therefore revert exclusively to the Master of the Faculties (who would correspondingly lose the powers in the Legal Services Act 2007 to authorise notaries for any legal services other than notarial activities). Notaries should also not be registered under the future legal services regulatory framework for any services provided in their capacity as a notary.

**Recommendation 33 (page 210):** There should be a single regulator for the legal services sector (the Legal Services Regulation Authority).

**Recommendation 34 (page 211):** There will be no continuing need for the concept of an 'approved regulator', and the role of professional bodies in the regulation of legal services should be brought to an end.

**Recommendation 35 (page 214):** The Legal Services Regulation Authority should be established as an arm's length regulatory agency. In addition:

- (a) the Authority should report directly to Parliament in its performance as a regulator (by laying an annual report and through scrutiny by the Justice Select Committee or perhaps by a Joint Committee of both Houses);
- (b) the Authority should also be subject to scrutiny in relation to its financial performance by the National Audit Office and the Public Accounts Committee;
- (c) there should be no general power for the Lord Chancellor to give directions to the Authority;
- (d) there should also be a statutory duty on the Authority to advise the Lord Chancellor publicly on any matters relating to legal services regulation that it considers appropriate;
- (e) the chair of the Authority should be a public appointment, overseen by the Commissioner for Public Appointments; and
- (f) the appointment of other members of the Authority's board (with a continuing lay majority) and of a chief executive should be made by the Authority following an open and public process.

**Recommendation 36 (page 217):** Legal services subject to before-the-event authorisation for the public good should be confirmed by Parliament and set out in statute. Changes to them should be proposed by the Legal Services Regulation Authority, following consultation, and subject to approval by senior judges in accordance with Recommendation 24 and to confirmation by affirmative procedure in Parliament.

Legal services subject to before-the-event authorisation for consumer protection, and any changes to them, should be determined by the Authority, following consultation, and subject to confirmation by negative procedure in Parliament.

Other legal services subject to regulation (including those for which the identification and definition of low-risk legal services attracting only ATE regulation is required), and the regulatory consequences attaching to them, should be determined by the Authority, following consultation.

**Recommendation 37 (page 219):** There should continue to be an independent Legal Services Consumer Panel to represent the interests of consumers.

**Recommendation 38 (page 219):** The Office for Legal Complaints (possibly renamed as the Office of the Legal Services Ombudsman) should be established on an equivalent basis to the Legal Services Regulation Authority in respect of the appointment of chair, board members and staff, and reporting to Parliament.

**Recommendation 39 (page 220):** The existing ‘front-line’ regulatory bodies should be replaced by a new integrated structure within the Legal Services Regulation Authority.

**Recommendation 40 (page 221):** The Legal Services Regulation Authority should have power to delegate or assign distinct aspects of its regulatory powers to other ‘designated bodies’.

**Recommendation 41 (page 224):** The Legal Services Regulation Authority should be under a statutory duty to set up a designated body in relation to the legal services for which public good authorisation is required.

**Recommendation 42 (page 228):** The enabling legislation, or the Legal Services Regulation Authority acting under the conduct and discipline elements of the regulatory arrangements it puts in place under that legislation, should establish a single tribunal to adjudicate on the conduct and discipline of regulated providers of legal services.

**Recommendation 43 (page 231):** The Legal Services Regulation Authority should have power to determine the general requirements for the award and removal of professional titles, and approve the particular arrangements of professional bodies for the qualification, conduct and discipline of title-holders.

**Recommendation 44 (page 234):** All legal professional titles should have the benefit of statutory protection. It should therefore be an offence for a person who is not a title-holder wilfully to pretend to be a title-holder or, with the intention of implying falsely that a person is a title-holder, to take or use any name, title or description.

**Recommendation 45 (page 248):** The minimum requirements of after-the-event regulation should in principle apply to all registered providers of legal services. However, the Legal Services Regulation Authority should have the power to direct that alternative but at least equivalent arrangements established by a non-legal regulator of registered persons would meet its requirements for that regulator to become a 'designated body'. The legal services ombudsman should then have the ability to triage consumer complaints and refer them as appropriate to the designated regulator.

**Recommendation 46 (page 250):** Given the public policy objectives for legal professional privilege, and parity for clients, legal professional privilege should be extended to those providers who are registered within the legal services framework and subject to before-the-event authorisation or during-the-event accreditation.



## 1.7 Summary of short-term recommendations

The following is a summary of the recommendations offered in Chapter 7 of this report as possible solutions or improvements to address the most short-term and pressing issues identified. These are suggested in the context and expectation of longer-term reform of the regulatory framework for legal services, as set out in Chapters 4 to 6, the recommendations for which are summarised in paragraph 1.6.

In summary, my short-term recommendations are:

**Recommendation S1 (page 262):** The Legal Services Board should be empowered to create a public register of providers (who are not otherwise authorised persons under the Legal Services Act 2007) of a non-reserved legal activity to consumers whether for reward or as part of a commercial activity. It should also decide if any regulatory arrangements (within the meaning, where relevant, of section 21 of the Act) should attach to those who are registered.

**Recommendation S2 (page 266):** The jurisdiction of the Legal Ombudsman under the ombudsman scheme rules should be extended to complaints by consumers against registrants on the same basis as if registrants were authorised persons.

**Recommendation S3 (page 271):** The registration scheme should exclude immigration advice and services, as defined in section 82 of the Immigration and Asylum Act 1999. As now, all immigration practitioners not regulated as authorised persons under the 2007 Act must continue to be regulated by the Immigration Services Commissioner.

**Recommendation S4 (page 274):** Paid McKenzie Friends should be subject to the registration scheme. The question of whether they should be given permission to address a court on behalf of a litigant should remain subject to judicial discretion and oversight.

## 1.8 Summary of benefits

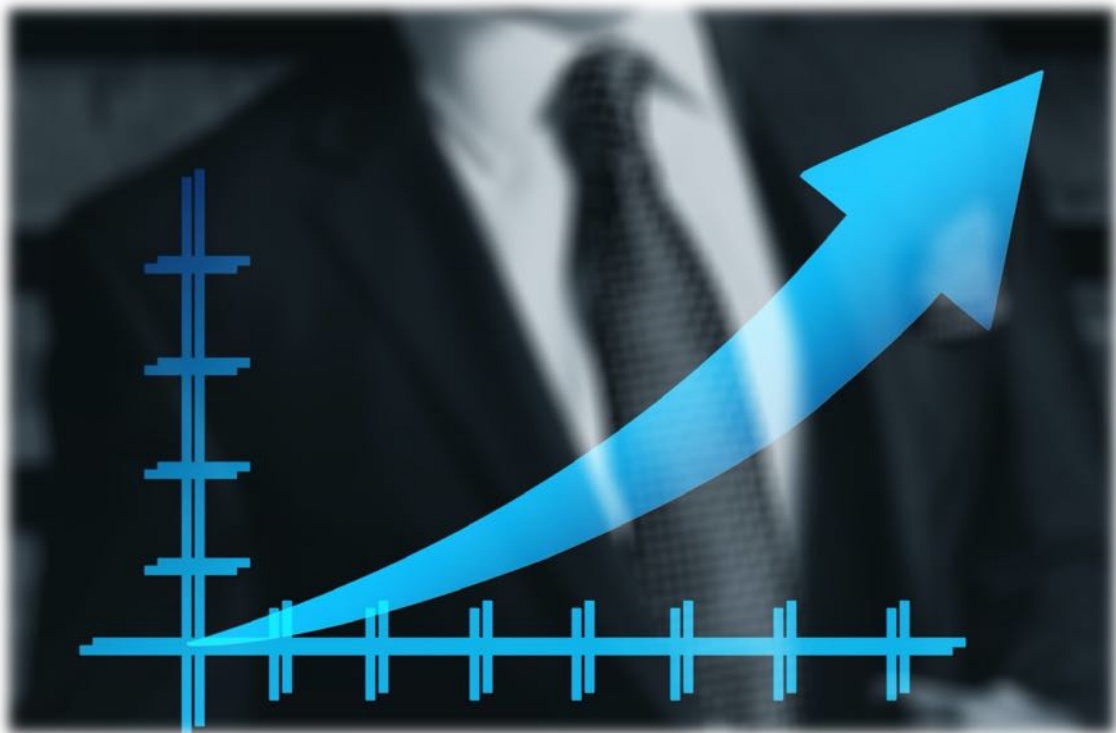
To address the identified shortcomings of the current regulatory framework (paragraph 1.5), the intended benefits of the long-term recommendations offered in this report are expected to be (see further paragraph 8.3):

- (a) It would be easier for consumers to check whether their provider or prospective provider is registered or not (including for higher-risk activities that attract further regulatory requirements and protection). This is a simpler starting point for consumers than the current complex mix of factors.
- (b) A differentiated, or layered, approach to regulation would allow before-, during-, and after-the-event requirements to be applied to providers based on the risks of the services that they actually offer.
- (c) Adopting such a risk-based approach could mean that more of the cost and burden of regulation would be self-selected and cumulative, depending on the commercial or operational choices that providers elect to make. As such, it would offer a more targeted and proportionate response to the public and consumer risks within the legal sector.
- (d) This approach would enable those who are currently unable to enter the regulatory structure to do so, for the benefit of their consumers. This should lead to an increase in access, competition and innovation in regulated legal services.
- (e) This approach would also apply to those providers who are moved (or move themselves) outside the current regulatory framework, for instance by having been struck off, disbarred, or even simply retired. It would constrain their current option to set themselves up as an unregulated paid adviser in respect of non-reserved activities.
- (f) A framework that is constructed around 'providers' of 'legal services' could apply to the providers of lawtech in ways that the current framework cannot.
- (g) There would be clear separation of regulatory from representative functions, and the existence of a single sector regulator would encourage greater consistency, coordination and scale economies in regulation across the legal services sector.



## PART 1

### THE CURRENT STATE OF THE LEGAL SERVICES SECTOR





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## CHAPTER 2

### THE LEGAL SERVICES SECTOR

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The data on which this chapter is based is taken mainly from the market structure, individual legal needs and consumer protection dashboards published by the Legal Services Board<sup>3</sup>, and from the recent major YouGov survey of individual legal needs<sup>4</sup>. Other sources are referred to as appropriate.

#### 2.1 Who works in the sector

In 2018, more than 176,000 individuals were authorised as providers of legal services. They can be split into solicitors (146,000), barristers (16,500), chartered legal executives (7,500), intellectual property practitioners (3,000), licensed conveyancers (1,400), notaries (775), costs lawyers (750), and chartered accountants (300). This represents an increase of 34,000 (about 25%) since 2010.

In addition to these authorised individuals, there are a further 172,000 other staff working in the legal sector, bringing total employment in the sector to 348,000 people.

These individuals worked in 33,500 enterprises. Not all of these will be providing legal services to the public, since it includes in-house lawyers in corporate and government legal departments and in various other organisational settings.

The most dominant group of providers is firms of solicitors at around 9,500.<sup>5</sup> Despite growth in turnover and staff, this is a reduction in solicitors' firms from a recent high of 10,400 in 2010. This suggests that, in general, solicitors have been consolidating and growing the size of their firms.

Even so, the number of sole practitioners and small firms (up to four partners) remains remarkably – and consistently – high at more than 85% of all solicitors' firms.<sup>6</sup>

Of all law firms, about 1,300 are 'alternative business structures' (ABSs). These were first allowed by the Legal Services Act 2007, and are licensed businesses that are not wholly owned by qualified lawyers. Since 2010, therefore, the proportion of all legal businesses represented by ABSs has grown from zero to about 10%.

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3. The dashboards are available at: <https://www.legalservicesboard.org.uk/research/market-intelligence>.
  4. Available at: <https://www.legalservicesboard.org.uk/news/largest-ever-legal-needs-survey-in-england-and-wales>.
  5. This information is taken from the Law Society's Annual Statistics Report 2018, available at: <https://www.lawsociety.org.uk/support-services/research-trends/annual-statistics-report-2018/>.
  6. This is also true in Scotland: see Competition & Markets Authority (2020a: paragraph 2.37).



## 2.2 Economic value of the sector

Turnover from legal services in the UK now stands at £37.2 billion a year. This has doubled in the past 20 years, and also shows an increase of about 25% between 2010 (£28.2 billion) and 2018 (£35.4 billion).

These turnover figures from the Office for National Statistics broadly account for fees billed by law firms in the United Kingdom. Legal services also account for about £6.5 billion annually of net exports – about 16% of all services exports. These figures show a healthy and growing sector, making a significant contribution to the national economy.

Recent research<sup>7</sup> has also sought to estimate a total value for the economic contribution of legal services. As a counterpoint to the usual measure of the turnover of private practice firms, this broader estimate takes into account those services that are provided internally to commercial and other organisations (often described as ‘in-house legal departments’).

The estimate also tries to account for free legal services to the public (often described as ‘pro bono’). This is an important consideration because the YouGov survey found that more than half (57%) of people who had experienced a legal issue in the last four years did not pay personally for the services of their adviser, with half of that number saying that they had used a free service.

On this basis, the ‘value’ of the legal sector will be significantly understated in statistics that refer only to private practice turnover. KPMG estimated the value of pro bono time at £440 million.

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7. Conducted by KPMG for the Law Society of England & Wales; available at: <https://www.lawsociety.org.uk/support-services/research-trends/economic-contribution-legal-services-sector-report/>.

In addition to the direct turnover of the legal services sector, a further £12 billion a year could be attributed to economic gross value added through the supply chain to the legal services sector.

Taken together, these estimates suggest that the total gross direct and indirect contribution of the legal services sector is around £50 billion a year.

## **2.3 Legal services and legal need**

While the numbers of people engaged in legal services, the continued growth of the sector, and its economic contribution, are significant, this still does not paint the whole picture of the overall health of the sector.

### **2.3.1 Help for legal issues**

In broad terms, the provision of legal services to the general public and small businesses probably accounts for about half of total turnover. This would put the value of consumer and small business legal services at around £18-20 billion a year. These services are not always provided to clients directly, but often through intermediaries.

The recent YouGov survey – the largest ever of its kind, and published in January 2020 – surveyed almost 30,000 adults in England & Wales. It sought to understand how individuals handle the legal issues they face. The findings are also consistent with the results reported by the World Justice Project (2019), summarised in Figure 2.3.

In the four years explored by the YouGov survey, almost two-thirds (64%) of those surveyed had experienced a legal issue. The issues faced were most likely to be in relation to a professional service or defective goods (26%) or anti-social neighbours (14%), followed by buying or selling property, making or changing a will, and employment issues (all on 11%).

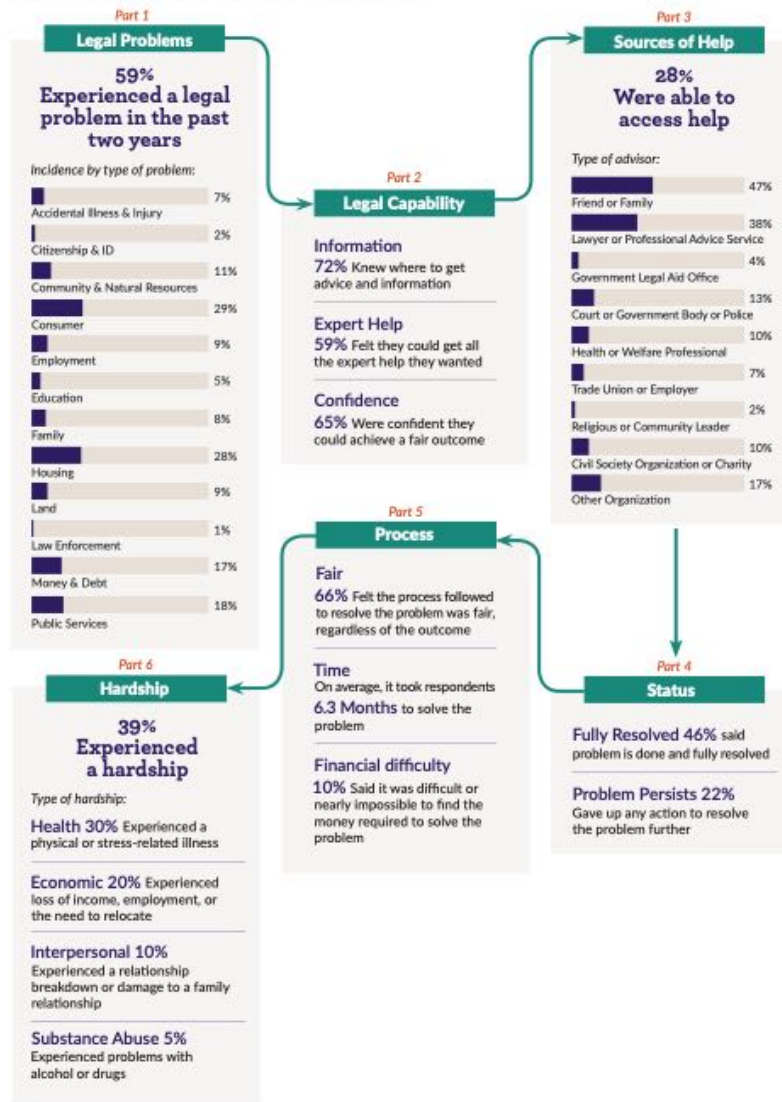
Of the 13,500 adults in the sample who had experienced a contentious legal issue (47% of the sample), only just over 2,000 (16%) of them described their issue as 'legal'. They were as likely to describe it as a bureaucratic issue, and more likely to identify it as an economic or financial matter (28%) or a family/private matter (18%).

This categorisation is important because it is likely to affect where someone turns to for advice and support. Individuals who do not see their problem as 'legal' might not realise that they are facing an issue on which legal advice and representation would be helpful.

On that basis, they might approach someone who is not legally trained and be offered what is in fact legal advice but provided by someone who – however competent and accurate they might be in giving the advice – is nevertheless not regulated in doing so.

# United Kingdom

Paths followed by people in the United Kingdom to deal with their everyday justice problems, summarizing the incidence of legal problems, respondents' legal capability, access to sources of help, problem status, assessment of the resolution process, and problem impact.



Source: World Justice Project, 2018 General Population Poll survey module on legal needs and access to justice. Data collected by YouGov using a nationally representative probability sample of 1056 respondents in the country.

Figure 2.3 UK legal needs and access to justice: summary (Source: World Justice Project 2019)

## 2.3.2 Failure to seek help and unmet need

Of the 17,500 adults who had faced a legal issue in the past four years, two-thirds (66%) of individuals received help, the vast majority from professionals (YouGov 2020: page 34). This leaves a third (34%) who did not receive any help, either because they did not think about it or did not try, or because they tried but were not able to find any help (whether from professionals or from family and friends).



A fifth (21%) did not think about getting help, and a tenth (11%) did not take any action (2020: page 79). In broad terms, those facing a consumer problem were three times less likely to take action than for any other issues.

The main reasons for individuals not taking action were that the issue was not considered to be important or serious enough, that action was thought unlikely to make any difference, that the issue resolved itself without the need to seek help, or that the individual did not know what to do. Very few did not pursue help because they thought it would have been too expensive or too difficult.

It is also important to recognise that a decision not to seek legal advice and assistance can be a considered and rational decision, too. As a private individual said in a response to the interim report:

I think that there are a number of good/understandable reasons why [consumers and businesses] don't which aren't just to do with the cost – using lawyers ups the ante, makes a bad situation worse, prolongs a problem, and the matter can be resolved by other means (living with it, accepting a loss, reaching a compromise informally) which people might well consider is preferable to a prolonged legal dispute with the relationship breakdown that this implies with little guarantee of a better outcome.

As the YouGov report makes clear, low awareness of professional assistance “is clearly visible in demographic trends”, with younger respondents, those on lower incomes, and those with low legal confidence more likely to say that they did not know where to get help (2020: page 81).

Importantly, the survey shows that the “likelihood of getting professional help appears to be lower for disadvantaged groups – 54% of those with low legal confidence did not get professional help [and] the same trend is seen across income, half (50%) of those on a household income of £32,000 or less did not get professional help” (2020: page 36).

The survey seeks to understand the extent to which legal needs go unmet. For this purpose, ‘legal need’ is taken to mean an issue that individuals cannot solve themselves and for which they need professional assistance (2020: page 84).

In this sense, a legal need will be unmet if there is no professional support available, or when any support given is deemed inadequate (because the issue took too long – more than two years – to resolve or the individual would have liked more assistance).

In the YouGov survey, almost 5,000 adults were judged to have had a legal need in relation to a dispute. Of them, 42% had their need met, and 58% did not, mainly because about 1,000 people (21%) in that group did not have any professional help (2020: pages 89-90).

However, the picture was very different for matters where there was no dispute, where only a quarter of those with a legal need did not have their need met, again mainly because they did not have professional help (2020: pages 94-95).

In terms of disputes with unmet need, those with the highest levels relate to property, employment and welfare, and family (2020: page 91). In fact, only for injury issues did

met legal need (just) exceed unmet need. For non-dispute matters, the area with the highest level of unmet need was conveyancing.

As in other areas of the survey, those who were under 30, on low incomes, or with low legal confidence, were more likely to have unmet contentious legal needs (2020: page 91).

The YouGov survey found that only 4% of adults had been funded through legal aid, mainly those with lower levels of education, with low household incomes, and mainly for rights relating to crime, police and immigration, and to family matters (2020: pages 101-102).

Interestingly, even among those respondents who had an issue that would be eligible for legal aid, and had a household income of £32,000 or less, 85% of them nevertheless thought that legal aid would not be available to them (2020: page 107). Such beliefs might well contribute to individuals not pursuing or defending their rights.

Legal aid expenditure in the UK stood at £1.86 billion for 2018-19 (down from a peak of £2.83 billion in 2009-10). The data in the YouGov survey suggests that any materially higher take-up of legal aid would need to add significantly to public expenditure – well beyond even the peak levels of ten years ago.

## **2.4 Consumer experience and confidence in using legal services**

### **2.4.1 Seeking professional help**

People are more likely to seek and obtain professional help if they define their issue as 'legal', if it relates to an injury, or is considered serious; they are less likely to do so if they are younger, or have low levels of legal confidence (YouGov 2020: pages 40-42).

The YouGov survey shows that "regardless of what the legal issue was, friends and family, a solicitor or a doctor are the most common sources of help that people use to handle an issue they face" (2020: page 43). Consequently, of the 17,500 adults in the survey who had sought help, more went to family, friends or doctors (45%), than to solicitors (22%).

Although solicitors might be the most-used source of *professional legal* help, at about a fifth of all sources they can hardly claim to be the principal source of help for the vast majority of people who face a legal issue. They are also the group most likely to have consumers reporting that it was difficult to search for prices (YouGov 2020: page 61).

*"Doctors are significantly more likely to be the main adviser people use when dealing with legal issues relating to injury or employment, finance, welfare and benefits"*

Given the degree of public trust in doctors relative to lawyers (see paragraph 2.4.4), the following finding from the YouGov survey is significant (2020: page 44):

The important role that doctors play in being a first source of help and for one in ten (9%) the main source of help can also be seen. Doctors are significantly more likely to be the main adviser people use when dealing with legal issues relating to injury or employment, finance, welfare and benefits.

Perhaps another relevant factor here is the connection between legal issues and stress. More than half of people facing a dispute reported that they experienced stress either as part of, or as a result, of that issue.

This resulted in a third of those people visiting a healthcare professional as a result, rising to almost a half when the issue relates to family – and almost a fifth needed time in hospital (2020: pages 15-16). This relationship between the stress of dealing with legal issues giving rise to health problems is also addressed in Genn (2019).

There are, therefore, consequential costs for individuals and their families, as well as to society and the state, arising from the incidence of legal issues, particularly the National Health Service.

## **2.4.2 Competition and unregulated providers**

One of the objectives of regulatory reform is often stated to be to encourage further competition in a sector. Looking at the range of providers used by individuals who have faced a legal issue indicates that there is already a variety of sources of help available (see further paragraph 3.9 for reflections on ‘regulated’ and ‘unregulated’).

YouGov shows that this range certainly includes all regulated lawyers (accounting for 32% of all sources of help), but extends to:

- family and friends;
- doctors, social workers and other health workers;
- accountants and other professionals;
- Citizens Advice Bureaux, and other advice services and charities;
- local councils, councillors, MPs, regulators, and trading standards;
- employers, trade unions and professional bodies;
- insurance companies;
- financial advisers; and
- the police.

This range might suggest that competition, of itself, is not the issue. It also challenges assumptions and pressures associated with the assumed divide between lawyers and ‘unregulated providers’: not all of the latter are inevitably lacking knowledge, experience or indemnity insurance.

The belief that there is a relatively low use of currently unregulated providers often leads to the assertion that the use and therefore risk to consumers does not warrant extending regulation to include them.

However, the YouGov survey shows that the use of unregulated providers is directly comparable to the public's use of barristers and other regulated lawyers (other than solicitors and licensed conveyancers). I have not heard a suggestion that such level of use would justify deregulating these low-use categories of lawyer.

Further, the Competition & Markets Authority (CMA) market study elaborated on the extent of the use of unregulated providers (CMA 2016: paragraph 2.41):

In our individual consumer survey, we found that around 4% of respondents had used these kinds of providers as their only or main provider. Similarly, the LSB found that for-profit unauthorised providers account for around 3% of all legal problems where assistance was sought. In certain legal services areas, unauthorised providers account for a greater share of supply. For example, the LSB found that around 7% to 9% of purchased wills originate from unauthorised providers and that online divorce providers account for 10% to 13% of total divorces. By contrast, 4% to 5% of employment services and 2% of conveyancing services (involving DIY and automated providers) are provided by paid-for unauthorised providers.

The challenge of currently unregulated provision of legal services, whether by those who are not qualified and regulated as lawyers, or through technology, is not likely to remain as so limited or confined to low-risk activities as to justify turning a blind eye.

A further relevant factor here is the YouGov findings (2020: pages 18-20) that, often, individuals do not necessarily seek a *legal outcome* to an issue they face. The desired outcome might be someone else recognising that an individual has rights and that they should meet their responsibilities.

It might also be offering an apology, or agreeing to a change in a decision or in the nature of a relationship. Indeed, almost a quarter of those with lower education levels might not even be sure what they want as an outcome.

These findings add force to the argument that, if consumers do not know what outcome they want, or know that they do not necessarily want a legal outcome to their issue, then they do not necessarily need a qualified lawyer to help them address it.

Equally, to the extent that they are seeking to resolve a legal issue, they might nevertheless need the protection offered by someone who is regulated in the context of legal services, even if that someone is not a lawyer.

*“if consumers do not know that they are facing a legal issue, do not know what outcome they want, or know that they do not necessarily want a legal outcome to their issue, then they do not necessarily need a qualified lawyer to help them address it”*

### 2.4.3 Search and transparency

Consumers apparently engage in only very limited shopping around for legal services, both in terms of who might provide services, what they offer and for how much (see Competition & Markets Authority 2016, Legal Services Consumer Panel 2019a, and YouGov 2020).

Although the tendency to shop around is gradually increasing with time, overall it still remains below one-third of consumers. While further efforts to improve the opportunities for transparency, information and comparison are to be encouraged, it may yet be some time before their outcomes are fully effective (cf. Legal Services Consumer Panel 2020).

Following the CMA's market study in 2016, the legal regulators were required to introduce new rules for making potential clients aware of prices for the legal services they were considering. This was the result of evidence that relatively few buyers of legal services shopped around or compared providers and prices.

The YouGov survey covered a period of time mainly before the new price transparency requirements came into effect. It showed that barely a fifth of people (18%) searched for or obtained price information – though this did rise to about a third (34%) when they were paying for some or all of the services received (2020: pages 52-53).

However, the figure doubles to 37% when other searches are considered, and includes asking for details of services, and using comparison websites and looking for reviews.

Such searching is most likely to happen in relation to a conveyancing or residential issue, and consumers are then also more likely to search for reviews of others' experiences. Searching is also likely in relation to wills, trust and probate matters, and for family-related issues. However, more than half of people did not seek information when faced with problems related to injury, employment law, or finance, welfare and benefits.

I would also note here that disclosure and transparency are not necessarily the same thing. Having price information in order to make a decision about which provider to engage is not solved by the obligation to include that information in a letter of engagement.

As the CMA has pointed out (2020a: paragraph 3.36), such letters "were not assisting consumers in shopping around and comparing prices of multiple providers before engagement, as the letter is issued only after the solicitor has been instructed".

In a further recent observation, the CMA has said that (2020a: paragraph 3.22):

the criteria that solicitors consider important in attracting consumers do not always coincide with consumer preferences.... The opposing views between consumers and providers illustrate the need for greater price transparency in the sector to facilitate consumer choice.

I would add that having more, and different, regulated providers in the sector subject to the same transparency requirements would add further to that choice. This would be particularly true if those new and different providers were likely to be more attuned to consumer preferences than the traditional providers.

#### 2.4.4 Confidence and trust in lawyers

We should perhaps expect that “many individual clients report that a lawyer’s trustworthiness and ability to provide a close and personal relationship are among the most important traits they look for from a lawyer” (Remus & Levy 2017: page 526-7).

However, when a market has been so consistently tutored for so long that law is what lawyers do, perhaps we should not be surprised when any consumer view is expressed in terms of ‘lawyer’ rather than ‘legal adviser’.

And if the assumption is that all lawyers are regulated, we should also not be surprised if consumers do not immediately or instinctively express confidence and trust in ‘unregulated’ ‘non-lawyers’.

Pleasingly, the YouGov survey shows (2020: pages 68-73) that levels of expressed satisfaction are high for solicitors (90%) and for other regulated lawyers (86%). Satisfaction is lowest (at 69%) among those under 30 years old, perhaps suggesting that generational expectations are changing or are less accepting of traditional ways of working.

Not surprisingly, levels of satisfaction tend to be lower (though still at 70%) when the outcome of an individual’s legal issue is not what they had hoped for. Indeed, “those who experienced a family-related issue are significantly more likely than average to think that the help did not result in a better outcome” (2020: page 120).

The main reasons for dissatisfaction (2020: pages 74-75) were that the adviser did not do enough (32%) or took too long to deal with an issue (31%). These were followed by making mistakes (24%), and failing to keep the client informed (22%). Unfortunately, treating the client poorly (15%), being unprofessional (13%), and ignoring the client’s wishes (12%) were also significant factors.

Poor value for money (14%) and the bill being higher than expected (12%) were not major issues for dissatisfaction, but nevertheless were factors for some clients (2020: page 75). Although perceptions of value for money are reported as high by YouGov for all types of provider, levels are lower for all regulated lawyers than for other providers (2020: page 104).

More generally, the Legal Services Consumer Panel (2020) reports that public trust in lawyers stands at 45%. This is very similar to accountants, and has changed little since the Panel started recording this measure in 2011. It is significantly below doctors, who have remained at around 80% over the same period, but significantly above bankers (20%) and estate agents (9%).

Only about 50% of the public have confidence in their consumer rights being protected. This might be part of the explanation for the nearly two-thirds (64%) of people handling a consumer issue who do not obtain any help at all in dealing with it (YouGov 2020: page 37).

Consumer confidence in complaining about a lawyer has declined from 49% to 44% in the period from 2011 to 2018. These numbers are significant in the context of the

Solicitors Regulation Authority recording in the order of 27,000 complaints a year for 2015-2018 (representing one complaint for every five solicitors, or 20%).

Unresolved complaints against all regulated providers in the sector referred by clients to the Legal Ombudsman have fallen marginally since 2011, resulting in about 6,000 referrals a year being resolved by the Ombudsman. The majority of these complaints relate to residential conveyancing, followed by personal injury, family law, and wills and probate.

While 27,000 complaints a year against solicitors are themselves cause for concern, we should also remember that the YouGov survey found that these would represent only about 35% of those who were in some way dissatisfied.

By extrapolation, the true level of dissatisfaction across the market would therefore be closer to 77,000. Of these, 50,000 individuals would be likely to do nothing: YouGov describes these individuals as 'silent sufferers' (2020: page 75).

As a result, although high degrees of expressed satisfaction are welcome, the levels of unreported or unresolved dissatisfaction within the sector are no cause for celebration.

## 2.5 Consumers, legal knowledge and regulation

Perhaps surprisingly, more than two-thirds (69%) of individuals facing a legal dispute report that they feel they understand their legal rights and responsibilities; this rises to 88% for non-contentious issues (YouGov 2020: pages 28-31).

This does not vary significantly with levels of educational attainment, but does reduce slightly for those under 50 years old.

The YouGov survey also shows that, although the process of experiencing a legal issue does increase understanding of rights and responsibilities, it still does not fully educate individuals about their rights (2020: page 28).

These figures do not suggest that the frequent calls for more extensive public legal education are likely to have a significant impact on legal capability, or demonstrate sufficient cost-benefit. This conclusion would be consistent with analysis of public financial education and improvements in financial literacy.<sup>8</sup>

*“These figures do not suggest that the frequent calls for more extensive public legal education are likely to have a significant impact on legal capability, or demonstrate sufficient cost-benefit.”*

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8. See Fernandes et al (2014), and footnote 34.

This confidence about rights does not necessarily extend to certainty about the regulatory status of providers used. The YouGov sample was broadly equally divided between those who did (52%) and those who did not (48%) know what the term 'regulated service' referred to. These levels showed greater lack of confidence in those who were younger (under 30), older (65+), or with lower educational attainment.

Of those who had used an adviser, 42% in the YouGov sample said that they already knew that their adviser was regulated, and a further 23% checked their adviser's regulatory status. However, this leaves a significant and potentially vulnerable proportion (35%) who did not know or check.

YouGov also reports (2020: page 64):

When probed on why people dealing with a contentious legal issue did not check whether their main adviser was regulated most people simply say they assumed their adviser would be regulated (31%). One in ten (13%) felt that regulation was not important. Pointing towards some gaps in knowledge, young people (aged 18-29) are more likely than any other older age group to report that they did not know what regulation meant (11%).

Interestingly, of those people who used an unregulated provider, 45% checked on regulatory status, and another 35% said that they already knew that the provider was not regulated. This leaves a lower proportion than the average (20%) who did not know or check.

Further consistent findings can be found in the IRN Research (2020) report. This shows that:

limited consumer knowledge over regulation and avenues for redress if something goes wrong is still a concern. Not enough users of law firms knew that their law firm was regulated, not many checked their consumer rights, and less than one in five of those who have used a law firm were aware of the Legal Ombudsman and understood that they could go to them, as a last resort, if they had a complaint.<sup>9</sup>

The propensity of the 80% who use unregulated providers knowing or having found out the regulatory status of their chosen adviser therefore seems to be little affected by regulation. This still leaves a risk to those who do not know and have not checked – and probably assume that regulation does apply.

It also highlights the potential risk to those who proceed with the knowledge that their adviser is not a regulated lawyer: we should not infer from this that the users thought, and knowingly accepted, that *no* protection or redress was available to them.

This might be reflected in unregulated providers demonstrating the highest level of dissatisfaction (at 20%, almost three times greater than those expressed for solicitors and other regulated lawyers: YouGov 2020: page 73). Under the current regulatory approach, there are very limited routes for the expression and investigation of this dissatisfaction, and for redress for it.

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9. Taken from <http://www.irn-research.com/news/consumer-legal-services-report-2020-results-of-our-annual-survey-of-consumer-use-of-legal-services/#>.



It might also be that consumers do not, or cannot, “adequately price the cost of dealing with a charlatan” (Berk & van Binsbergen 2017: page 36), suggesting that consumers are exposing themselves to risk that effective regulation could mitigate.

*“potential risk to those who proceed with the knowledge that their adviser is not a regulated lawyer: we should not infer from this that the users thought, and knowingly accepted, that no protection or redress was available to them”*

## 2.6 Conclusions

The legal services sector is large and economically valuable. It is also widely dispersed, and highly fragmented. There are a small number of very large law firms that dominate the market (though usually for commercial legal services to larger companies and institutions).

There are then a large number of very small firms that typically service the consumer and small business market. There is a vast difference between these firms and the large ones. The nature of their work, their clients, and their organisations, makes it difficult to say at any meaningful level that they are parts of the same profession.

These differences in scale and distribution of lawyers and law firms are important. They have a direct bearing on the capacity of smaller firms to take on board the onerous and increasing burden and cost of regulation and compliance. As such, it is relevant to questions of the targeting, proportionality and cost-effectiveness of regulation.

Although qualified lawyers are a key part of the sector, they cannot claim to form a majority of those who are consulted by consumers who face a legal issue. Nor are they considered to provide better value for money than other sources. Reported levels of satisfaction are also distorted because of the significant proportion of ‘silent sufferers’ who do not complain.

Regulated lawyers are clearly not serving the whole market. They are just a significant group among a range of alternatives used by individuals and businesses. It is not realistic to think that their regulated share will grow significantly, either. The nature and extent of what is currently unregulated can only grow in relative importance and market penetration.

If regulated lawyers (other than solicitors and licensed conveyancers) have the same market share as unregulated providers, it is difficult to accept the logic of the argument that the 'use and risk' of unregulated sources of help are too low to justify regulatory intervention.

In fact, perhaps the more pertinent question is whether opening up the market to more alternative and new providers of regulated services could lead to better outcomes for consumers compared to a sector with one highly dominant group of regulated providers (solicitors).

In my view, this case is strengthened as the cost of private practice lawyers continues to increase, public funding for legal aid and court estate is understandably constrained, and the growth and spread of technology offers cost-effective opportunities for the provision of legal services by one provider to many consumers.

At present, the position of solicitors as the most dominant group of *legal professional* advisers gives them a disproportionate influence over the extent, nature and consumer experience of legal services regulation. There is a danger that other, smaller legal professions and regulators are dragged along in their slipstream<sup>10</sup>.

Even if solicitors are the most dominant group of *lawyers* consulted by those who need help, they are still not the principal source of help. I therefore question the relative weight that we should give to their views about regulation. It is difficult to see why those views should be allowed to determine or dominate choices and decisions about regulation for the whole sector.

Indeed, given the wide sources of help used by individuals and businesses in addressing their legal needs (whether they are recognised as such or not), it would be misguided to construct a regulatory framework for the future on the questionable assumption that only lawyers need to be regulated for the provision of legal advice and representation.

*“it is difficult to accept the logic of the argument that the ‘use and risk’ of unregulated sources of help are too low to justify regulatory intervention”*

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10. There is a slightly different question relevant to this in relation to the span of regulatory control and scale economies in regulation. I return to this in paragraphs 6.2.6.2 and 6.2.6.3.

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## CHAPTER 3

### FINDINGS AND ISSUES

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#### 3.1 The Clementi reforms

Following the review of the regulation of legal services by Sir David Clementi in 2004<sup>11</sup>, the Legal Services Act 2007 created a new framework for the regulation of legal services and those who provide them. It has five major features:

- (1) It sets out eight regulatory objectives that regulators must promote. These include objectives that many would regard as unobjectionable, such as the public interest, the constitutional principle of the rule of law, and an independent and strong legal profession. It also articulates a set of professional principles.<sup>12</sup>

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

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

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

- (3) It created the Legal Services Board (LSB) as an oversight regulator, with a lay chair and a lay majority, that currently oversees ten front-line regulators<sup>13</sup>.

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

The Legal Services Consumer Panel was also created to represent the interests of consumers. In discharging that role, the Panel has sought to provide balanced, independent advice to the LSB. Rather than acting primarily as an advocate of

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11. See Clementi (2004).

12. The professional principles can be found in section 1(3) of the 2007 Act: 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.

13. They are: Solicitors Regulation Authority, Bar Standards Board, CILEx Regulation (the regulatory body of the Chartered Institute of Legal Executives), Master of the Faculties, Council for Licensed Conveyancers, Intellectual Property Regulation Board, Costs Lawyer Standards Board, Institute of Chartered Accountants in England & Wales, Institute of Chartered Accountants in Scotland, and Association of Chartered Certified Accountants.

consumer interests, it has also wished to engage with the front-line regulators and the wider sector in taking account of the consumer perspective.

- (4) The Act requires the independence of the regulation of professionals from the representation of them. In introducing this requirement, it led to the creation, for example, of the Bar Standards Board (BSB) and the Solicitors Regulation Authority (SRA) as the separate regulatory arms of the Bar Council and the Law Society. This separation has in practice been problematic and often unsatisfactory for all parties.
- (5) Finally, the Act allows the participation in law firms of owners, managers or investors who are not legally qualified: these firms are 'licensed bodies' (more usually called alternative business structures, or ABSs). These are regulated entities allowed to carry on reserved and non-reserved legal activities, with more than 10% of their ownership, management or control held by individuals who are not legally qualified.

This reform led to a very significant shift from a regulatory position before the Act under which law firms had to be wholly owned by qualified lawyers to one where they could be wholly owned by individuals who are not legally qualified. However, an ABS can only be given a licence to operate if it offers one or more of the reserved legal activities in (2) above.

As at May 2020, there were about 1,300 ABS licences issued by the relevant licensing authorities (although about 10% of licences previously issued are no longer in effect).

In comparison to most other jurisdictions around the world, the 2007 regulatory framework for legal services in England & Wales is already one of the most liberal.

Many would suggest that the Legal Services Act 2007 has led to the positive developments and outcomes intended by Sir David Clementi in 2004 and the then Department for Constitutional Affairs<sup>14</sup>. It is doubtful, though, that those intentions have been realised as quickly or as fully as their initiators would have wished.

By the time of Sir David Clementi's review of the regulatory framework in 2003-4, law firms were already competing strongly among themselves for work and talent. However, that framework contained elements that inhibited the ability of others to compete with law firms (and would also have made it very difficult for law firms to compete for work and talent against those others or to raise capital).

Although, by 2004, the sector was internally competitive, it was still relatively closed and under-developed compared to the competition and financing seen in other markets.

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14. See Department for Constitutional Affairs (2005).

### 3.2 Competition and consumerism

At the time of the Clementi Review, there was (and has often been since) a prevailing policy belief that a combination of competition and consumerism is beneficial, and that market forces will drive higher quality services and improved value for money.

The evidence to show that this belief is well-founded is not incontrovertible – and, arguably, there is much evidence from the global financial crisis that even regulated markets can do significant harm to society and citizens.

However, the public good would not be well served by a market sector in which competition is deliberately stifled or distorted. Nor would legitimate consumer interests be met if providers were to benefit from an inherent imbalance of knowledge or power.

*“Consumers and small businesses are generally not aware of the distinction or differences between authorised and unauthorised providers, and tend to believe that all providers are regulated in the provision of legal services.”*

The Competition & Markets Authority (CMA), as part of its market study in 2016, made a number of observations about legal services that are worth recording here as contextual information (CMA 2016)<sup>15</sup>:

- There are some inherent characteristics of legal services that affect consumers’ use and experience. These include: legal issues not always being clearly identifiable or defined; infrequent purchase; and needs arising at moments of vulnerability, distress, stress or time pressure (including occasions when participating in the legal system might not be a choice – such as crime and immigration, where being detained or suddenly being in court without a lawyer is a highly likely and common occurrence).
- There is also asymmetry of information: this is inevitable, given the training and experience of providers of legal services compared to the majority of the consumers of those services. Consequently, this makes assessments of providers and quality of service difficult for consumers to form.

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15. Many of these points are also reinforced by similar findings in relation to legal services in Scotland (see Competition & Markets Authority 2020a).

- Consequently, many individuals and small businesses do not characterise their problems as 'legal' and deal with them as such (as explored in Chapter 2), or they are not in a position or set of circumstances where the 'normal rules' of consumer engagement and choice can apply.
- Even when a problem is recognised as being legal, about two-thirds of individuals and three-quarters of small businesses tend to do nothing, or seek to resolve issues themselves or with only informal help from friends and family rather than seek formal advice.

(The more recent and extensive YouGov (2020) survey provides a more nuanced picture: see paragraph 2.3.2 above.)

- More particularly for small businesses, perceptions of risk deter them from seeking legal advice: high and uncertain costs, compounded by their open-ended nature; complexity, with associated fear and time commitment; the risk of escalation; difficulty in finding the right provider; and the perceived lack of practicality and business understanding of lawyers.
- The provision of legal services to individuals and small businesses is highly fragmented, with more than 7,000 law firms serving these types of consumers, ranging from sole practitioners to large national businesses.

The Legal Services Board reports that concentration levels are low across all legal services areas, but particularly for residential conveyancing and family law. Such fragmentation makes it harder for those who might wish to seek legal advice to find their way to an appropriate provider.

- Intermediaries (such as estate agents, mortgage brokers and trade unions) can be very influential in linking consumers to providers, thus filling a potential lack of information and experience in seeking advice and representation – though the interests and incentives of these intermediaries may not always be aligned with those of the consumers.
- Although most legal services (that is, non-reserved activities) can be provided by either authorised or unregulated providers, more than three-quarters of consumers will still obtain them from those who are authorised.

For more than two-thirds of consumers who use a regulated lawyer, that provider will be a solicitor – and the proportion is even higher for conveyancing, will-writing, probate and estate management advice.

- Consumers and small businesses are generally not aware of the distinction or differences between regulated and unregulated providers, and tend to believe that all providers are regulated in the provision of legal services. Consequently, they assume that they would be protected in some way if matters did not turn out as expected.
- While regulation does not appear to create significant barriers to entry to or exit from the market, regulatory costs might be felt more acutely and disproportionately by smaller firms and sole practitioners. This can deter their entry or delay their exit.

- However, some regulatory costs may be excessive in nature, and these costs are likely to be passed on to consumers in the form of higher prices. Consequently, the regulatory costs of the current framework are likely to be disproportionate to its objectives, and are based on burdensome and prescriptive rules that impose high compliance costs on providers.

These observations identify many of the factors that lead to the outcome often described as ‘unmet legal need’ (see also paragraph 2.3.2 above) and, for many, is symptomatic of the broader challenge of securing access to justice.

While the market study focused primarily on what might be described as the ‘consumer market’ for legal services, it did identify issues and reach conclusions of relevance across the entire sector. This Review has also considered the clients and circumstances of commercial law firms (particularly in the context of international transactions, where international trade in legal services is worth some £6.5 billion a year: see paragraph 2.2 above) and of corporate in-house legal teams.

To complete this initial assessment, I would add that Sir David Clementi finished in 2004 his work on which the 2007 Act is based. The current structure therefore pre-dates the global financial crisis, which has led to austerity, further changes to the funding of legal aid and the wider courts and justice system, and then to a rise in self-lawyering and litigants-in-person<sup>16</sup>. It also pre-dates a use of technology that has become more extensive and pervasive, as well as the rise of machine learning and artificial intelligence in law.

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

*“some regulatory costs may be excessive in nature, and these costs are likely to be passed on to consumers in the form of higher prices. Consequently, the regulatory costs of the current framework are likely to be disproportionate to its objectives”*

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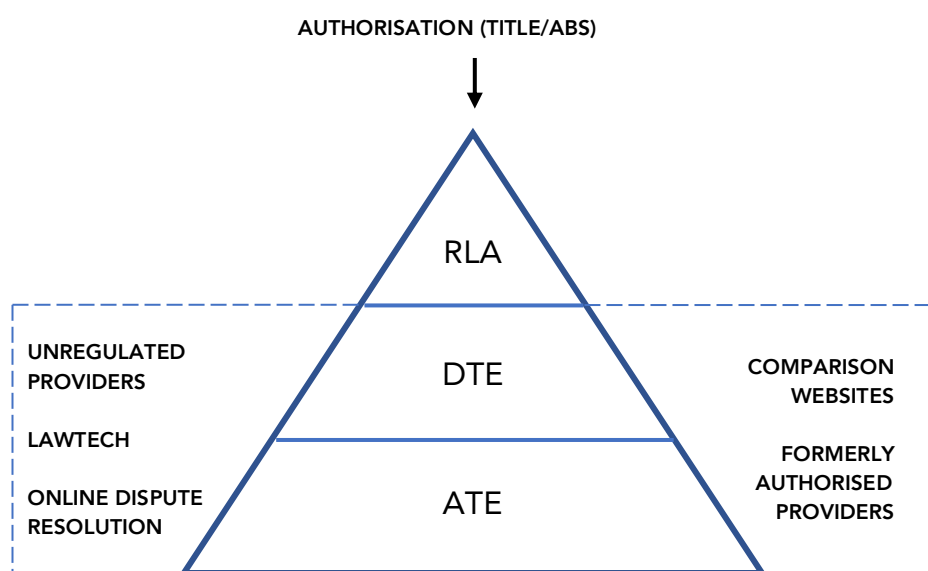
16. This point is emphasised in *Wright v. Troy Lucas & Rusz* [2019] EWHC 1098, where Her Honour Judge Eady QC (sitting in the High Court) said: “At a time when Legal Aid has been significantly reduced and there is a rise in the number of unregulated persons who seek to help individuals engaged in litigation without the assistance of a lawyer (including, but not limited to, those known as McKenzie Friends), this claim raises a question of potentially wider interest in terms of the duty of care that might be said to arise from such a relationship”.

### 3.3 Consumer expectations and regulatory reality

The present regulatory framework can be represented as a triangle, made up of:

- **the reserved legal activities** (RLAs, for which prior (BTE) authorisation is required before those activities can be offered to the public);
- **during-the-event regulation** (DTE, such as requirements for the handling of client money, professional indemnity insurance, continuing professional development); and
- **after-the-event regulation** (ATE, such as access to complaints handling by the Legal Ombudsman, the availability of compensation, and conduct and discipline proceedings).

This is represented diagrammatically in *Figure 3.3*.



*Figure 3.3: Representation of current regulatory framework*

This presents a narrow 'entry gate' to regulation. A combination of a reserved legal activity, combined with an authorisation to carry on such an activity (usually arising from a professional title), is required to enter the triangle. However, once through that gate, the whole array of BTE, DTE and ATE tools is engaged, resulting in everything that the holder of a legal professional title does being subject to legal services regulation.

On the other hand, individuals or businesses wishing to offer only non-reserved legal activities, and not otherwise subject to legal services regulation, cannot gain admission to legal sector regulation (the 'unregulated providers'). The same is true of those who offer comparison websites, online dispute resolution, and lawtech products.

However much these providers might otherwise wish to subject themselves to regulatory obligations and offer the benefit of regulatory protection to their consumers, they cannot because they do not hold a professional title or a licence for an alternative business structure (ABS). They lie outside the triangle, legally able to carry



on non-reserved legal activities, but not able to enter (or to be brought within it) – that is, they are both unregulated and unregulatable.

This situation creates the ‘regulatory gap’, under which a consumer might seek exactly the same non-reserved legal service from two providers. One of them would be authorised for an (unneeded) reserved activity that results in all of their work being regulated. The other who is not so authorised cannot be regulated and is not able to offer the same assurance or protection<sup>17</sup> to the consumer.

*“individuals or businesses wishing to offer only non-reserved legal activities ... are both unregulated and unregulatable”*

This complexity in the regulatory framework is not usually apparent to consumers (often even to those who might be regarded as ‘sophisticated’). In fact, it completely undermines the general consumer assumption that all providers of legal services are regulated.

Further, however transparent the market, it seems an unreasonable burden to expect consumers to navigate the complexities of reserved and non-reserved activities, or to understand which title-holders are authorised for which activities, and in what circumstances a complaint may or may not be referred to the Legal Ombudsman.

Indeed, since 25 November 2019<sup>18</sup>, the protections attaching to those who are described as ‘solicitors’ have varied depending on whether the individuals work in a regulated law firm, in an unregulated provider, or on their own account as a freelancer. This can only add to the complexity.

The circumstances described here do not in my view meet the Legal Services Consumer Panel’s principles of the consumer interest<sup>19</sup> relating to information and redress, namely that “Consumers’ rights are simple to understand and easy to find” and that “It is easy for consumers to understand their rights and routes to redress”.

This complexity, confusion and frustration is illustrated in Viewpoint 1 (page 48).

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17. In fact, as Viewpoint 2 (on page 62) shows, even the protection offered by currently regulated providers might in practice be more illusory than real.

18. See the new approach for the regulation of solicitors at <https://www.sra.org.uk/newregs/>.

19. See Legal Services Consumer Panel (2014).

## VIEWPOINT 1: A PERSONAL CONSUMER EXPERIENCE

The following views are taken from a consumer submission in response to the interim report. This followed a protracted and frustrating experience of consulting relevant regulators over concerns arising both during and after defending ancillary relief family proceedings:

"I have experienced a regulator not take action when they could have done and their delay has allowed foreseen harm to be done when they could have stopped it had they investigated adequately and considered the law and their own regulations appropriately.

My observation is that the problems being experienced by the public are largely due to inadequately managed legal processes, unaffordable legal advice, lack of legal aid and to baffling options on how to buy legal services and ways of doing that which go beyond the comprehension of the general public. The public can be led to enter complex contracts with lawyers of a type not suited to family matters.

There are dangerous, high-risk products in the market using messy business structures and secured lending which regulators don't seem to understand fully. Third-party contracts introduce confusion, complicate matters, can compromise assets, and the public can feel like pawns in an unfair game played out in court.

This means that when a problem emerges, several regulators can then be involved. This in turn creates weaknesses that allow harm to be perpetrated. It is more complex than the public or indeed the regulators can currently comprehend. The tragedy is that we have legislation and regulations that are not being used or applied. This undermines legal processes and the proper administration of justice.

So people who have noticed that something is wrong are often left to their own devices in this maelstrom to use their own initiative to attempt to navigate a course through a baffling regulatory landscape. To try to understand how what has happened can happen, to find out if what they have suffered is a regulatory offence and whether anybody is going to do anything about it. We soon become terriers chewing at the heels of regulators that prefer the easy life and to close the file. This makes us angry and rightly so.

This regulatory journey is not for the faint-hearted. Nor is it designed for the dyslexic, mentally impaired, traumatised, ill, vulnerable, inexperienced, young or old, nor for anyone who lacks access to technology or digital skills or time. When things go wrong it can literally ruin lives. It is possible that there can never be a recovery. So the duty of care on all regulators is significant. They need to be alert to the possibility that something can happen these days that they never envisaged, and they need to listen to the public.

Engaging with regulation is an inherently time-greedy and inefficient process; often barriers are erected to ensure it is difficult. The opportunity to intervene is too easily lost, hampered by the lengthy process of investigation, which has only its own timescale and agenda and often does not fulfil even that. Regulators who promise answers by certain dates, then do not answer at all – not even when chased up.

It was my own assumption that the regulatory world operates on a direct consideration and review and application of legislation and rules to a scenario. The reality seems that there is a systemic reluctance for regulators to look into their own toolkit or stick their head above the parapet to identify and name offences they themselves have written beautiful rules on, even when presented with clear evidence."

*(continued)*

### **Viewpoint 1: A personal consumer experience (continued)**

"I have seen non-application of the rules and regulations, and regulators will even limit or misrepresent what those regulations are, even when a semi-intelligent person can read that they mean the very thing that would make their grievance succeed. The paper-pushing and a reluctance to take action means that regulation is largely futile currently. However, every now and again somebody in regulation actually does their job, stops hiding behind excuses and delay, and names an offence or requires some action. In those rare moments, there is a glimmer of hope.

In a complex problem, there will not just be one regulator to be consulted. So the process can be repeated, one regulator, then the next. It is very easy to get the order wrong. This wastes resources and time and does not curtail damage.

Then there is the trick of the regulators to avoid accountability. This is done by first choosing to dismiss a concern without proper investigation. Since they volunteer themselves to scrutiny by an Independent Reviewer service, the public can also later be sent down that path as the final resort following a complaint process so that their own complaint process can be overseen. Those regulators who subscribe to an independent reviewer service have a free choice from what I can see to choose who they want to pay to oversee complaints about their own service, and they can change the provider of the review service when they wish, which does not help.

All of this takes considerable time and effort. By this point, shattered nerves need somehow to become nerves of steel to carry on. It is useful to consider here that this could happen to you. None of us is immune.

So what message does this give to those who want to bend the rules and regulations to fit their own agenda for gain? It tells them that it is unlikely that they will be found out, it is unlikely they will be sanctioned, and it is likely they will be allowed to carry on causing harm.

The person with the valid complaint has by now been truly stitched up, strategically placed between a rock and a hard place, and left to ponder whether to take a gamble on the Independent Reviewer addressing their concerns, or to reject it and assert to the regulator that it is they that have failed in their duty.

Exhaustion has set in. Regulators use this tactic. Only die-hard or severely wronged complainants will stick out the cross-country course to an Independent Reviewer and even then they can be tripped up at the last hurdle due to the narrow scope of a review.

Will the reviewer appreciate the true nature of the complex problem that generated their involvement as the points of law, legislation, process and procedural irregularities or even crimes that should have been identified by the regulators whose job it is to recognise them? Will they recognise that which has been overlooked or brushed under the carpet? I suspect not, because their role may only be whether the complainant was 'treated fairly' or other such bamboozling terminology to facilitate more inaction.

The irony with all this is that the public can readily identify right from wrong based on common sense alone. They do not need to know the law inside out or the regulation inside out to know that something should not be happening.

If it feels wrong, it invariably is wrong; and yet even in the face of robust evidence, I have witnessed regulators turn a blind eye.

It is of course simply not good enough."

*(Quoted with permission)*

While not creating a monopoly for lawyers as a matter of law, the current regulatory framework creates a monopoly in effect, with unwelcome consequences (Dunlap 2014: pages 2817, 2820, and 2841-42):

[T]he low level of legal knowledge ... is fundamentally at odds with the ideal of the rule of law....

[O]ur law's complexity and the lawyers' monopoly have led to a pervasive perception of law as the exclusive domain of lawyers, such that even highly educated laypeople may lack basic legal understanding....

[T]he lawyers' monopoly has led to a view of the law as the exclusive domain of lawyers, leaving laypeople with inadequate knowledge of their rights and responsibilities. This ignorance deprives citizens of the protection of the law and the norms it represents, because wrongdoers are undeterred by laws they are not aware of, victims do not claim rights they do not realize they have, and government actors have limited incentive to address problems that go unrecognized by the public...

[Promoting] ... access to lawyer-provided services exclusively leaves laypeople too dependent on the legal profession to mediate the laws that govern their lives.

Therefore:

#### ***Finding 1***

There is a discrepancy between consumer expectations of regulatory scope and protection, and the current reality of that scope and protection.

*“complexity in the regulatory framework ... completely undermines the general consumer assumption that all providers of legal services are regulated”*

### **3.4 The reserved legal activities**

The existing group of reserved legal activities has a difficult history.<sup>20</sup> Reservation in effect creates a monopoly for qualified lawyers and so creates barriers to entry. But these activities lack any consistent, risk-based justification for their different treatment.

Combined with the need for authorisation for these activities arising only through holding a professional title or being given a licence for an alternative business structure (see paragraph 3.1(5)), the effect is to exclude from the regulated market those who wish to offer competitive but protected non-reserved services to the public.

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20. See Mayson & Marley (2010).

During the course of the Review, one unregulated business described the reserved activities to me as “the biggest block on commercial development”. This is because of what are seen as the artificial arrangements that the business needs to put in place in order to navigate the divide between the reserved and non-reserved activities that arise during the course of providing what clients see as a single service (see, for instance, Case Study 2, page 154).

A case can be made for some form of prior authorisation for conducting legal activities that are of public importance, carry high risk (for the State or for citizens), or are offered to consumers who face a particular vulnerability. It is not clear, though, when that case is made, that the conclusion must be the reservation of the activity only to those who hold a full professional title.

In such circumstances, the future need for the concept of reservation and the pivotal position of reserved activities in the regulatory framework is questionable.

Accordingly:

### ***Finding 2***

The justification for the reservation to lawyers of the current legal activities is stronger in some cases (such as rights of audience and the conduct of litigation) than it is in others (such as the narrowly defined probate activity). While there might remain a need for before-the-event authorisation of providers in respect of certain public interest or high-risk legal activities, the continuing need for the concept of ‘reserved’ legal activities in the regulatory framework is questionable.

## **3.5 Differentiation of approach**

The effect of the narrow gateway to regulation created by the combination of reserved activities and authorisation through professional titles is an ‘all or nothing’ outcome. Once through the gateway, all of the before-, during-, and after-the-event regulatory tools then apply. If a provider cannot go through that gateway (because they do not hold a professional title and only wish to offer non-reserved legal activities), regulation cannot attach at all.

If the role of reserved legal activities in forming the narrow gateway for admission to regulation can be re-thought, the path becomes clear for a more risk-based, segmented and differentiated use of the full range of regulatory tools. This is required by the better regulation principles, incorporated into the regulation of legal services by sections 3(3) and 28(3) of the Legal Services Act 2007, and the Regulators’ Code.

Accordingly:

### ***Finding 3***

There is merit in considering legal services being assessed for risk to the public interest, with a ‘differentiated’ approach to regulation under which an appropriate mix of before-, during-, and after-the-event regulation could be applied.

### 3.6 Professional titles

Under the present framework, professional titles represent the principal route to authorisation that brings individuals, or the organisations in which those individuals work, within the scope of regulation under the Legal Services Act 2007. These titles are often also recognised by consumers as relating – and possibly even limited – to regulated providers of legal services.

As such, professional titles are a signal of, or proxy for, assumed authorisation, competence and redress. A consequence of the limitation is that many consumers do not consider using a provider who does not have a recognised professional title, even though there would be no current restriction on those alternative providers offering non-reserved services to the public.

Professional titles therefore bring some positive features to the market as well as some negative consequences. The positives are that titles:

- are generally recognised by consumers and are assumed to assure competence, quality and protection;
- provide a potential short-cut for consumers in their search for possible providers of legal advice and representation;
- are subject to protection from mis-use and the deliberate misleading of consumers by those who do not hold the title;
- provide a signal of some competence and quality to employers; and
- offer benefits in international settings: in addition to similar brand recognition by international consumers and businesses, there are benefits of mutual recognition of qualifications and rights of establishment offered to title-holders by other jurisdictions.

The negative consequences are that titles:

- do not necessarily provide a clear indication to consumers of precisely what it is that an individual is regulated or competent to do: for example, 'solicitors' who are authorised to conduct litigation might have spent their careers in non-contentious practice, or they might not hold authorisation to exercise rights of audience in the higher courts; and 'chartered legal executives' may or may not hold a civil, criminal or family certificate that allows them to practise in those areas;
- are not necessarily understood by consumers in terms of the protection or redress that they do or do not provide: this situation has been further complicated since late 2019 when solicitors who practise in regulated and unregulated organisations, or as freelancers, are subject to different requirements and consequently to different levels of protection for clients; and
- present or preserve barriers to entry to the regulated legal services sector in respect of non-reserved activities provided by those who do not wish (or cannot afford) to qualify for the award of a title.

In short, the 'signals' of title are not as clear for consumers as might be assumed. For consumers who correctly ascribe value to those signals, it is important that their trust is not undermined. However, for those who are ascribing too much, trust and confidence in the wider structure of legal services is at risk.

Similarly, consumers can be mistaken, because the strength of titles leads them to assume that all providers of legal services offer equivalent protection.

It is not entirely accurate to suggest that *titles* present barriers to entry for those who might otherwise feel capable of offering targeted services covered by reservation (such as probate activities). The barrier is perhaps better described as a regulatory framework that requires prior authorisation for certain activities, and then principally only offers that authorisation to those who hold a relevant title.

There are providers who want to offer a specialised service, but do not wish to incur or cannot afford the full cost of gaining a professional title that would give them authorisation. For them, the regulatory need to acquire a title as the price of entry into the market is indeed a barrier.

The future role of professional titles in the marketplace, as a 'signal' to consumers, as a route to gaining access to authorisation for regulated legal services, and in their general relationship to the regulatory framework, accordingly begs a number of challenging questions.

Nevertheless:

**Finding 4**

The link between the reserved activities and authorisation through professional titles creates inflexibility and constraints in the current regulatory framework.

To be clear, I do not see professional titles disappearing (nor would I wish them to do so): on the contrary, there is a case to be made for some re-strengthening (see further paragraphs 5.5 and 6.4).

*“The barrier is perhaps better described as a regulatory framework that requires prior authorisation for certain activities, and then principally only offers that authorisation to those who hold a relevant title.”*

## 3.7 Flexibility, cohesion and independence

### 3.7.1 Regulatory flexibility and the need for cohesion

A principal concern expressed in the CMA's market study related to inflexibility. I agree and adopt their assessment:

#### **Finding 5**

The current regulatory framework is insufficiently flexible to apply targeted, proportionate, risk-based and consistent regulation to reflect differences across legal services areas and across time.

Too much prescription, constraint or process is 'hard-wired' into the Legal Services Act 2007, restricting the ability of regulation to be adapted quickly, appropriately and cost-effectively. As stated in the Preamble (page 4), this restricts the need or opportunity to reflect developments in society, the market for legal services, in legal practice, in technology, or in the changing risk profile of any or all of these factors.

It is encouraging that these issues have been recognised in other sectors. For example, the Department of Health & Social Care (2019: page 3) recognises that:

more fundamental change can only be delivered through freeing the regulatory bodies from the constraints of prescriptive and bureaucratic legislation.... Too much detail about the regulators' day-to-day functions is set out in legislation which is subject to the agreement of Parliament.

On the other hand, the remedy or alternative to too much inflexibility could create challenges of its own. By avoiding prescription or predetermination in statute, flexibility to respond to emerging or changing circumstances will require someone to have the authority to make decisions and judgements over time. The question is where that authority should rest.

Even when such matters have been addressed, various consequential issues remain, such as the actual or perceived independence of some stakeholders from others, and the participation and consultation of certain stakeholders in exercising judgement and making decisions.

Greater flexibility in the regulatory framework would almost certainly create a need for consistency in decision-making, coherence in the cumulative effect of those decisions, and coordination across the sector. Without this, the integrity of the regulatory framework, as well as public, consumer and provider confidence in it, could be threatened.

Consequently:

#### **Finding 6**

The requirement for flexibility, consistency, coherence and coordination across regulation within the legal services sector necessarily leads to a single regulator.



### 3.7.2 Regulatory independence

The question of the independence of regulation, regulators and the regulated community from government and state influence is important, and will be considered later in this report (see paragraph 6.2.4). For now, this paragraph looks at independence as between regulators and those they regulate.

Most commentaries and assessments of the regulatory structure introduced by the Legal Services Act 2007 refer to the intended separation of regulatory and representative interests. The Act's focus on this was inevitable given the pre-existing arrangement of the self-regulation of the legal professions by bodies that both regulated and represented their members.

By the time of the Clementi Review in 2004 (and probably long before), such an inherent conflict had become socially and politically unacceptable. The ensuing quest to separate the regulatory functions of the 'approved regulators' has led to tension.

It has become common to ascribe this tension to an incomplete separation. After all, the 'approved regulator' – which remains, formally, the professional body (such as the Law Society or the Bar Council) – is named in the Act<sup>21</sup>, with no reference to the name of the regulatory bodies (respectively, the Solicitors Regulation Authority and the Bar Standards Board).

It should not be surprising, then, that the professional bodies would wish to exert or claim some influence over their regulatory arms on the basis that they remain the body named in the Act with the ultimate statutory accountability.

Nor is it surprising, given that their members are also funding the regulatory arms through their practising certificate fees, that the professional bodies might wish to rein in the activities and cost of the regulatory bodies.

Although the tensions have become less public in very recent years, they still exist. The regulatory bodies will, on occasion, wish to 'flex their muscles' as they protect their territory and seek to demonstrate their true independence from representative interests.

*“the nature of the separation and independence of regulatory functions from representative activities remains unsatisfactory”*

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21. The approved regulators for the legal professions listed in the Act (Schedule 4) are: the Law Society, the General Council of the Bar, the Master of the Faculties, the [now Chartered] Institute of Legal Executives, the Council for Licensed Conveyancers, the Chartered Institute of Patent Attorneys, the [now Chartered] Institute of Trade Mark Attorneys, and the Association of Law Costs Draftsmen (now the Association of Costs Lawyers).

The Legal Services Board's internal governance rules seek to manage the separation and independence of the approved regulators in their regulatory and representative capacities. These rules have so far struggled to articulate fully and effectively the nature and appropriate parameters of these relationships<sup>22</sup>.

In this sense, the nature of the separation and independence of regulatory functions from representative activities remains unsatisfactory.

In this Review, I have explored what I describe as the 'proper role' of regulation.<sup>23</sup> In my view, it is to set the floor below which providers may not go in their provision of legal services.

This should be distinguished from the goal of a profession (and perhaps legal services providers more generally) to aspire to higher, or even the highest, standards of competence and quality. In short, the floor is entirely a matter for regulation, while professional aspiration is not.

Taking this as an alternative lens through which to view the issue of regulatory independence, there is an inevitable – and possibly irreconcilable – conflict between the regulatory and representative positions.

When a professional title and the associated obligations are matters for a regulator, it is more likely that over time the regulatory standards and expectations applied will be lowered to a point closer to the regulatory 'floor' referred to above. This is because a regulator's proper role is to impose the *minimum necessary* regulation in order to achieve the regulatory objectives as cost-efficiently as possible.

Either as a matter of reality or perception, therefore, the regulated community of professionals is likely to feel that its hard-earned calling is gradually being dumbed down or 'de-professionalised'.

At the same time, practitioners might also perceive that the regulator is increasing the amount of process, bureaucracy and compliance elements of regulation, adding to the cost and often (as they see it) the irrelevance of the regulation to which they are subject.

These perceptions are also more likely where, as is usually the case these days, the regulatory body has a lay majority and its staff are career regulators.

Consequently, practitioners will look to their professional body to represent their interests, resisting the regulator's perceived over-reach, any perceived failure to understand professional work and client relationships, and the imposition of what are seen as burdensome irrelevancies.

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22. The latest version of these rules was published on 24 July 2019 (see <https://www.legalservicesboard.org.uk/wp-content/uploads/2019/07/IGR-2019.pdf>). In my view, even this version continues the struggle because of the tension that is hard-wired into the Act.

23. See Mayson (2020d: paragraph 3.3).

*“The insight and sharing of professional experience can be lost or dismissed in the desire to avoid perceptions of ‘influence’”*

Even so, conscientious practitioners will still seek to maintain professional standards at as high a level as possible (as will the firms and employing organisations within which they work).<sup>24</sup>

It is not hard to see that these positions could be mutually incompatible. Under the current structure, the professional bodies and their members will see supervision of standards being taken away from them, with a loss of control and decline in professional status following from that.

Conversely, the regulators will see a group of self-interested professionals seeking to retain or regain control so that they can continue to require standards that are unnecessarily high and expensive in a consumer market that has insufficient competition and innovation.

My conclusion is that both positions are equally right and equally wrong. The question is whether the better approach lies in full separation of regulatory and representative interests.

Incomplete separation, as we have seen, can lead to a strained, stifled or absent dialogue, where representative bodies are inclined – or even required by the internal governance rules – to be cautious and measured in their engagement on regulatory matters; and regulatory bodies can be unduly defensive of their own territory.

In these circumstances, a mutually beneficial discussion and collaboration that respects the balanced views, objectives and experiences of both regulation and representation is inhibited. The insight and sharing of professional experience can be lost or dismissed in the desire to avoid perceptions of ‘influence’.

Accordingly:

***Finding 7***

The nature of the separation and independence of regulatory functions from representative functions remains unsatisfactory. The current approach and requirements of regulation and the internal governance rules make the desirable cooperation and collaboration between regulatory and representative functions problematic to achieve.

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24. I should perhaps also record here the converse risk relating to those less-than-conscientious practitioners who perceive that the costs and burdens of regulation are disproportionately high. They might prefer to reduce or even ignore the standards applied to them, creating difficulties for both their profession generally and the clients who instruct them.

I wonder, however, whether framing the debate in terms of 'independence', 'influence' or 'prejudice' serves to obscure what should be the principal goal. Those with an interest in regulation, its scope and its effects on their daily practice probably cannot ever be truly independent or not wish to exercise whatever influence they can muster.

It seems to me that the real objective here is that the regulator should not be – or be perceived to be – 'captured' by the regulated community. In this sense, I would adopt the definition of 'regulatory capture' offered by Carpenter & Moss (2014: page 13):

the result or process by which regulation, in law or application, is consistently or repeatedly directed away from the public interest and toward the interests of the regulated industry, by the intent and action of the industry itself.

On this definition, the robust expression of views by professionals would not necessarily lead to capture, even if it was clearly the exercise of influence. It could also accommodate cooperation and collaboration, without inferring capture.

While a system of self-regulation would almost certainly appear to the public and consumers to be captured, we have now moved beyond that. Perhaps it is time for a more developed understanding of capture and how best to avoid it.

### **3.7.3 Is greater separation of regulatory and representative functions desirable?**

My belief is that it is difficult – perhaps even impossible – for a *perception* of regulatory capture to be avoided if there is incomplete structural separation between regulatory and representative bodies. We should also acknowledge that each body has distinct, but equally legitimate and necessary, roles. These roles proceed from different perspectives and objectives.

The regulators are right that professions have a tendency to raise standards of competence and quality above those necessary to protect consumers. It is also true that if all consumers were well served at all times, for all services, and with full protection, no-one could suffer from incompetence and poor quality.

But this overlooks the potential variability of consumers' needs and preferences in different circumstances. It also puts legal services beyond the financial reach (and sometimes comprehension) of a significant part of the population.

Regulators are wrong to assume, though, that because of this tendency they as regulators must necessarily be the guardians of the professions. A regulator's true role as a gate-keeper and guarantor of minimum necessary standards does not inevitably equip them to be the best judge of what a profession might legitimately aspire to or wish to achieve.

Equally, the professions (and professional bodies) are wrong if they do not accept the need for an arbiter of minimum standards. There should be an independent assessment of whether those in a regulated market have met those standards and of the need to protect consumers from known and emerging risks.

They must also accept that the views, expectations and experiences of consumers do not always match those of professionals. Sometimes, consumers will have a legitimate complaint and a right to redress when things – in their eyes – have not gone well.

However, the professions (and professional bodies) are right when they claim that there is value in the sector generally, and to clients in particular, in their professional status being recognised if it provides a level of competence, specialisation or quality that is indeed higher than that required merely to protect consumers from harm or detriment.

As an analogy, we expect all new vehicles sold to us to have sound engineering and electrics, and to be roadworthy and safe. We are allowed to choose, beyond that minimum, what other features and benefits we wish (and can afford) to pay for.

Different levels of expertise and quality can be applied by vehicle manufacturers to advanced features (such as self-parking, automatic distance control, keyless entry), the interior finish (wood, leather), the sound system, and so on. Sellers compete in an open market to persuade consumers that these differences are worth paying for.

Therefore, there are different roles for representative bodies and regulatory bodies to fulfil. Both are important and needed, but they are mutually incompatible. The same body cannot reasonably or legitimately carry both roles simultaneously.

*“A regulator’s true role as a gate-keeper and guarantor of minimum necessary standards does not inevitably equip them to be the best judge of what a profession might legitimately aspire to or wish to achieve.”*

It seems to me that, in relation to regulation, the primary role of a professional or representative body is, as the description suggests, to represent the views and interests of its members. I respect that position – indeed, I regard it as vital that the professions continue to be represented robustly and fearlessly.

Adopting such a role does not, and should not, mean that the representative body is not also concerned with promoting the public interest. These are not mutually exclusive. But I have no doubt which is, and properly should be, the primary role and motivation of a professional body.

The inevitable consequence of this is that professional bodies should not in future be constrained in their representative role by the artifice of ‘approved regulator’ status or the contortions of the internal governance rules. In my view, therefore, the time has come to complete the separation between approved regulators and representative bodies.

Therefore:

### **Finding 8**

The same body cannot simultaneously carry on both representative and regulatory functions, and the removal of 'approved regulator' status from representative bodies is now necessary.

## **3.8 Public confidence in legal services and their regulation**

The question of the public's confidence in lawyers and legal services was raised in Chapter 2 (particularly paragraph 2.4.4), and there is much to celebrate. The fabric of society, and belief in the reality of the rule of law and ability to participate legitimately and effectively in society, rest on such confidence.

However, the Legal Services Consumer Panel has expressed some concern about levels of public and consumer confidence (see, for example, 2020: paragraphs 1.3, 6.1, 7.1, and 9.1). There are similar concerns in other jurisdictions, with the CMA noting for Scotland, for example, "an acknowledgement that the current system is perceived by consumers as biased towards providers" (2020a: paragraph 5.24).

During the course of this Review, I have received a significant number of submissions from consumers. Many of them have not had a good experience with their lawyers. Following complaint, they then report heightened dissatisfaction with the whole legal system because of what they see as poor service from regulators.

They indicate, in no uncertain terms, that there are some major challenges in maintaining public trust and confidence in lawyers and legal services, and in their regulation (see Viewpoint 2, page 62). These views have provided valuable insights into consumer and complainant experience, and have been considered carefully in forming the findings and recommendations in this report.

Regrettably, consumer concerns are too often dismissed by practitioners as the views of the disappointed, disaffected, uninformed or downright wrong. This is unfortunate (at best) and offensive (at worst). At one level, it is irrelevant whether these perceptions are right or wrong. A crucial factor is simply that they exist and that lessons should be learnt wherever possible.

Of course, in seeking to identify those lessons, the concerns should be properly and fully considered. In other words, they should neither be summarily dismissed as mistaken nor taken at face value as incontrovertible statements of truth.

Confidence is founded on perceptions. If those perceptions are not as positive or as strong as we would wish, the proper response is not to criticise those who hold them. It must be to work to learn from them and then to change them by providing an alternative experience.

However, concerns about public confidence are not only based on consumer experience and feedback. In 2018, Hunter et al reported on judicial perceptions of the quality of criminal advocacy. This is at least equally disturbing because they recorded

instances of judges who had complained to regulators about the performance of advocates.

One judge reported not even receiving an acknowledgement from the regulator. Others expressed frustration at “the apparently lacklustre or uninterested responses” from both the SRA and the BSB. Any lack of confidence in the regulatory structure in fulfilling its purpose of assuring competence and performance and dealing with practitioners who fall short will have consequences.

If complaints from judges lead to no response or action from regulators, and judicial confidence in the competence and performance of advocates is then reduced, we can hardly be surprised if wider public confidence in legal services and their regulation is jeopardised.

In short, the quality of regulation and of regulators (including in the willingness or ability of regulators to address issues raised) is just as important to overall public perception and confidence in legal services as the performance of the regulated practitioners. If neither is up to the expected standard, deeper challenges exist.

## VIEWPOINT 2: PUBLIC CONFIDENCE IN COMPLAINTS AND REDRESS

The following views are recorded with no assessment of whether the underlying actions truly justify them, and therefore without implying any necessary fault. They do, however, reflect views formed as a consequence of those actions, and therefore deserve careful consideration as causes of a weakening of public confidence in regulation.

The complaints and redress structure appears complicated. Complainants do not readily understand the distinction between service and conduct. Nor do they understand the different roles of the Legal Services Board in relation to the Office for Legal Complaints (OLC) and the Legal Ombudsman (LeO), the OLC in relation to LeO, LeO in relation to the regulators, the Solicitors Regulation Authority (SRA) in relation to the Solicitors Disciplinary Tribunal, and so on.

The scope of remit or jurisdiction is also poorly understood at best. If a complainant happens to approach the wrong body, or with the wrong issue, they are told that the matter is outside the scope of the body complained to (see also Viewpoint 1, page 48). But they are then not always given a clear, helpful or meaningful indication of where the appropriate jurisdiction does lie. Such fending off and buck-passing increases frustration, and leaves dissatisfied consumers with an even greater feeling of isolation.

It is also common for complainants to receive no response, or very delayed responses, from law firms and from regulators. The feeling of being ignored only adds to the sense of grievance.

Indeed, it reinforces a deep-seated suspicion that lawyers and those who oversee them are 'all in it together'. When a regulatory body is paid for through the practising certificate fees collected from lawyers by that regulator, complainants often feel that the regulator will not wish to undermine its revenue by upsetting those who provide it ("He who pays the piper calls the tune").

This suspicion is further fueled when, for instance, a regulator refuses to carry out an investigation when asked to by a disciplinary tribunal. Similarly, when there is a difference of recollection as between a complainant and a provider, it is difficult for the complainant to understand why the provider's statement is taken as fact when their statement is put to further proof or requests for 'evidence'.

Yet more dissatisfaction is caused by regulators insisting that certain documents can only be submitted in a particular format, and by concerns about the competence of investigators at the SRA and LeO or their ability to understand issues of legal practice.

It is particularly frustrating when complainants are required to offer evidenced detail about their complaints, but the regulator is not obliged to provide a detailed explanation for the rationale behind its decision to reject a complaint. A sense of not having been listened to, or of all factors not having been taken into account, is understandable.

As one complainant summed it up: "If you've been wronged by a lawyer, that's life. That's what they do and there is nothing you can do to right the wrong. The SRA is nothing but a good idea without any authority or, indeed, any staff with any understanding of what their own website claims they do!"

This view is also supported by a solicitor: "their internal disciplinary process ... is in my view arbitrary", staff "are poorly trained and supervised", and "it does not follow its own policies or guidelines and it does not really matter if they don't as there is no one to take them to task in this regard".

*(continued)*



## **Viewpoint 2: Public confidence in complaints and redress (continued)**

A particular cause of concern is the operation of the Compensation Fund (see paragraph 5.3.1). This is a key component of public confidence in redress against defaulting practitioners who have been dishonest or failed to account for clients' money.

Most of the concern is expressed in relation to the SRA being the controller of its own fund. This is in part driven by the perception that its decisions on complaints will have a direct effect on claims on the fund and therefore on the future liability of solicitors to contribute to it.

There are different ways in which the regulator can be seen to be directly influencing claims outcomes:

- (1) The SRA both investigates and prosecutes cases of professional misconduct. It therefore frames the charges that will be ruled on by the SDT. By not alleging dishonesty in those charges, the regulator is thought to reduce the chances of a claim being made on the Compensation Fund (see also Case 2013).
- (2) On occasions, the failure of the SRA to make certain allegations has been the subject of comment by the SDT ("there were, surprisingly, no allegations of lack of integrity, recklessness nor ... behaving in a way that maintains the trust the public places ... in the provision of legal services ... which the tribunal would normally expect to see in cases of this nature").
- (3) When dishonesty cannot be the basis for a claim against the Compensation Fund (where loss alone would be sufficient), the alternative of failure to account requires further proof of hardship suffered by the claimant. Taking dishonesty out of the equation (by not alleging it and effectively putting the onus on a claimant to prove it) is therefore seen as further reducing the prospects of successful claims (because a claimant does not have sufficient evidence of a practitioner's intent, did not suffer loss, or finds the enquiry into hardship too intrusive or burdensome).
- (4) Further, for a compensation claim to be successful, the claimant's loss must have arisen "in the course of an activity of a kind which is part of the usual business" of the provider. This allows the regulator to make a decision, long after the event in question, that something was not 'part of the usual business' of a solicitor and so avoid a claim. It rather begs the question why, if one of the main purposes of a compensation fund is to maintain public confidence in lawyers and legal services, a client is not entitled to assume (unless expressly told otherwise at the time) that, when they go to a solicitor, everything that the solicitor then does is part of their usual business.

Whatever the merits of the regulators' policies and processes, the communication and perception of them clearly needs attention. When the facts as described would appear to warrant some response, a reply of 'no action is being taken', or 'no redress is available' cannot be expected to inspire confidence.

Perhaps we should not be surprised in all these circumstances if the public think regulators are inept, or in the profession's pocket, or biased in favour of practitioners, or even (in a word sadly all-too-frequently used in this context) 'corrupt'. We must, though, be troubled.

As a result of the representations and submissions made to me during the course of this Review, there are clearly concerns about the competence, quality and performance of some providers in the legal services sector.

These are not limited to those who currently sit beyond the reach of regulators. More disturbingly, they apply with equal force to those who are authorised and within that reach (see paragraph 5.2.2.2 and Case Study 5 (will-writing, page 181), 5.5.3 (criminal and youth court advocacy) and 5.7.4 (immigration advice and services).

The concerns are expressed by a broad spectrum, including clients and consumers, judges, regulators, and other practitioners.

This leads to:

### **Finding 9**

There are persistent concerns about variability in the competence and quality of:

- will-writing services;
- criminal representation and advocacy;
- youth court representation and advocacy; and
- immigration advice and services.

Regulation and enforcement in relation to immigration advice and services is further complicated by differences in powers and approach as between regulators established under the 2007 Act and the Immigration Services Commissioner (see paragraph 5.7.4).

Unfortunately, one of the principal components of the Legal Services Act framework for dealing with client dissatisfaction and fractured confidence – the Legal Ombudsman – is itself under pressure. This leads to:

### **Finding 10**

The Legal Ombudsman has struggled in different ways almost since its formation to deliver a stable, timely and cost-effective process for dealing with consumer complaints.

In part, this is due to underlying flaws in the parameters of the ombudsman scheme within the Legal Services Act 2007. It also reflects difficulties in the resourcing and operation of the scheme in practice.

Consequently, a further manifestation of inflexibility arises in relation to the Legal Ombudsman. Statutory restrictions on jurisdiction and process mean that consumers' expectations of their ability to refer an unresolved complaint about legal services cannot be met.

Further, the decisions of the various regulatory bodies can also vary as between each other where a complaint relates to the conduct of different professionals within the same firm, as well as from the conclusions of the Ombudsman.

The Ombudsman also has to act on individual complaints, rather than on a group of related complaints against the same provider, or on its own initiative, or to carry out a thematic review. The structure almost inevitably sets up the Ombudsman and

providers in opposition to each other, raising issues of providers' cooperation with any investigation as well as with disclosures to complainants.

Therefore:

***Finding 11***

The structure and processes under which the Legal Ombudsman must investigate and resolve consumer complaints do not permit the most comprehensive, coherent, consistent or cost-effective outcomes, whether for individual consumers, or the sector generally. Opportunities for more efficient investigations, shared learning, thematic reviews and market feedback are excluded.

*“Opportunities for more efficient investigations, shared learning, thematic reviews and market feedback are excluded”*

### **3.9 Regulated and unregulated providers**

The current framework presents an ‘all-or-nothing’ contrast between who is regulated for the provision of legal services and who is not. It is easy to use shorthand expressions to refer to ‘regulated’ and ‘unregulated’ providers or services. However, as with many aspects of legal services regulation, the distinction can be subtle – and subtly misleading.

I am seeking in this Review to address a number of aspects of currently ‘unregulated’ provision of legal services where there is a sense that this could expose consumers to unwarranted risk, harm or detriment. It might therefore be helpful to gather some thoughts at this point about the nature of the ‘unregulated’.

1. In the context of the regulation of legal services, the primary framework is the Legal Services Act 2007. On this basis (and for the purposes of this Review), ‘the regulated’ means those who are authorised persons under the Act for one or more of the reserved legal activities (see paragraph 3.1(2)). These are individuals who hold a professional title or relevant qualification, and entities that are licensed as alternative business structures (see paragraph 3.1(5)).

2. As a consequence, the broadest definition of ‘the unregulated’ is anyone who is not an authorised person and is providing non-reserved legal services. The YouGov survey (2020: page 44) found that regulated lawyers represented barely a third of all sources of help used by individuals who faced a legal issue. Consequently, a varied group of ‘the unregulated’ constituted 68% of sources of help (see paragraph 2.4.2 above).

3. We should ask why two-thirds of those who have legal needs are either choosing not to consult 'the regulated' or feel that they cannot. This alone suggests that the current approach to the regulated and protected provision of legal services does not meet the needs and expectations of the society, or the rule of law, that it is supposed to serve.
4. Compared with citizens who used regulated providers and are therefore entitled to the full protection of legal services regulated under the 2007 Act, twice as many are seeking advice and assistance for which that protection is not available. This does not inevitably mean that there is *no* protection available to them. But it does beg the question of whether protection, where it exists, is adequate and comparable.
5. However, it is important to recognise that more than a half of all 'the unregulated' sources of help were family and friends. It would be unreasonable and impractical to suggest that such informal advice and assistance should be subject to regulation. Accordingly, at 32% the revised scale of 'the unregulated' as sources of help is the same as 'the regulated' (YouGov 2020: page 44).
6. The sources of help within this revised notion of 'the unregulated' are not specifically qualified or regulated for the provision of legal advice and assistance. Nevertheless, the vast majority can probably and reasonably be assumed to be responsible and careful in the help they give (for example, as law centres, charities, social workers, and councillors).  
Some of 'the unregulated' will also be regulated as professionals in their own right (such as doctors, accountants, and financial advisers). For this group, the pertinent question is whether their alternative regulatory arrangements are adequate and comparable in the context of any legal advice and assistance they offer.  
This is why I leave open the possibility in Part 2 of this report (see paragraph 6.5.3) that this segment of 'the unregulated' might still be subject to, say, a code of conduct and a sector-wide consumer complaints process where there is insufficient comparability.
7. Despite this alternative personal regulation and a reasonable expectation of responsible help, those who are advised or assisted by these sources of help on legal issues will not have protection or redress of the same nature or degree as those who use 'the regulated'.



In other words, in addressing their legal needs, half of individuals will have law-specific protection and redress and half will not. Given the comparable scale of provision by both 'the regulated' and 'the unregulated', it must be reasonable to question whether the outcome in relation to this broadest view of the latter is acceptable.

8. In fact, the more common use of the expression 'the unregulated' is a much narrower group. For example, the YouGov survey (2020) referred only to human resource and business consultancies, McKenzie Friends, and specialist will-writers.

In a more extensive review of unregulated provision, the Legal Services Board (2016b) also identified online providers, landlord advice and tenant eviction services, trademark and patent providers, invention promotion companies, and timeshare release companies.

9. Taking this narrower group of 'the unregulated', the evidence of their effect on the legal services sector is often harder to pin down. At one level, because the activities are not regulated and do not need to be identified as legal services, it is arguably simply impossible to know the true extent of unregulated provision.

This absence of direct evidence does not mean, though, that such provision is necessarily insignificant or unproblematic. Indeed, there is some evidence from YouGov (2020: pages 72-73) that those who use unregulated providers are significantly more likely to report dissatisfaction with the service delivered.

As with regulated legal services, though, this will probably ignore a substantial number of 'silent sufferers' (see paragraphs 2.4.4 and 2.6). This all suggests that providing consumers with a route at least to complaint investigation and redress in relation to unregulated providers would be beneficial in increasing consumer protection and confidence (see also paragraph 7.3.1).

10. Looking at the evidence that is available, for example, suggests that for-profit unregulated providers accounted for only 3% of legal problems for which advice or assistance was sought (LSB 2016b: page 1).

Similarly, the Competition & Markets Authority found that about 4% of individuals had used an unregulated provider (2016: paragraph 2.41). On the other hand, the YouGov survey reported unregulated providers as the main adviser for only 1% of all types of legal issue, rising to 2% for family issues (2020: paragraph 5.7).

It can therefore be tempting to emphasise this lack of scale and market penetration in arguing that the nature and extent of the problem in relation to this narrow group of 'the unregulated' does not justify any need for regulatory action. In my view, though, such a claim takes the scale of the entire market as its point of comparison and this provides a misleading assessment.

11. Looking at level of activity, rather than proportion of providers, the LSB has reported that paid-for legal services bought from unregulated providers accounted for a greater market share.

This shows an average 5% share, rising to up to 13% for divorce, to 11% for property, construction and planning, to 9% for wills, trusts and probate, and to 8% for intellectual

property (2016b: page 1). Also, for example, unregulated providers of online divorce services could be reaching up to 30,000 customers a year (2016b: page 20).

12. Even on the YouGov data (2020: paragraph 5.7), unregulated providers are shown with the same level of market penetration across the market as barristers and other regulated lawyers (except solicitors and licensed conveyancers).

For some legal issues, again the level of market penetration is the same as or higher than that for barristers (consumer problems, family, property, construction and planning, and wills, trusts and probate), for licensed conveyancers (property, construction and planning, and wills, trusts and probate), and for other regulated lawyers (consumer problems, family, and property, construction and planning).

13. Therefore, the level of market activity is the same or higher for the narrowly defined group of 'the unregulated' than it is for certain other professions or elements of 'the regulated'. In that case, there must be a strong argument that, for the comparable protection of consumers, 'the unregulated' should be regulated to the same extent as 'the regulated'.

(There is an alternative, but I think less appealing, argument on the same analysis. This would be that, if the unregulated do not need to be regulated, then some of the currently regulated do not need to be, either. Arguably, the present framework is imposing unnecessary regulatory costs that have to be borne ultimately by consumers who choose the regulated rather than the unregulated.)

14. The LSB report also noted that "many unregulated providers are based primarily or entirely online" (2016b: page 1). Indications are that the rate of growth in technological provision has increased since then. For example, LawtechUK (2020: page 4) reports that investment in legal technology in the UK has grown to almost £300 million.

The LSB also cautions about consumers not making informed choices of their providers and the dangers of misleading advertising drawing them in to unregulated technology-based provision. Consumers could also be tempted by the offer of free online information, and then referred to unregulated sources of follow-up advice (whether human or technological, and either paid for or also provided free to consumers but actually funded by advertisers).

15. I record in paragraph 7.1 how the Covid-19 pandemic led to an initial increase in the demand for legal advice and support, including online. As the consequences of the crisis play out, there is an increased need for people to seek advice, for example, in relation to wills, probate, employment, housing, benefits and debt.

This increase in demand, at precisely the moment at which there is apparently a risk of the weakening or disappearance of 'the regulated' (see paragraph 7.1), can only lead to greater reliance by consumers on 'the unregulated' (in both the broad and narrow senses).



16. It is a mistake to assert or believe that 'the unregulated' (in the narrow meaning) are completely unqualified, unethical, uninsured or driven entirely by the profit-motive. For example, the LSB report showed that many of the people working in the unregulated sector are law graduates (2016b: pages 20, 24 and 25). It also includes non-practising (or former) lawyers.

The unregulated sector also includes advisers who subscribe to voluntary self-regulation, for example as will-writers (see paragraph 5.3.1), mediators (see paragraph 4.6.2), paralegals (see paragraph 4.8.3.2) or providers of online services (see Case Study 1, page 140). These arrangements usually include codes of conduct, professional indemnity insurance and complaints processes.

It is not therefore true that 'the unregulated' are all seeking somehow to avoid regulation or are inclined to unethical behaviour.

17. Finally, I have already addressed the perception that, in its narrow meaning, the level of provision of legal services by 'the unregulated' is too small to be regarded as being in real need of attention (see points 10-12). In a similar vein, I have also heard the suggestion that the nature of legal issues dealt with by this group is often too 'small' or 'relatively insignificant' to consumers to be worth regulatory attention.

This is also difficult territory. For many lawyers, a client's issues might appear to be relatively 'low value' or 'minor', compared to many of the other matters that they deal with. However, for the client concerned, the issue might relate to their home, family relationships or life-savings. What is small, low-value or minor to some could be of overwhelming importance and significance to others.

We send a dismissive message if any of these issues are thought to be too unimportant to be worthy of regulatory protection, particularly if the consumer feels that they are taking legal advice at a time of vulnerability, and in ignorance of any difference between regulated and unregulated providers.

We need to avoid creating any sense of difficulty in accessing regulated legal services, of exclusion from protection or redress, or of frustration at the reactions of providers, regulators and an ombudsman (see Viewpoint 1, page 48).

This is necessary to avoid undermining public confidence in the real meaning and value of the rule of law, in the availability of legal advice and representation, and in the integrity of legal services regulation.

### 3.10 Summary of issues that need to be addressed

What the findings of this report confirm is the nature and range of issues that in my view will need to be addressed in any future reform of the legal services regulatory framework.<sup>25</sup> They point to some significant shortcomings and challenges arising from the present structure for the regulation of legal services and those who provide them.

In summary, they are:

- inflexibility arising from statutory prescription;
- competing and inappropriate regulatory objectives;
- a pivotal set of reserved legal activities that are anachronistic and distort the approach to activities that ought to be regulated;
- title-based authorisation that leads to additional burden and cost in relation to some activities being more heavily regulated than they need to be (resulting in higher prices to consumers);
- the unsatisfactory nature of the separation of regulation and representation;
- the existence of unregulated providers who cannot be brought within the current regulatory framework (with an expectation that their numbers will increase);
- the emergence and rapid development of lawtech (see paragraph 4.9) that is capable of offering legal advice and services independently of any human or legally qualified interface or interaction, at scale, and is beyond the reach of the current framework;
- a regulatory gap that exposes consumers to potential harm when some activities are not regulated when they ought to be, and puts legally qualified practitioners at a competitive disadvantage;
- increasing costs of legal advice and representation, reducing further the availability and affordability of legal services for many; this encourages either greater self-lawyering and litigants-in-person, or nudges increasing numbers of citizens into the world of unregulated providers or lawtech;
- consumer confusion, caused by the existence of both regulated and unregulated providers for the same legal activities, and a profusion of differently regulated professional titles;
- concerns about variability in the competence and quality of legal services, particularly in relation to will-writing, immigration advice and services, and criminal and youth court advocacy and representation;
- inadequate or incomplete consumer protection, that is not consistent with a widespread consumer expectation that all legal services and those who provide them are subject to some form of regulation and protection;

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25. See also Mayson (2020a). In a judgement of the Court of Appeal, the legislative framework was described by Christopher Clarke L.J. as “somewhat tortuous”: *Kanat Assaubayev & Others v. Michael Wilson & Partners Ltd* [2014] EWCA Civ 1491.



- concerns about the competence and quality of responses made by front-line regulators and the Legal Ombudsman in relation to complaints by dissatisfied and aggrieved clients and consumers; and
- as a result of all of these issues, the risk of falling public confidence in legal services and their regulation.

### **3.11 Political risks**

This Review was conducted making no assumptions about the timing of legislative reform. Nevertheless, its work has been conducted on the basis that reform is a question of ‘when’ rather than ‘if’.

I therefore seek to offer, in Part 2 of this report, findings and recommendations that represent a measured alternative approach for the future – for consideration whenever the timing for longer-term reform is judged to be right.

However, I have frequently been asked through the course of the Review two important questions. The first is, ‘What is the harm we are trying to address here?’. The second is, ‘Is there really any political appetite to look at this?’. There is, of course, some potential link between the two, in the sense that unaddressed consumer or economic harm might well gain political attention.

To conclude this initial assessment, it might be helpful to look at these two questions.

#### **3.11.1 Where’s the harm?**

Fifteen years after the Clementi Review, and 12 years after the enactment of the Legal Services Act 2007, it is possible to identify a number of shortcomings in the present regulatory arrangements for legal services. These shortcomings particularly, but not exclusively, affect consumers and small businesses.

I shall not repeat them here (they are set out in paragraph 3.10), but the current structure either perpetuates or cannot address a number of shortcomings, challenges, harms, or detriment.

These factors combine to exacerbate a growing crisis in access to justice and to legal services generally, by highlighting the effects of the regulatory gap, a reduction in available public funding, the increasing activities of unregulated providers, and the rise of lawtech.

It is common for the crisis in access to justice to be attributed mainly to changes in public funding. However, even if one were to accept the claim that cuts in funding for legal aid and court infrastructure are adding to the crisis, I do not subscribe to the view that this offers a complete or even substantial explanation of the crisis.

When the cost of lawyers is beyond the reach of most citizens, questions must also be asked about the basis of that cost. If the expense of qualification and regulation

contributes to the costs of legal practice and the price to consumers (as it undoubtedly does), the ability of all citizens to access legal advice and representation is undermined.

In turn, this can compromise the public interest in the rule of law and the effective enforcement of legal rights and duties. It is also aggravated by any undermining of public confidence in legal services and their regulation, as described in paragraph 3.8.

I am not suggesting that the presence, absence, burden or cost of regulation explains the difference between the cost of legal services and the ability of citizens to afford them, such that changes in regulation would be justified for that reason alone.

Equally, I am also not suggesting that greater public funding can reasonably be expected to make up the difference.

However, I do believe that reform to the regulation of legal services could improve the targeting, proportionality and cost of it, as well as provide opportunities for alternative or additional regulated provision to address currently unmet consumer needs for legal advice and support.

In this sense, I regard the most telling evidence of harm or detriment to consumers to be the increase in unmet need for advice and representation and the growth of self-representation.

I do not deny that there is an 'access to justice crisis'. However, for me, that does not describe the entirety of the problem. There is a much wider crisis of access to appropriate support in times of need. It is a reflection of the 'triple asymmetries' that affect too many consumers of legal services.

These asymmetries are:

- asymmetry of information as between clients and lawyers – for which more public legal education is not the answer;
- asymmetry of power, both as between clients and lawyers and between (relatively) vulnerable consumers and (relatively) better resourced opponents – for which more lawyers is not the answer; and
- asymmetry of representation, when consumers are not professionally represented but their opponents are – for which more public funding is not the answer.

As Sandefur (2019) points out, the way to deal with citizens' unresolved issues is not necessarily to describe them as 'unmet legal needs', for which the remedy is assumed to be more legal services. Instead, they can be identified as 'unresolved problems governed by civil law'. What is needed is "a wider range of options" leading to "results that satisfy legal norms" (2019: page 50).

If the purpose of legal services regulation is to protect the interests of the public and the legal system itself, the currently regulatory framework is failing – not mainly in what it does achieve, but more in what it does not and cannot achieve.

Accordingly:

**Finding 12**

There is sufficient known or potential detriment to the interests of consumers and providers of legal services, and to society at large, arising from the shortcomings in the current regulatory framework to justify further reform.

I understand the assertion that the case for change might not be sufficiently compelling to subject practitioners to further regulatory reform at a time when there is continuing political and economic uncertainty.

However, the contention that change now would intensify other current factors or concerns cannot be allowed to delay all reform. My task in this Review was not to look at regulatory reform considering only the perspective or concerns of any particular group of providers or users of legal services or other interested parties.

*“If the purpose of legal services regulation is to protect the interests of the public and the legal system itself, the current regulatory framework is failing – not mainly in what it does achieve, but more in what it does not and cannot achieve.”*

In the end, I have become far more concerned about the consequences for ordinary citizens of not being able to access or afford regulated legal services. They are increasingly driven into taking no action at all, self-representation, or relying on pro bono or voluntary services. They also increasingly venture into the world of unregulated and tech-based providers (against the worst of whom they have no meaningful protection or redress).

Even the Solicitors Regulation Authority has recently acknowledged that the “rate of change makes it increasingly difficult for the regulatory framework laid down by the Legal Services Act to remain relevant”.<sup>26</sup>

I am certain that the current framework is not capable of doing all that it should; and that more substantial reform is still, understandably, some way off. However, I am not persuaded that ‘no change’, or ‘no change yet’, is an outcome that I can support. Short-term reform is needed, however far off longer-term reform might be.

My proposals for the short term are therefore included in Chapter 7. The need for these proposals has intensified through 2020 as the Covid-19 pandemic has taken hold and ripped up many of the assumptions and foundations on which the current regulatory framework has been built.

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26. See <https://www.sra.org.uk/sra/corporate-strategy/>.

*“ordinary citizens ... increasingly venture into the world of unregulated and tech-based providers (against the worst of whom they have no meaningful protection or redress)”*

### 3.11.2 Political appetite

In so many ways, the issue of political appetite for reform of legal services regulation rests on an assessment that it would be neither necessary nor appropriate for me to make. I therefore do not attempt to make it.

I take the view that it is not for me (or, I suspect, for anyone else outside government) to second-guess when ministers might come to a different conclusion.

The main purpose of this Review is to present to the Ministry of Justice a carefully considered pathway to reform for whenever the timing is judged to be right. However, I do wish to venture some observations that those who read this report might take into account. There are four themes that I would like to pick up on by way of background and context.

The first is the previous Lord Chancellor’s speech to the Lord Mayor’s Banquet 2019<sup>27</sup>. In it, David Gauke MP rightly emphasised the importance of the rule of law. In doing so, he echoed the primacy of the public interest (see paragraph 4.2). He referred to the principles of the rule of law, namely, equality under the law, access to justice, government being subject to the same law as anyone else, and a framework of law that is clear and certain.

He then said that these “underpin and protect so many aspects of our way of life, from the liberty and rights of the individual to the strength of our economy. In a changing and uncertain world, they are principles that act as an anchor for us.”

The nature of this underpinning can be seen in the UK’s position in the World Bank’s annual assessment of the ease of doing business in countries around the world. The UK is currently placed 8<sup>th</sup> out of 190 countries benchmarked (World Bank 2020: page 4). Our economic strength and global competitiveness needs to be maintained or even bettered in a post-Brexit, life-after-coronavirus, world.

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27. Available at: [https://www.gov.uk/government/speeches/lord-mayors-banquet-2019-david-gaukes-speech?utm\\_source=01250f93-266f-4a02-a8f6-0f184cdad63e&utm\\_medium=email&utm\\_campaign=govuk-notifications&utm\\_content=immediate](https://www.gov.uk/government/speeches/lord-mayors-banquet-2019-david-gaukes-speech?utm_source=01250f93-266f-4a02-a8f6-0f184cdad63e&utm_medium=email&utm_campaign=govuk-notifications&utm_content=immediate)

The importance of this ranking is underlined by the Foreword to an earlier edition of the report (World Bank 2015: page v), which emphasised that what is important for an economy's success or failure

is the nuts and bolts that hold the economy together and the plumbing that underlies the economy. The laws that determine how easily a business can be started and closed, the efficiency with which contracts are enforced, the rules of administration pertaining to a variety of activities ... are all examples of the nuts and bolts that are rarely visible and in the limelight but play a critical role.

The law and legal services are vital to economic prosperity, and effectively regulated legal services are themselves critical to the nuts, bolts and plumbing.

However, Mr Gauke went on to suggest that there has been a regrettable deterioration in our public discourse that has contributed to a "growing distrust of our institutions – whether that be Parliament, the civil service, the mainstream media or the judiciary".

As a consequence, a "dangerous gulf between the people and the institutions that serve them has emerged", while the reality is that the legal system and the judiciary "offer us the kind of confidence and predictability that underpins our success as a society".

It is important, therefore, that we are not carried away by misplaced confidence or rose-tinted spectacles. The World Justice Project's annual rule of law index has seen the UK slipping down the tables.

Since 2016, we have fallen from 10<sup>th</sup> place to 13<sup>th</sup>, and the index itself has dropped from 0.81 to 0.79. We score particularly badly for civil justice, where we are ranked 17<sup>th</sup>, and especially in relation to accessibility and affordability (World Justice Project 2020).

The question of public confidence in legal services and their regulation is a recurring matter of concern in this Review (cf. paragraphs 3.8, 4.3.1, 4.3.5, 4.5.2.3, 6.2.3, 7.1 and 8.2).

In a further, important, passage, the Lord Chancellor cautioned:

Our institutions have evolved over time to reflect the changing needs of our society. And that has not stopped. Our institutions are strong and effective because they continue to change organically as society demands, but not immediately in knee-jerk reactions to events in the news. Change comes with urgency sometimes, but must always be approached in a considered way to avoid negative unintended consequences....

That view – that our institutions are not perfect, they must change to reflect society but they are beneficial and essential to our way of life – is under attack. Rather than recognising the challenges of a fast-changing society require sometimes complex responses, that we live in a world of trade-offs, that easy answers are usually false answers, we have seen the rise of the simplifiers. Those grappling with complex problems are not viewed as public servants but as engaged in a conspiracy to seek to frustrate the will of the public.

These themes of the public interest, a need to evolve in a considered and sometimes complex and nuanced way, but avoiding knee-jerk, easy solutions, resonate very much with the approach of this Review.

Second, the departmental plan of the Ministry of Justice for 2019-2022<sup>28</sup>, includes objectives, for example, to promote the rule of law and the independence of legal services to provide a solid foundation for our status as a financial and legal global centre.

It also seeks to ensure that the UK remains a highly attractive place to conduct legal business, focussing on developing the UK as a key lawtech market, and that the law remains fit for the future and ready to address legal issues arising from new technologies and changing societal trends.

A premise of this report is that such objectives are underpinned, at least in part, by a modern, robust, risk-based and targeted approach to the regulation of legal services and of those who deliver them.

Third, the Ministry's 'Legal Services are GREAT' campaign emphasises that the "sector is one of the UK's greatest exports and has supported trade and commerce around the world for generations". It contributes billions of pounds to the UK economy every year (see paragraph 2.2), and "is at the heart of the UK's future as a global, outward-looking, free-trading Britain".

Again, these outcomes cannot be achieved, nor our position as a pre-eminent jurisdiction and the second-largest legal economy in the world maintained, without appropriate and effective regulation of legal services.

As Sir Geoffrey Vos, Chancellor of the High Court, recently explained (LSB 2020: page 23):

Regulation is a comparative exercise. National and international businesses compare the regulatory environments in different countries. They will choose the most hospitable environment for their innovative projects. It is critical for UK regulators to make the right choices so that a balance is struck between adequate protection and promoting innovation.

Fourth, in other related sectors, there is a current appetite to re-examine regulatory approaches and to consider new structures to strengthen the protections available to citizens for the risks arising from professional activities.

For example, in July 2019, the Insolvency Service launched a call for evidence on a review of the regulation of insolvency practitioners.<sup>29</sup> A working group on the regulation of property agents was established by the Ministry of Housing, Communities and Local Government and has recently reported.<sup>30</sup> In the regulation of health

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28. See: <https://www.gov.uk/government/publications/ministry-of-justice-single-departmental-plan/ministry-of-justice-single-departmental-plan--3>.

29. See: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/816560/Call\\_for\\_Evidence\\_Final\\_Proofed\\_Versionrev.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/816560/Call_for_Evidence_Final_Proofed_Versionrev.pdf).

30. See: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/818244/Regulation\\_of\\_Property\\_Agents\\_final\\_report.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/818244/Regulation_of_Property_Agents_final_report.pdf).

professions, the Government has also recognised the need to free regulatory bodies from the “constraints of prescriptive and bureaucratic legislation”.<sup>31</sup>

While these developments do not necessarily signal any short-term intention to reform legal services regulation, they might nevertheless indicate that the door to regulatory reform is not inevitably closed. Indeed, with the Covid-driven disruption and consequential re-design that we now face in so many fundamental aspects of our way of living and working, I would hope that supportive, independent, strong and effective legal services are at the forefront of our national regeneration.



### 3.12 Conclusion

While the 2007 reforms have been mainly beneficial overall, there has nevertheless been some additional cost and tension in the regulatory structure. The Act might best be characterised as an incomplete step towards restructuring legal services regulation.

For reasons that are understandable, it did not fully follow through on some key elements of the structure, such as review and reform of the reserved legal activities, the known regulatory gap, and the separation of regulation from professional representative interests.

This lack of follow-through has led to increasing challenges to the integrity of the regulatory framework as the legal sector has evolved and developed since 2007.

The Competition & Markets Authority also presented a detailed analysis of how the Legal Services Act 2007 does not meet its own requirements for better regulation (Competition & Markets Authority 2016: paragraphs 6.8 to 6.70). These require (in section 3(3)) transparency, accountability, proportionality, consistency, and targeting only at cases in which action is needed (usually based on assessed risk).

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31. See:

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/820566/Promoting\\_professionalism\\_reforming\\_regulation\\_consultation\\_reponse.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/820566/Promoting_professionalism_reforming_regulation_consultation_reponse.pdf).

As a consequence:

***Finding 13 and conclusion***

The current regulatory structure provides an incomplete and limited framework for legal services regulation that is not able in the near-term and beyond to meet the demands and expectations placed on it.

However, this does not lead me to the conclusion that, in some way, the objective of reform should be to ‘finish the job’ of the Clementi Review and whatever the 2007 Act might have left incomplete or problematic. Instead, I envisage an opportunity to revisit and develop further rather than to ‘make good’.

With this in mind, I shall now turn to how an alternative regulatory future might be conceived. I shall do this, first, by considering longer-term reform in Part 2 and, secondly, by looking in Part 3 at what a more immediate ‘refurbishment’ of the current structure might achieve in the shorter-term.

*“the current structure either perpetuates or cannot address a number of shortcomings, challenges, harms, or detriment”*



## PART 2

### LONGER-TERM REFORM





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## CHAPTER 4

### RISK AND SCOPE

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#### 4.1 Introduction and objectives

This part of the report explores some recommendations for ways in which the findings and issues set out in Chapter 3 might be addressed in a longer-term future for legal services regulation. Although these recommendations are intended to be read as a coherent whole, elements might nevertheless also be considered independently.

I have adopted the following objectives as foundations for the reforms discussed:

- (1) A rationale for the regulatory framework based on a primary objective of protecting and promoting the public interest.
- (2) Addressing the regulatory gap.
- (3) Replacing the current narrow gateway of entry into legal services regulation with broader scope.
- (4) The ability to apply before-, during-, and after-the-event regulatory requirements independently of each other, in response to assessed risk in the services delivered.
- (5) Future entry into the regulatory framework should not be restricted by reference to reserved legal activities or professional titles, and should therefore be open to all 'providers of legal services'.
- (6) An appropriate balance between regulating legal services (activities) and those providers who continue to hold a professional qualification (titles).

## 4.2 Public interest foundations

### 4.2.1 A primary regulatory objective

The starting point is the stated rationale for any new regulatory framework. I suggested in one of the Review's working papers that the public interest should be the principal rationale for the regulation of legal services.<sup>32</sup>

Through the course of this Review, no-one has taken issue with this. In a position paper submitted in response to the Review, the Law Society of England & Wales did, though, refer to such precedence as only "superficially attractive", not least because of the lack of shared understanding or agreed definition.

I agree with this definitional concern (which I have sought to address by elaborating the relevant aspects of the public interest for regulatory purposes). I would also observe that I am not suggesting that the public interest should be the *only* regulatory objective, but rather the *primary* one.

Accordingly:

#### **Recommendation 1**

The primary objective for the regulation of legal services should be promoting and protecting the public interest.

For this purpose, 'the public interest' should be understood as an objective to secure the fabric of society and the legitimate participation of citizens in it. In this sense, sector-specific regulation is particularly justified to ensure:

- (a) that the **public good** of the rule of law, the administration of justice, the international standing and economic contribution of our courts and legal services, and the wider interests of UK society, are preserved and protected; and
- (b) that regulation secures the private benefit of appropriate **consumer protection**, where incompetent or inadequate legal services could result in harm or detriment to citizens, and particularly where such harm or detriment could be irreversible or imperfectly remedied.

The distinction between the two limbs is important, but it is worth highlighting that the second limb cannot be achieved without the first. In our approach to regulation, we must be sure to emphasise, and not to lose sight of, the fundamental constitutional importance of the rule of law and the independent, effective administration of justice.

While protecting consumers is important, the first limb can protect society from the risks not just of ineffective legal representation but also from the harmful effects and costs of *competent* legal advisers and representatives who pursue specious or aggressive litigation and outcomes on behalf of their clients.

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32. See Mayson (2020b).

Middleton & Levi (2015) describe this as ‘abusive litigation’. It includes intimidating, demanding behaviour that is often justified as ‘merely acting in the client’s best interests’. Leitch emphasises the point (2017: 677):

Where there is a serious imbalance of knowledge, power, and resources between the parties, and the use of questionable – if legally permissible – tactics to maintain an advantage in litigation, there will be serious consequences for the weaker party. The prioritizing of the partisan commitment to client interests can obscure lawyers’ responsibilities to engage in a consideration of their competing responsibilities, or worse, be used as a justification for conduct that may further the client’s immediate interests and remain undetected by a party untrained or inexperienced in the process.

Similarly, in *Wright v. Troy Lucas & Rusz* [2019] EWHC 1098, a paid but unregulated adviser made claims on behalf of a claimant in litigation for which there was no evidence, made applications to the court that were misconceived, failed to ensure that the court’s directions were complied with, and failed to advise the claimant on the role of alternative dispute resolution and how it might benefit him.

The public interest objective therefore encourages regulation to consider *systemic* risks to the rule of law and the administration of justice, and to society and the economy in general, as well as to those who might be parties to a provider-client relationship.

*“The primary objective for the regulation of legal services should be promoting and protecting the public interest.”*

#### **4.2.2 Subordinate regulatory objectives**

The Legal Services Act contains other regulatory objectives, and it was never my intention to suggest that they should in future be ignored or forgotten. I think that a distinction could usefully be drawn, though, between objectives and outcomes.

Objectives should be those things that would lie entirely or substantially within the scope of a regulator’s control and reasonably available resources to achieve. Outcomes are desirable results or consequences, but they might not fall substantially within a regulator’s control or influence.

It would therefore seem to me unwise to set an outcome as a regulatory objective, and then seek to hold a regulator accountable for something over which they do not have at least substantial control.

Taking the current regulatory objectives, I would maintain the following as regulatory objectives for the future, albeit subordinate to the primary objective of promoting and protecting the public interest:

- (a) promoting the interests of consumers;
- (b) encouraging the independent, strong and effective provision of legal services (note that this would be broader than the current regulatory objective, which refers only to the legal profession – on the basis that society should expect and require that all providers are independent: cf. paragraph 5.5.3); and
- (c) promoting and maintaining adherence to a code of conduct that requires regulated providers of legal services to –
  - (i) act with independence and integrity;
  - (ii) maintain proper standards of work;
  - (iii) act in the best interests of their client (though subject to the requirements of the primary objective); and
  - (iv) keep the affairs of clients confidential.

The following current objectives should then be dealt with differently. In fulfilling their duties to comply with the primary and subordinate regulatory objectives, regulators should also take into account and facilitate so far as practicable, and not act in a way which is reasonably likely to undermine or be detrimental to the outcomes of:

- (a) improving access to legal services or to justice;
- (b) competition and innovation in the provision of legal services;
- (c) diversity among providers of legal services (including in terms of protected characteristics, geography, and organisational forms); and
- (d) public understanding of the citizen's legal rights and duties.

This approach would offer the clarity of an overriding regulatory objective without losing the benefit of regulatory decisions being shaped against the backdrop of other desirable purposes and outcomes.

## **4.3 Addressing the regulatory gap**

### **4.3.1 The nature and consequences of the gap**

The regulatory gap is one of the most problematic issues arising from the current structure of a mix of regulated activities, regulated individuals and entities, and professional titles.

The public view is commonly that all providers of legal services are regulated in the provision of legal advice and representation in return for payment, and that clients are therefore protected if something goes wrong. Consequently, the current regulatory gap leads to a situation where there is a mismatch between reality and public expectation about the extent and availability of protection and redress.

The regulatory gap arises from the distinction between the reserved and other (non-reserved) legal activities, combined with authorisation and regulation flowing from a professional title. Non-reserved legal activities do not require authorisation.

As a result, someone who is not legally qualified can legitimately offer those non-reserved services to the public without being subject to regulation (other than the general law and normal consumer protections).

However, once authorisation is given for one or more of the reserved activities, then all of a legally qualified practitioner's activities are subject to regulation – even if he or she (or the authorised entity) only practises in non-reserved areas.

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

Unregulated providers might, with relative impunity, not follow through on the advice or commitments that they have given, and can walk away from a client when the fancy takes them. They might also persuade clients that there is no available remedy (when legally there is) or that they should accept an outcome that leaves them in a worse position than effective legal advice and representation would have done.

Second, because of their assumption that all providers of legal services are subject to regulation, consumers might be less inclined to make proper enquiry of the expertise and experience of providers before instructing them. Research suggests that consumers and small businesses do benefit from 'shopping around', but that only about a quarter actually do so.<sup>33</sup>

This leaves a significant proportion of potential users of legal services who are then possibly less inclined to seek legal advice and representation at all. They can assume that it is unnecessary, too difficult, complex or expensive to instruct lawyers. They can remain unaware of the existence of alternatives even in the current structure, or less than fully aware of the consequences of their untested assumptions.



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33. See Legal Services Consumer Panel (2019a) and YouGov (2020); and paragraph 2.4.3.

### 4.3.2 Closing the gap

The assessment of the Competition & Markets Authority (CMA 2016) suggested that the regulatory framework does not adequately match expectations and the scope of regulation, and this should be considered further.

It remains an open question whether the goal should be to remove the regulatory gap, or increase the transparency to consumers of its existence (for example, by requiring all providers – whether authorised or not – to declare their regulatory status and the availability of any protection and redress available).

The coherence of a regulatory structure must surely be examined further where those individuals who do not hold a professional title may lawfully provide legal services to the public, yet are not subject to legal sector regulation. Indeed, they *cannot* be regulated by a front-line legal regulator even if they wanted to be.

Equally, those who are qualified (such as solicitors who might wish to offer a comprehensive will-writing and estate administration service) cannot avoid regulation even though Parliament has not mandated it for all elements of that service. They must currently compete with unregulated providers who are able to outsource the narrow reserved probate activity and so ‘escape’ sector regulation of any of their business.

In addressing the disparity between current expectations and the regulatory position, there could be three potential approaches:

- review the current reserved legal activities with a view to bringing higher-risk legal activities within the regulatory framework for the benefit of consumers;
- embark on a significant programme of public education to explain to consumers: the legal services that are and are not regulated; the providers who are and are not regulated to provide particular services; to whom and about what they may or may not complain; and the redress, insurance and compensation protection that is variously available depending on their choice of providers; or
- adopt a risk-based approach, with the differential use of regulatory tools that could result in all legal services that are offered to the public being subject to some form of targeted and proportionate regulatory oversight.

For the reasons that follow, I would prefer the third approach.

### 4.3.3 Alignment: extend the reserved activities

The extension of reserved legal activities, as envisaged by section 24 of the Legal Services Act, is a rather blunt (and possibly disproportionate) instrument for achieving the regulation of additional legal activities. Only a ‘legal activity’ can presently be considered for reservation, and so the extension of the regulatory net through reservation can necessarily only be achieved on a piecemeal, activity-by-activity, basis.

Experience under the Legal Services Act 2007 has also shown that such a piecemeal expansion of reserved activities is inherently challenging. Since the introduction of the Act, its powers to add or remove reserved activities have never been exercised, even



though there is increasing recognition that the current activities are incomplete or inappropriate.

Perhaps it is right that the threshold for reservation should be set at a high level. However, on this evidence, the prospect of any closer alignment between consumer expectation and regulatory coverage is likely to remain highly uncertain if alignment were to be based on the scope of the reserved activities.

Consequently, I conclude that alignment through extending the reserved activities will not be a sufficiently flexible, timely or cost-effective way of resolving the challenges of the regulatory gap. (I shall nevertheless later advocate a review of the reserved activities: see paragraph 5.2.2.)

In any event, the current consequence of the Legal Services Act 2007 is that extending reservation would result in authorisation being offered overwhelmingly to those who already hold a professional title rather than opening up the market for legal services. It would address neither the regulatory gap nor the access gap in any meaningful way.



Instead, by imposing a regulatory restriction (authorisation for a newly reserved activity) where currently there is none, such an extension would almost certainly result in the withdrawal and further exclusion from the legal services marketplace of currently unregulated providers who might be delivering a wholly competent and acceptable service to consumers.

There are competent, ethical and insured providers in the legal services market at the moment who happen not to be regulated because they do not have a professional title and offer only non-reserved services. Frustratingly for them, they have to compete against both regulated dabblers and unregulated charlatans, and there is nothing that the current regulatory framework will actually do to help them.

#### **4.3.4 Alignment: public legal education**

At the moment, there is a widespread consumer expectation that all legal services are in some way regulated and that there is protection or redress available to them as consumers. This seems to be founded on assumption or possibly even urban myth.

In England & Wales, it has never been the case that all legal services are regulated. Equally, though, it is almost certainly true that the distinction between reserved and non-reserved activities was not so generally known before the 2007 Act as it is now.



Changing such assumptions or myths could properly be said to be the goal of public legal education. Making consumers fully or better aware of when they are protected, how, and to what extent (and, correspondingly, when not) would be one clear way of better aligning their expectations and the reality of the regulatory framework.

However, the nature of legal services, and of consumers, and the recognition and timing of need, are such that this goal is not easily or cost-effectively achieved.

Also, if consumers do not always recognise that they have a legal need, even a full understanding of the regulatory landscape would not help if consumers did not consider themselves to be entering it.

Even such a full understanding would, under the current arrangements, still require consumers to appreciate whether, for example:

- they have a legal need;
- the advice and representation they need is a reserved activity or not;
- they are using – and possibly wishing to complain about – a solicitor, barrister, licensed conveyancer, legal executive (chartered or not), other title-holder, or unauthorised provider;
- if they are using a solicitor, the individual is in a regulated law firm, in an unregulated business, or a freelancer;
- their complaint is about service or professional conduct;
- indemnity insurance, a compensation fund, the Legal Ombudsman, a disciplinary tribunal, or an action for negligence offers the best route to the remedy they want.

It seems more than a little optimistic to expect public legal education to achieve this level of understanding across enough of the population even to meet most consumer needs most of the time. In fact: “Furthering the idea that lawyers have an exclusive ability to understand any law risks discouraging laypeople from learning about particular legal issues that are relevant to their lives” (Dunlap 2014: page 2822).

It is also highly unlikely that this understanding could ever exist for those members of the public who suddenly find themselves, say, in a police cell, or facing deportation or eviction.

In my view, alignment through public legal education or similar would be insufficiently effective, as well as too burdensome and expensive in achieving the desired outcomes.

This conclusion would be consistent with analysis of public financial education and improvements in financial literacy, which shows that such education makes virtually no difference to financial behaviour.<sup>34</sup>

#### **4.3.5 Alignment: increase the scope of regulation**

The 2007 Act sought to encourage competition and innovation in the delivery of legal services. It also generated the expectation that this would lead to better service, better value and fewer service complaints. In doing so, however, it created the possibility and prospect that perhaps as much as 80%<sup>35</sup> of legal services could be provided by those who cannot currently be regulated.

The Legal Ombudsman's statutory jurisdiction is also restricted to complaints about authorised persons. Even the development of voluntary jurisdictions would, almost by definition, still not extend to statutory redress from the providers in respect of whom there are the greatest regulatory or consumer concerns. These factors potentially increase the vulnerability of consumers.

The point has already been made (paragraph 3.10) that the increasing cost of legal services is reducing the availability and affordability of legal services for many. It is clear that the absolute cost of legal services has increased in recent years, and there has also been a clear increase in self-lawyering and litigants-in-person, as well as more nudging of consumers into the world of unregulated providers or lawtech.

Recognising these developments, at the same time as knowing that the current regulatory framework cannot adequately address the risks associated with them, presents a call to action. In my view, therefore, this third approach of extending the scope of regulation offers the better outcome:

##### **Recommendation 2**

Consumer expectations and regulatory reality should be aligned by at least allowing access to after-the-event redress for all consumers of legal services offered to the public commercially or for reward.

Consequently:

##### **Recommendation 3**

All legal services should be capable of falling within the regulatory framework, irrespective of who provides them.

At first sight, this would be a challenging proposition. It might appear potentially to be greatly increasing regulatory reach, presumably at some cost, and going against the grain of liberalisation and policies of deregulation.

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34. See Fernandes et al (2014), who found that financial education interventions explained only about one-tenth of 1% of the variance in financial behaviours, with even weaker effects for interventions directed at low-income individuals.

35. See Mayson (2020a: paragraph 4.5).

For me, the goal should not necessarily be one of deregulation or liberalisation, or even of competition, innovation or consumerism. Instead, consistent with the rationale for regulatory intervention in the sector (cf. paragraph 4.2 above), the goal should be 'right regulation' to achieve the appropriate public interest objectives.

If this suggests that more legal services should properly fall within the scope of regulation, then so be it. Indeed, it might be that, although broader in scope, a different starting point or emphasis of this sort could, overall, result in less regulatory activity if regulatory requirements and intervention are better targeted.

I am acutely aware of the link between regulatory scope, activity and cost. I fully accept that even appropriate and proportionate regulation will have a cost, ultimately borne by consumers.

Nevertheless, it might also be necessary to accept that 'right regulation' appropriately imposes that cost. I agree entirely with the CMA's observations that (2020a: paragraph 5.85):

changes to the regulatory structure are not solely to minimise regulatory costs, but to maximise good outcomes for consumers and the wider sector. More effective regulation, which may necessitate increased regulatory monitoring and enforcement, benefits the consumer interest and hence may justify additional regulatory costs that are outweighed by such benefits.

YouGov (2020) shows that there is in fact considerable activity by providers of legal help who currently fall outside the scope of legal services regulation (see paragraph 2.4.2).

At least in relation to emerging technology (on which see paragraph 4.9), even if the activities of 'alternative' or unregulated providers are presently at a low level relative to the whole market, they are nevertheless increasing. I also note that the growth of alternatives in fact applies more broadly across the sector and is not confined to lawtech.

We are, effectively, on notice in knowing that risks, vulnerabilities, threats and insidious impacts arising from technology and alternative or unregulated providers are already 'out there' in the legal services sector. Allowing them to increase and spread, unchecked, will in the end improve neither access to legal services nor public confidence in the provision and regulation those services.

*"All legal services should be capable of falling within the regulatory framework, irrespective of who provides them."*

Indeed, as Hook has pointed out, this expansion might take place beyond the immediate horizon and reach of legal services regulators. As Domingos once observed (2015: page 286): “People worry that computers will get too smart and take over the world, but the real position is that they’re too stupid and they’ve already taken over the world.”

Recent developments suggest that the impetus for technological innovation is perhaps more likely to come from new sources (Hook 2019: page 27):

the ‘unlawyered’ may be more effectively reached by services which do not present themselves as ‘legal services’ but rather as affordable, multifaceted solutions to problems approached from the client’s point of view. They perhaps also illustrate that individuals who are not legally trained may be better placed to re-engineer legal problems.

I do not believe that we should leave such developments to regulatory happenstance.

#### **4.4 Widening the gateway to regulation**

The triangle of legal services regulation (as presented in paragraph 3.3 above) is currently based on a narrow entry point at the very top of the triangle, created by a combination of reserved activities and authorisation.

However, once a provider is through that gate, the whole range of before- (BTE), during- (DTE), and after-the-event (ATE) conditions then generally applies, almost irrespective of relative risk, focus of practice, or need for client protection. There can be little or no flexing of the burden or cost of regulatory requirements to reflect these factors.

Further, for those providers of non-reserved legal activities who would be willing to subject themselves to regulation in their quest to offer protection to their consumers, there is currently no way in, however noble their intentions.

An alternative approach would be to allow entry at the bottom of the triangle, thus offering near-universal access to some form of after-the-event regulation, such as to insurance and formal resolution of consumer complaints. Consequently:

##### ***Recommendation 4***

Professional title and authorisation should no longer be the basis for entry into legal services regulation. There should be an alternative or additional form of entry into regulation for those who do not hold a legal professional title.

Such an alternative would invert the current approach (as shown in Figure 4.4).

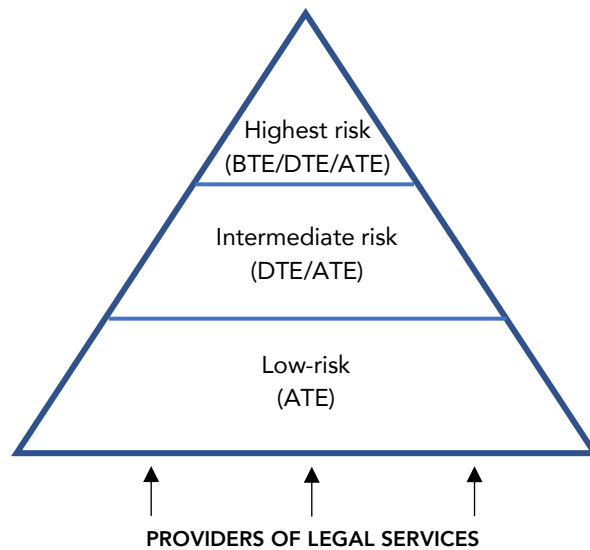


Figure 4.4: Representation of the alternative regulatory framework

This alternative approach, considered in more detail in paragraph 4.5, would instead start with a broader, and more inclusive, base that could subject all legal services to some form of regulatory cover. It could then add, on a risk basis, additional layers of regulatory obligation.

Rather than the current ‘all or nothing’ style of being fully regulated or not regulated, providers could make more commercial decisions for themselves about the extent to which they wished to offer the higher-risk services that would lead them into additional regulatory conditions.

Initiatives to broaden the scope of regulated providers beyond traditionally qualified lawyers are no longer novel. The introduction of licensed conveyancers in 1985 and of alternative business structures in 2010 are examples of steps already taken in England & Wales.

Some jurisdictions in North America have also extended regulated provision to include ‘limited license’ legal technicians and similar (referred to in paragraph 4.5.2.4).

Such initiatives are often resisted, usually on the basis that advice and representation from qualified lawyers will be better, more competent, and less prone to ethical concerns. Also, say the critics, there is no evidence that such services will be wanted from ‘non-lawyers’ (either by would-be consumers or would-be providers) or that they will be sustainable or cheaper.

My view is that there is evidence. We have seen growth in the regulated provision of legal services by individuals previously regarded as ‘non-lawyers’. These include licensed conveyancers, costs lawyers and accountants.

This growth also applies to the emergence of online tech-based solutions for, say, chatbots, document preparation and review, predictive case outcomes, intellectual property renewals, contract management, and online dispute resolution. As Sir

Geoffrey Vos, Chancellor of the High Court, pointed out recently (Legal Services Board 2020: page 23):

Online Dispute Resolution has been introduced in England & Wales for certain family cases, social security disputes and civil money claims up to £10,000. These processes will plainly increase access to justice, by allowing legal claims to be vindicated at a lower cost and with minimum delay.

In addition, I have received submissions from both consumers and potential providers during the course of this Review that they would indeed welcome regulation for currently unregulated services.

While I do not dismiss concerns out of hand, I conclude that resistance to broader regulatory scope is not well-founded. It is important, though, that the conditions for practice are not too onerous. For example, the Supreme Court of Washington State permitted limited licensing in 2012<sup>36</sup>, but on 5 June 2020 surprisingly closed the scheme to new licensees in part because of low take-up.

The proposals in this report are not about allowing 'the unregulated' to practise law on an equal footing with established title-holders and other professionals, so that there will – as some responses to the interim report seem to imply – somehow still be 'regulated' and 'unregulated' providers.

They are about bringing the currently unregulated within the scope of regulation so that they cease to be 'unregulated'. All providers would be regulated. While all providers might not be regulated in exactly the same way, providers of the same legal services will be.

One response to the interim report suggested (in line with similar views that have been voiced during this Review):

the consumer ... may not understand the differences between the different providers. A greater number of providers entering the regulatory triangle could cause consumers to be driven towards untitled providers who (at least on the face of it) are charging less, but who have not had the benefit of the extensive training or the high ethical standards that are inherent to regulated professionals.... This could create problems for consumers such as poor-quality legal advice, poor standards of service or delays.

My response to this is, first, if all legal services are regulated in the same way and to the same standard, the consumer will not need to understand the difference between providers – except, perhaps, to the extent that title-holders might wish to persuade them of the value of paying a premium.

Second, new providers might not, in fact, charge less. They should also be as trained and as ethical as required by the minimum regulatory requirements for the services they offer. That would be a matter for the regulator to assure, and for any difference, again, to be promoted by those seeking a premium on their fees.

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36. In the matter of the adoption of new APR 28 – limited practice rule for limited license legal technicians (2012) No. 25700-A-1005; available at: <http://www.courts.wa.gov/content/publicUpload/Press%20Releases/25700-A-1005.pdf>.

Third, issues relating to poor quality, poor service or delay are just as likely to arise with title-holders as with others. They all need to be addressed by the regulator, but cannot, in themselves, be sufficient reason for not admitting those who do not have a professional title into the regulated sector.

## 4.5 A differentiated approach

### 4.5.1 Introduction

An opportunity presented by a new approach to regulation for the future would be greater flexibility and independence in the use of regulatory tools, interventions and conditions. Accordingly:

#### **Recommendation 5**

A regulator should be enabled to apply a risk-based approach to the imposition of regulatory requirements. A future regulatory framework should therefore allow the differential application of before-, during- and after-the-event regulation to reflect the importance or risk of any particular activity or circumstance.

Such an approach would not necessarily change the range of regulatory tools and interventions from what is available now. It could, though, lead to their use in different circumstances and conditions, and without the same dependencies or preconditions. Indeed, in many ways, this approach affirms and adopts the regulatory tools and interventions that are already known and in use.



The future difference would lie in coordinating and applying them in a more targeted, risk-based and proportionate manner. In adopting such an approach, I would suggest that it would bring the regulatory framework more in line with the following view expressed in the CMA's market study (2016: paragraph 6.22):

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 ....



The details of the different forms of BTE, DTE and ATE regulation are discussed in Mayson (2020e: paragraph 4).

In essence, as first raised in Mayson (2020e: paragraph 4), the approach would be to 'map' regulatory intervention along the lines of only ATE conditions for low-risk services, a mix of ATE and DTE conditions where there is intermediate risk, and the use of BTE, DTE and ATE regulation for the highest-risk services. However, in practice, the delineation will need more nuance.

Dealing with complaints is clearly an after-the-event *process* (that is, after the event giving rise to the complaint). However, in making an assessment on the complaint, the body charged with investigating it (currently the Legal Ombudsman) might wish to take into account, say, the provisions of a letter of engagement or of a code of conduct, or a provider's processes of checking for a conflict of interest.

In terms of *timing*, though, such a letter of engagement and conflict-checking will have been before the event (instruction) and a code will have applied during the event (delivery of the service).

In this report, therefore, the BTE, DTE and ATE labels apply to the timing of their *application* by regulation rather than the strict timing of their *origin*.

The working assumption for the differentiated, risk-based approach considered here must also be that the relatively less onerous regulatory requirements closer to the base of the triangle would also be relatively less expensive and burdensome.

## 4.5.2 Application

### 4.5.2.1 Entry into regulation

Entry into the triangle of regulation would be set with broader scope than now. It would extend at least to low-risk legal services, principally for ATE remedies (such as indemnity insurance and access to consumer complaint resolution and redress). This level would then also set the minimum regulatory conditions applicable to *all* regulated providers of legal services.

I was previously attracted to the proposition that all legal services (as defined) would be regarded as low risk *unless* they were separately defined and identified as either 'intermediate risk' or 'high risk' services requiring more targeted regulation.

However, on reflection, and with the benefit of responses to the interim report, I would now conclude:

#### **Recommendation 6**

A future regulatory framework should define those legal services to be regarded as low risk. These need not be set out and fixed in statute, but should be identified and revised (according to experience and changed risk assessments) by the regulator.

The risk under consideration would be assessed as low by reference to the public interest in the need to secure the public good or consumer protection (as set out in paragraph 4.2): see further paragraph 4.5.3.3.

As well as access to a formal resolution and redress system, the minimum conditions attached to the regulation of low-risk services could include disclosure and transparency obligations, any requirements judged necessary by the regulator for accreditation or indemnity insurance, and adherence to a code of conduct: this issue is picked up in paragraph 5.3.1.

#### **4.5.2.2 Higher-risk services**

As with reserved legal activities now, there should be powers to determine that certain legal services carry a high innate degree of risk (again to the public good or to consumers). This is considered further in paragraph 5.2.2.

Consequently:

##### **Recommendation 7**

The highest-risk activities should be subject to before-the-event conditions, as well as to during- and after-the-event requirements. Before-the-event conditions would require that providers have prior authorisation to carry on those highest-risk activities before they are allowed to offer their services to clients.

In regulatory terms, this would amount to 'positive licensing'.

As a result of identifying more limited numbers of high-risk and low-risk services, there will then be the residual group of 'intermediate-risk' services. These will, most probably, represent the largest group of legal services.

The regulator should be able to determine, as appropriate, what DTE and ATE regulatory measures should be applied to services falling within this intermediate category.

Accordingly:

##### **Recommendation 8**

In addition to the after-the-event requirements that would apply to all providers, intermediate-risk services should be subject to such during-the-event practice conditions as the regulator assesses to be appropriate, based on the risk attaching to specific services, groups of services, or vulnerability of the clients.

Practice conditions could include accreditation requirements to assure minimum competence ('negative licensing'), as well as continuing professional development (CPD) obligations and re-accreditation to assure minimum continuing competence (this is considered in more detail in paragraph 4.5.2.3).



Practice conditions could include (as appropriate to the legal service and risk):

- any competence, accreditation and reaccreditation requirements;
- obligations relating to the handling of clients' money;
- requirements for indemnity insurance (which might, if appropriate and beneficial, be flexed to apply different requirements relevant to the risk-management experience of indemnity insurers);
- contributions to a compensation fund (or a requirement for a fidelity bond or insurance);
- the performance of undertakings;
- supplementary codes of conduct that apply to specific legal services, circumstances of client vulnerability, or particular life events (such as moving home, or bereavement); in addition, if the advice and communications of those providers who are subject to BTE and DTE regulation are subject to legal professional privilege (cf. paragraph 6.5.4), additional requirements could be set out in a code of conduct that applied beyond those expected of providers subject only to ATE regulation; and
- possibly appropriate management systems<sup>37</sup>.

These conditions will also include non-sector requirements such as those relating to data protection, money-laundering, proceeds of crime, and bribery.

Perhaps the imposition of regulatory requirements might then be addressed not only in terms of inherent risk in the legal service in question but also in terms of the additional risks arising from providers 'dabbling' or lacking familiarity.

Those who do not regularly practise, for instance, in conveyancing (which already has the highest incidence of claims) or drawing up wills, immigration, or advising on corporate finance and acquisitions, could soon find themselves significantly out of their depth and present a risk to their clients. The boundaries are not always clear between what is a 'simple' will or 'straightforward' domestic conveyance, and something more challenging.

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37. On management systems, see the example of the Legal Services Commissioner for New South Wales: [http://www.olsc.nsw.gov.au/Pages/lsc\\_practice\\_management/lsc\\_practice\\_management.aspx](http://www.olsc.nsw.gov.au/Pages/lsc_practice_management/lsc_practice_management.aspx).

Even an apparently straightforward domestic conveyance or estate administration, while perhaps presenting low risk from a technical perspective can still be high risk to a client given that their life-savings or entitlement to assets could disappear if something goes wrong or fraud is involved.

*“Perhaps the imposition of regulatory requirements might be addressed not only in terms of inherent risk in the legal service in question but also in terms of the additional risks arising from providers ‘dabbling’ or lacking familiarity.”*

Nor will it always be clear what areas of related law a practitioner might need to be familiar with in order to offer competent and effective advice. Few will-writers will be able to ignore trusts or the tax consequences of their advice; and conveyancers will need to be aware of planning law.

There should accordingly be sufficient flexibility for a regulator, where appropriate and justified, to prescribe DTE conditions, such as accreditation and continuing competence requirements, special codes of conduct, or targeted indemnity insurance obligations, for distinct areas of practice.

It might also be pertinent here to mention the role of indemnity insurers as ‘quasi-regulators’ of providers. Based on their claims data or as a condition of cover, insurers might require evidence of appropriate risk assessment and management for the practice (including the firm’s need for continuing competence and internal processes to address the identified risks). They are also in a position to advise regulators on specific and emerging risks.

Also, if insurers perceive that regulators are not taking sufficient action in response to risk, they will most likely price the increased risk into their insurance products. It is therefore in everyone’s interests – clients, providers, and regulators – for risk to be effectively identified and responses to be appropriate and robust.

A differentiated approach to regulation cannot afford to become tangled in its own detailed complexity of over-prescription, and a balance would be needed. This should be based on an assessment of risk following relevant consultation, including with practitioners, consumer groups and the Consumer Panel, the Legal Ombudsman (or future equivalent), and indemnity insurers.

It might be that something like the LSB’s segmentation matrix<sup>38</sup>, with its combination of legal service, type of client, and type of problem, could provide a starting point.

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38. See <https://www.legalservicesboard.org.uk/research/reports/market-segmentation201>.

Further insight could also be taken from insurers' classifications of various legal services for indemnity insurance purposes, or perhaps from the YouGov (2020) classification from its recent legal needs survey.

#### **4.5.2.3 Assurance of competence**

In any system of services regulation, the challenge of assuring consumers that the providers they choose to engage are competent is problematic. The role of regulators in ensuring that those they regulate are sufficiently competent to do what they claim, and in a way that is consistent with the expectations of consumers, gives rise to considerable difficulties.

At the time of writing, the Legal Services Board has issued a call for evidence in relation to ongoing competence.<sup>39</sup> Their investigation will consider the effectiveness of continuing professional development, self-assessment, monitoring, observation or peer review, or even periodic revalidation.

The regulators of other traditional professions, such as the General Medical Council and the Nursing & Midwifery Council (who between them regulate about a million practitioners), require revalidation to ensure the continued fitness to practise of their registrants. It could be difficult from a public and consumer perspective to argue against lawyers being subject to the same obligation.

However, the issue is complex and challenging, not least because of the likely disparity between the initial authorisation based on professional title and the variety of services, clients and contexts that emerge during the course of a practitioner's career. Any component of this variety could be far removed from the learning that resulted in the award of title many years previously.

I have already stated that I believe that the proper role of regulation and regulators is to assure the minimum necessary conditions for practice below which practitioners must not stray if they are to remain in the sector (see paragraph 3.7.2).

In this case, the role of assuring competence for initial authorisation is to ensure that those minimum conditions have been met. The role in relation to continuing competence should in principle be no different, namely, that the minimum conditions continue to be met.

Accordingly:

#### **Recommendation 9**

The regulator should determine what qualification or assurance of initial and continuing competence, experience and integrity should be demonstrated by any provider of particular legal services, whether for before-the-event authorisation, or for other requirements that would be applied on a during- or after-the-event basis to providers of those services.

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39. See <https://www.legalservicesboard.org.uk/our-work/current-work/ongoing-competence>.

Under the current regulatory framework, authorisation is gained from a professional title. Discussion about continuing competence then naturally tends to focus on competence sufficient to maintain the title, rather than competence in respect of the specific activities that a practitioner is carrying on at any given time.



There is a significant danger in any consideration of ongoing competence and continuing professional development that the emphasis shifts towards higher quality than the minimum necessary standards. As a matter of professional aspiration and client service, there is much to be applauded in this.

However, it is questionable whether that is the proper emphasis for a regulator in discharging its responsibility for assuring *minimum necessary* regulatory standards.

I do not wish to be misunderstood on this point. I am certainly not against the achievement of the highest possible standards of competence and service in the delivery of legal services to clients. I would always welcome the most earnest efforts to raise and maintain professional standards, whether they are sought by individual practitioners, professional bodies or employers.

For example, professional and other bodies already offer separate quality marks indicating competence or specialisation in specific areas of practice, such as wills and inheritance, conveyancing, family law, immigration and asylum, and criminal litigation.<sup>40</sup>

I am also aware that some professional firms, as part of their own risk management, operate (in effect) an in-house licensing system. As a consequence, their practitioners are not allowed to practise in certain designated areas unless they have been issued an appropriate and up-to-date internal licence to do so by the firm. There may even be additional licensing requirements *within* a designated area in respect of very highly specialised work.

Such approaches to assuring competence are to be welcomed. Even so, these are essentially voluntary arrangements that understandably seek to encourage higher levels of assurance than are – or should be – required by the regulator.

That said, I would acknowledge that in relation to the higher-risk activities for which prior authorisation should be essential, there is an inherent risk that gives rise to the need for authorisation. In these circumstances, there should perhaps be little or no difference between the minimum necessary standards required by a regulator and the high standards that practitioners and their professional bodies would expect of themselves.

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40. See, for example, details of the Law Society's schemes at: <https://www.lawsociety.org.uk/for-the-public/using-a-solicitor/accruited-specialists/>.

These judgements about assurance of necessary competence should be made following an assessment of the relative risk. It might be that, for the future, where BTE authorisation is required, the regulator should identify and approve available forms of accreditation for specific services.

Accreditation would then become a precondition for authorisation, and maintaining that approved accreditation would be an acceptable assurance of continuing competence.

Similarly, for services that are not sufficiently high risk to warrant BTE authorisation, they might still be assessed by the regulator as risky enough to justify a DTE condition of accreditation. In this case, accreditation would not be a precondition of authorisation (since authorisation would not be necessary).

However, it would be a signal to regulators and consumers that a practitioner has the necessary degree of competence and experience in their chosen field of practice. For this reason, it is important that accreditation focuses on regulating competence and quality of *service*.

Some accreditation or quality assurance schemes focus on the management of the entity through which the services is provided (see Gibbs & Ratcliffe 2019: page 27, who refer specifically to Lexcel and the Legal Aid Agency's quality mark). Such schemes are not sufficient in my view for the accreditation of *competence*.

Again, there is a danger in accreditation schemes that the accrediting organisations (including professional bodies offering accreditation) will not draw sufficient distinction between the regulatory minimum necessary standards and professional aspirations for high quality. To guard against this, the regulator will need to ensure, when giving approval to any scheme, that this distinction is maintained.

The regulator will also need to ensure that any providers of accreditation do not over-specify the requirements or price in such a way that achieving accreditation presents an economic barrier for practitioners (cf. Recommendation 28).

In this way, accreditation should not become a barrier to entry through imposing either higher cost than necessary or higher standards of achievement than are necessary. Just as, for example, the probate practitioners qualification scheme of the Council for Licensed Conveyancers includes different levels of diploma, so an accreditation scheme could include a qualifying level to satisfy a regulator's minimum conditions.

A scheme could then allow higher levels of accreditation for those who wished to go further and demonstrate more advanced specialisation and experience. These higher levels would not normally be required by the regulator. However, it might be open to the regulator to specify a higher level of accreditation for different aspects of legal services offered where it considers that the risk is higher.

*“accreditation should not become a barrier to entry through imposing either higher cost than necessary or higher standards of achievement than are necessary”*

At the end of the day, the regulator would need to strike a balance. If the requirements of competence assessment and assurance are set too low, public confidence will be undermined over time.

If set too high, the burden and cost of accreditation could result in providers either not entering the market or choosing to leave it, so reducing provision and consumer choice.

The future role of accreditation is considered further in paragraph 5.6.3.

#### **4.5.2.4 Limited licensing?**

In some respects, the approach to the regulation of low-risk services described here could be seen as similar to the ‘limited license’ or equivalent approaches recently adopted in some of the states of the US, such as Arizona, California, New York City, Utah, and Washington State (cf. Howarth & Wegner 2019), as well as in Ontario.

They might also represent a step in a process of legal apprenticeship (as the Chartered Institute of Legal Executives has effectively supported for many years). This allows an individual to progress through levels of regulatory accreditation and authorisation over time.

Such an approach offers an alternative to significant initial student debt incurred against the uncertainty of future employment and career prospects that have recently attached to gaining a professional title.

As Howarth & Wegner point out (2019: pages 454-455), this might also allow a shift from the current style of vocational education in preparing for and testing Day 1 ‘breadth’. Instead, it would move to one where assessing “deeper knowledge of a small number of chosen subjects permits a judgment on the candidate’s capacity to achieve equivalent depth in whatever new, utterly unpredictable subjects that lawyer might encounter over the course of his or her career”.

While there is an element of comparison with limited licence practitioners, I would emphasise the following differences. First, although entry into ATE regulation would require registration, it would not involve the issue of a licence to those who were not otherwise authorised.



Second, for higher-risk activities requiring authorisation or accreditation, the regulatory permission to practise would in principle be granted on the same basis to all regulated practitioners (see further paragraphs 5.2.2 and 5.6.3).

In this sense, therefore, all providers would be regarded as equivalent, the standards applied to them would be the same, and all would be held accountable for their performance against those standards. This is an important point, emphasised by the CMA (2020a: paragraph 4.32): if requirements (such as accreditation) are specific, or limited, to only certain types of provider, they will perpetuate barriers to entry and competition.



Third, therefore, there would be no sense in which those who were regulated but were not qualified lawyers should be described as 'limited' (that is, by implication, as 'less than' qualified lawyers).

My preference, therefore, is to see regulation that applies to all by reference to what they are (regulated providers of legal services) rather than identifying some of them by reference to what they are not (lawyers).

### **4.5.3 Differentiation, risk and vulnerability**

#### **4.5.3.1 Introduction**

I readily acknowledge the challenges of a risk-based approach to regulation, and that further – and detailed – work will still be necessary. Given the nature and purpose of this Review, I am more concerned with principle and viability than with absolute detail. Nevertheless, I have tried in this report to offer as much detail as I can at this stage.

The nature, extent and consequences of risk are constantly changing, and responses must be timely, targeted and proportionate. Although on a different scale, the emergence and spread of coronavirus Covid-19 in early 2020 has fully demonstrated the importance of continual reassessment of the nature, extent, consequences and response to risk.

The public and consumer interest in effective responses to emerging and changing risk are not therefore well-served by enshrining the conditions for the nature and response to risk in statute (see Preamble, page 4). This is why I believe that much of the assessment and regulatory response must be the continuing responsibility of an appropriately accountable regulator.

It is also important to ensure that any risk-based assessments take due account of the different perspectives of risk, and are therefore not over-zealous in the pursuit of one perspective in preference to another.

Brownsword offers this cautionary note (2019: paragraph 4.2.2.2, emphasis in original; his context is technology, but the message is of wider relevance):

while risk-assessment experts tend to accentuate the *likelihood* of a risk eventuating (so that, where there is judged to be little likelihood of the risk eventuating, the technology is characterised as 'low risk' or as 'safe'), members of the public often focus more on the *gravity* of the consequences should the risk eventuate (so, that even if there is little likelihood of a catastrophe, the gravity of this means that the technology is perceived to be 'high risk').

Finally, I also readily adopt this statement from the Better Regulation Commission (2006: page 37): "We have a collective, social responsibility to protect those who are vulnerable, but we need to guard against making assumptions about vulnerability".

#### **4.5.3.2 A starting point**

In terms of risk, a starting point might be to propose that risk in legal services can arise from:

- (a) the need to protect the public good (including the rule of law, the administration and independence of justice, the legal foundations of social and economic relationships);
- (b) the complexity of the underlying law (such as the law relating to tax<sup>41</sup> and pensions, intellectual property, and social welfare);
- (c) the complexity of the transaction or dispute in respect of which the client seeks advice and representation;
- (d) the inherent vulnerability of the client (arising from, say, mental health, age, cognitive or language ability);
- (e) the relative vulnerability of the client, arising from the circumstances giving rise to the need for legal support (such as bereavement, relationship breakdown, loss of employment, homelessness);
- (f) the nature and extent of the consequences to clients, other affected parties, and the wider public, and the ease (or not) with which any negative consequences might be remedied; and
- (g) the vulnerability of practitioners to compromising influences: this primarily includes inverse vulnerability as described in Mayson (2020e: paragraph 3.6, but

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41. In their joint response to the interim report, the Chartered Institute of Taxation and the Association of Taxation Technicians refer to "the huge complexity of the UK tax system".

it also includes other risks identified externally and arising from money-laundering, bribery and similar (see also, therefore, Financial Action Task Force 2019).

Each of these factors is considered in more detail in Mayson (2020e: paragraph 3). Based on these considerations, a scale of risk could be envisaged, from high to low. I should also emphasise that 'low risk' does not mean 'no risk': nothing in this report is intended to suggest that it is possible to eliminate risk.

#### **4.5.3.3 Assessing risk**

Many respondents to the interim report expressed support for a move towards risk-based regulation. Others see it as potentially too complex, uncertain or impractical. I confess to sharing the concern that we should not move towards a regulatory approach that required every legal service to be assessed in detail for its risk characteristics.

Nor am I attracted to a system that would require fine distinctions between, say, a simple lease or will, and a more complicated one. However, we should not assume that risk assessment would somehow be inherently new or difficult in the context of legal services regulation.

Indemnity insurers have been making such judgements for years. In addition, regulatory bodies and LeO already have evidence and experience of the risks to consumers arising from different types of legal services or different types of providers. They also understand the impact that those risks have for consumers, for business clients, and for the legal system generally in terms of public confidence being undermined.

A reassessment of high-risk services is certainly needed. The starting point might well be the current 'reserved legal activities', but I have no doubt that these reservations should be revisited and revised (this is considered further in paragraph 5.2.2).

*“we should not move towards a regulatory approach that required every legal service to be assessed in detail for its risk characteristics”*

For the future, the highest-risk services identified by a reassessment should be designated and defined for BTE authorisation. To my mind, these are likely still to include the exercise of most of the existing rights of audience and rights to conduct litigation.

They might also continue to include notarial activities and possibly extend to immigration advice and services. However, for reasons explored in paragraphs 5.7.4 and 5.7.5, I think that an alternative approach to both would be preferable.

In relation to low-risk services, attracting only ATE regulation, I would not envisage a great number of qualifying services. Tentatively, I would propose the following services for consideration (none of which involves the exercise of rights of audience or the conduct of litigation, and should be considered in conjunction with the minimum ATE requirements discussed in paragraph 5.3.1):

- non-contentious employment matters;
- uncontested divorce and family mediation;
- contract advice;
- short leases (to be redefined as leases for terms of less than seven years);
- commercial and other non-family civil mediation<sup>42</sup>;
- licensing applications (such as for gaming, premises and alcohol);
- document preparation (such as pre-nuptial agreements, company formation<sup>43</sup>, stock transfers containing no trust or limitation of the transfer, shareholder and partnership agreements, non-disclosure agreements);
- consumer rights: YouGov (2020) reports that the lowest financial loss arising from a legal issue relates to consumer problems, where the average loss is £150; this confirms that there is little cost-benefit advantage in regulating consumer rights services too heavily; and
- debt advice (excluding consumer credit and advice subject to FCA regulation).

For document preparation, I would envisage exclusions for any of the remaining current 'reserved instrument' activities (these would potentially in future be subject to at least DTE conditions). Exclusions from 'low risk' might also include agreements where the regulator assesses the risk to be disproportionate, such as when the value of a contract exceeds a certain threshold and DTE obligations should apply.

I also anticipate that will-writing would not be a low-risk, ATE-only, service.

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42. Major commercial, and international, mediations are likely to fall within the scope of the exceptions for 'non-consumer services' (see paragraph 5.6.6). Similarly, mediations conducted under the auspices of another body, such as the Royal Institution of Chartered Surveyors, are likely to fall within the exemption for providers of 'subsidiary but necessary' services (see paragraphs 4.7.2, 6.2.6.4 and 6.5.2).

43. Recent concerns about the use of certain company formation agencies in facilitating fraud and money-laundering, etc might, arguably, militate against this (see, for example, David Clarke in *The Times*, 4 December 2019). On the other hand, inclusion would at least bring such services within the scope of legal services regulation.



The suggested approach of dealing with the 'outliers' of high risk and low risk services would then leave a larger 'middle ground' (as envisaged in paragraph 4.5.2.2). For the intermediate-risk legal services in this group, DTE regulatory requirements would need to impose consistent, risk-based and proportionate requirements across the sector.

The regulatory powers would also need to be flexible enough to impose as appropriate, say, specialist accreditation for providers of particular legal services that carry lower risk than BTE services but greater risk than ATE services: cf. paragraphs 4.5.2.3 and 5.6.3.

Also, as now, DTE conditions could be imposed in certain circumstances, such as when providers are handling client money, or advising those whose condition or circumstances make them vulnerable.

One of the determining factors here might then become the extent to which ATE redress would be capable of effectively and quickly dealing with any failure – including whether compensation, return of fee paid, further work or other remedies would be able to resolve the client's position. If it was not, then the case for more protection and prescription would almost certainly be made.

The need for unwieldy or impractical detailed prescription across the entire range of legal services could be avoided. By having a limited number of high-risk services identified and defined for the purposes of BTE authorisation, that requirement is no more onerous than it is now for the reserved legal activities. (Indeed, I would hope that the lessons of the reserved activity definitions could be learnt and clearer boundaries established in future designations.)

Similarly, by having a limited number of low-risk services subject to ATE regulation, the need to define them should be manageable.

#### **4.5.3.4 Defining risk**

It would not therefore be necessary for the regulatory framework to have a definition of every conceivable legal service, with a risk assessment carried out and a determination made about its status as a BTE, DTE or ATE service. As long as the regulator has the appropriate powers and tools, DTE regulation could be applied to the 'intermediate' category of services on a specific, targeted and proportionate basis.

It might also be worth considering the use of broad definitions of services (see paragraph 4.6.1) when designating both high-risk and low-risk services, as well as for the circumstances in which DTE conditions need to be imposed by the regulator.

Regulatory consequences might then be framed not only in terms of specific legal services but also in terms of 'life events'. This could encourage regulators to assess relative risks and vulnerabilities in relation, say, to moving home, administering a relative's estate, facing a criminal charge, dealing with the break-up of a personal relationship, starting a business, and so on.

This approach would allow the regulator to bring together a number of risk factors, such as complexity of law or circumstances, and relative client vulnerability. It would also align better with the circumstances or 'prompts' that lead consumers to seek legal advice and support.

It would encourage the 'bundling' of risks and vulnerabilities and enable broad authorisations or permissions (on the potential for such 'composite approvals', see paragraph 5.6.5). However, the regulator would need to be reasonably confident that such bundling would not lead to risks being obscured at the margins where inappropriate inclusion or exclusion might potentially expose consumers to harm or detriment.

It is also likely that, with broader definitions of services or composite approvals of them, the regulator should also have power to create exceptions. These powers could be used to provide exemptions to remove lower-risk activities from the scope of the broader definition.

This is not necessarily a suggestion that some activities should be removed entirely from the scope of legal services regulation. This might be possible where risk to consumers is considered to be non-existent, or is a clarification of what is within or outside the defined scope of regulation: see paragraphs 4.6 and 4.7.2.

Instead, the purpose of exemptions here would be, where appropriate, to remove some elements of legal services from the burden of higher levels of regulation (BTE or DTE), and assign less onerous regulatory requirements (DTE or ATE, as appropriate to the circumstances and risk).

In this way, the current temptation to 'game' definitions might be reduced. For example, the combination of appropriate definitions and exemptions could result in all aspects of, say, residential conveyancing or probate and estate administration services being within regulatory scope.

However, this would not inevitably mean that any or all of the constituent elements of those services would have to be provided or supervised by someone who has BTE authorisation.

The combination of BTE, DTE and ATE conditions applied to services within scope could ensure that the relevant services can be 'unbundled' within the same organisation for the purpose of applying regulatory conditions.

The higher-risk elements would be handled by those who are subject to whatever BTE or DTE requirements are appropriate. The lower-risk elements could be handled more cost-effectively by those who are regulated for DTE and ATE purposes.

Such an arrangement could be commercially more attractive than current responses that often see an unregulated business handling all but the reserved activity element of a transaction. Their need to have that element outsourced to a separately regulated individual or firm creates unnecessary regulatory and structural consequences that are commercially unattractive.

These structural contortions are also confusing and non-sensical to the business's clients (and often employees, too). They also lead to equally nonsensical and commercially unattractive consequences for multidisciplinary businesses: see paragraph 4.13 and Case Study 2 (page 154).

The proposals here would also allow a regulator to deal directly with everyone involved in the provision of services, rather than having to fall back on the often inadequate 'fig-leaf' of supervision by a regulated professional or paralegals and others.

Consumer risk seems to be inadequately managed when, for example, an unregulated individual can be conducting, say, conveyancing, will-writing or costs litigation under the supervision of a regulated title-holder who has no, or only limited, knowledge or experience of the relevant law or practice (see Case Study 4, page 179).

In too many cases – and perhaps more so in smaller firms where expertise and resources can be thinly stretched – the supervising professional has insufficient experience or time to exercise effective supervision.

*“creates unnecessary regulatory and structural consequences that are commercially unattractive [and] are also confusing and non-sensical to clients”*

#### 4.5.3.5 Vulnerability

As well as risk in the services themselves as a criterion for regulation, the vulnerability of those involved might also be considered a relevant source of situational risk that merits specific regulatory attention.

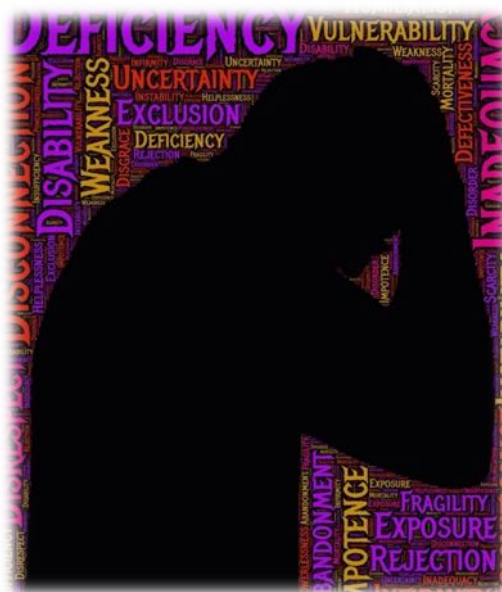
Vulnerability can arise from disparity in knowledge, resources, power or capability as between the parties. Forced participation in the criminal justice system when charged with an offence and facing the might of the state is a common example. Similarly, being a citizen in dispute with a government department, or a consumer seeking redress from a very large retailer or manufacturer, can all be daunting.

The need for legal advice and representation in these circumstances may be involuntary and urgent. Competition and transparency will achieve little to help when choice and possible future redress mechanisms are far from the citizen's mind.

As indicated in paragraph 4.5.3.2, vulnerability can also result from inherent conditions of the client (arising from, say, mental health, age, cognitive or language ability). There might also be relative vulnerability, arising from the situation or circumstances giving rise to the need for legal support (such as bereavement, relationship breakdown, loss of employment, homelessness).

It is also worth noting here the observation from the SRA recently that "even the most sophisticated and empowered clients can be vulnerable when they are dealing with critical, often life-changing and distressing circumstances" (SRA 2019a: page 5).

This is one reason why an approach to regulation cannot readily be founded on differences between 'sophisticated' and 'vulnerable' clients. As the CMA has observed: "consumers are often not able to compare between solicitors effectively, even if they are capable of making sophisticated choices in other circumstances" (CMA 2020a: paragraph 3.8).



I would also record here that more than one general counsel has emphasised to me during the Review that in-house lawyers are *not necessarily* informed or expert buyers of legal services in the way that is too often assumed in any discussion about 'sophisticated clients'.

Consequently (borrowing from the financial sector: Financial Services Consumer Panel 2012: page 2):

The reality is that most people are likely to be vulnerable consumers at some point in their lives, in that they face a higher risk of detriment, although not all vulnerable consumers will actually suffer detriment. Vulnerability to the risk of detriment ... is particularly widespread given the current context of markedly low levels of ... capability in the UK.



Nevertheless, even where classes or categories of vulnerability might reasonably be identified, “it is unlikely that everyone who falls into one of those categories faces the same level of risk” such that it is “unrealistic and, arguably, patronising to assume that everyone in these categories will experience being a consumer in the same way” (2012: page 1, emphasis in original).

Accordingly, that Panel suggests that (2012: page 1):

A more effective framework to help ... identify and communicate the risk of consumer detriment ... would support proactive and proportionate regulatory activity by:

- recognising the distinction between being vulnerable to the risk of detriment and actually experiencing it;
- capturing diversity both within and between different consumer groups and recognising the experiences of consumers who fall outside groups commonly perceived to be vulnerable;
- going beyond a consumer’s personal characteristics or income, taking a wide view of their circumstances, resources, experiences and expectations; and
- highlighting the way that the actions of the regulator and providers can make it more risky for consumers to access or use goods and services.

We should not be surprised – or deterred – by the realisation that risk assessment in a complex and fast-changing world is neither straightforward nor static. Black & Baldwin put it well (2012: page 4):

How risks are selected, framed and categorized for attention is a complex process, involving a mosaic of technical, psychological, cultural, social, political, organizational, and economic concerns.... There is, however, no single and uncontentious way to define and ‘rate’ many risks – what is a ‘low risk’ or a ‘high risk’ is a matter of construction – and risk categorization is an art rather than a science, notwithstanding the prevalence of quantitative risk models in much risk regulation.

Even so, they claim (2010: page 182) that although “there are considerable difficulties to be faced in seeking to apply risk-based regulation really responsively”, nevertheless “the payoffs from doing so outweigh any such difficulties”.

*“even the most sophisticated and empowered clients can be vulnerable when they are dealing with critical, often life-changing and distressing circumstances”*

#### 4.5.3.6 Conclusions on risk

A more conscious and explicit link between risk and vulnerability might in turn lead to regulatory focus and action not simply founded on a 'legal service' but equally – and perhaps even separately – on vulnerability.

This would include explicit DTE regulatory requirements for services that involve, say, an individual's forced participation in the justice system, or where there are mental health or similar issues, where English is not the first language, or where a client's money or other assets are being handled.

In addition, codes of conduct could require practitioners explicitly to consider and record an assessment of client vulnerability and how, as a consequence, interaction and communication with the client should best be managed.

In the final analysis, it would be for a regulator to identify and set out its approach to evidenced risk assessment. It must do this without over-simplifying the complexity and ambiguity of real-world situations. As Hadfield points out (2019: pages 38-39): "Eliminating all complexity would eliminate much of the benefit of law, because it would make rules unresponsive to the subtleties, ambiguities, and varieties of life."

It must also bear in mind the range in sources of risk in legal practice, as well as the psychological, social and cultural dimensions of risk assessment. This, as the Professional Standards Authority rightly points out (2015: paragraph 6.16), "touches on a key challenge for risk-based regulation: how to incorporate these subjective elements into an approach that appears to draw its value primarily from its objectivity".

However, such an approach would also be consistent with that advocated by Which? in its report on effective responses and consumer redress (2019: page 9):

There needs to be a robust and systematic approach to enable understanding of the potential risks posed by different products, sectors and businesses – including analysing trends and identifying new and emerging issues and threats.... There needs to be a risk-based approach to prioritisation which takes into account the nature of the business, scale and potential impact of any non-compliance, including the severity, number and nature of people affected and confidence in the management.

As they also emphasise (2019: page 6): "Joined up and real-time intelligence systems need to underpin a future regime so that emerging trends can be quickly identified and resources targeted at the areas of most potential harm."

Nevertheless, we need to guard against an unrealistic, unduly cautious or over-zealous approach to risk. For these reasons, it is worth restating the following propositions of the Better Regulation Commission (2006: page 38)<sup>44</sup>:

- zero risk is unattainable and undesirable;
- any regulatory intervention should clearly specify the risk that is to be addressed or managed, the objective to be achieved, and the reason why intervention is considered the optimum solution;

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44. These proposition are echoed in other sectors, such as healthcare (cf. Bilton & Cayton 2013: page 18).

- any intervention should be targeted on those who are most at risk;
- the costs and benefits of risk reduction should be assessed, including the opportunity cost of risk management; and
- any regulatory intervention should be reviewed on a regular basis to ensure that it achieves the intended outcomes and does so cost-effectively.

As the Professional Standards Authority has observed (2015: pages 18-20), the benefits of risk-based regulation include not only protection for society and consumers, but also greater visibility, transparency, quality, consistency and economy in regulators' decision-making.

#### 4.5.4 Comparative approaches

The legal sector in England & Wales is not the only occupational field with a need to address risk and vulnerability as part of its regulatory policy. Accordingly, there are other experiences that can also be brought to bear on this challenging topic.

In other jurisdictions, legal services regulation is increasingly looking at the application of risk-based approaches. For example, the interim report referred to recent and ongoing work in Utah, led by the encouragement of that state's supreme court.<sup>45</sup>

This work suggests that regulation should be based on the evaluation of risk to the consumer, that risk to the consumer should be evaluated relative to the current legal services options available (not against an ideal of perfect legal representation provided by a lawyer), and that regulation should establish probability thresholds for acceptable levels of harm (and not seek to eliminate all risk or harm from the market).

*“risk to the consumer should be evaluated relative to the current legal services options available (not against an ideal of perfect legal representation provided by a lawyer)”*

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45. See Utah Work Group on Regulatory Reform (2019).

The medical profession has also looked closely at risk and regulation. For example, in 2016, the Professional Standards Authority (2016a) proposed a two-stage assessment of risk. Adapting for the legal services sector, this could translate into:

- (1) Stage 1 would consider evidence of the risk of harm relating to –
  - (i) the complexity of the legal services undertaken;
  - (ii) where the service takes place (for instance, in a client’s home); and
  - (iii) the vulnerability or autonomy of the client and their ability to make an informed choice about their circumstances.
- (2) Stage 2 would address wider external factors –
  - (i) the scale of the risk: the size of the practitioner group or number of clients who are served;
  - (ii) means of assurance: the range of different ways in which the risk of harm can be managed;
  - (iii) sector impact: the implications of regulation for workforce cost and supply;
  - (iv) risk perception: the effect that regulation would have on the confidence of the public, employers and other stakeholders in practitioners; and
  - (v) unintended consequences of the preferred form of regulation.

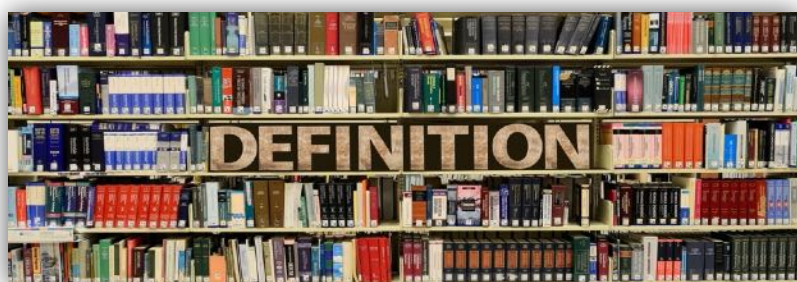
These Stage 2 factors guard against the limitations of focusing risk assessment only on practitioners. As the Professional Standards Authority stated elsewhere (2015: paragraph 6.9): “The reality is that mistakes, poor practice, and perhaps less obviously deliberate harm are caused by a combination of factors relating both to the practitioners and to the systems and environments in which they operate”.

## **4.6 A revised definition of ‘legal activity’ or ‘legal services’**

### **4.6.1 The challenges of definition**

If access to regulation is to be widened in the way suggested in paragraphs 4.3.5 and 4.4, the definition of the services or activities that fall within the scope of regulation will be central to the purpose and implementation of the framework. The challenge of defining what might fall within the scope of sector-specific legal services regulation is not, I think, insurmountable.

I am also mindful of the Better Regulation Commission’s view (2006: page 15) that “attempts to restrict the scope for subsequent interpretation of regulations by ‘precise drafting’ can lead to regulations that are excessively prescriptive and complex”.



In general terms, therefore:

**Recommendation 10**

Regulatory scope should apply to advice, assistance, representation and document preparation in pursuance of or in connection with legal rights and duties arising under the law of England & Wales.

The 2007 Act includes in section 12(3) a definition of 'legal activity' which in effect covers all forms of legal advice, assistance and representation, including both non-contentious and court-related activities, preparation of legal documents and notarisations, and the administration of oaths.<sup>46</sup> It is subject to what have become the 'usual exceptions' through the exclusion of judicial, quasi-judicial and mediation activities.

Such an approach to definition would probably suffice to capture all necessary services. However, it might be necessary to clarify, for the avoidance of doubt, that the provision of information only would not be included.

Even here, though, some modern caution might be necessary. For example, a website might provide free access to legal information, but might then offer links to sources of further help that have been 'distorted' by inappropriate relationships with third-party providers.

The writing and publishing of books, articles, blogs, off-the-shelf wills and other templates, giving lectures, and so on have not usually been considered as the provision of regulated legal services.

There will, of course and as always, be some grey areas. For example, what individuals often need help with is simply completing official forms (whether applying for various registrations or benefits, or complying with other formal requirements, such as submitting tax forms or returns). I am aware that regulators in the United States have also grappled with such issues in the context of what amounts to the 'unauthorised practice of law'.

On-line templates and form-filling support is an important area as technology is increasingly brought to bear in supporting citizens looking for help in meeting their legal and other needs. It would be unfortunate if such form-filling support was regarded as a legal service to be regulated. It seems to me unlikely that an assessment of benefit, risk and cost would justify such an outcome.

On the question of a 'legal service' or 'the practice of law', it might be that one of the critical factors will be the extent to which legal advice is needed for the consumer to be able to make informed choices about how best to complete any particular form or template. If such advice is an intrinsic part of the service, it might well be regarded as a legal service.

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46. The Legal Services (Scotland) Act 2010 is in substantially the same terms, although it refers to 'legal services' rather than 'legal activity'.

For comparison websites (also known as 'digital comparison tools'), there is a question of whether sector-specific regulation should be applied on the basis of general principles across all markets: see CMA (2017).

The risks of such sites can 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 also 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."

It would follow from a different approach to the scope of regulation that a narrow range of reserved legal activities should no longer 'guard the entry gate' into regulation. The future scope of sector-specific regulation should in principle be any and all legal services.

Nevertheless, depending on the assessment of risk or potential detriment attaching to different legal services, the focus of regulation should then be differentiated to offer greater protection or redress where that is a reasonable and proportionate response to risk.

In other words, the *scope* of the definition of legal services should be broad (to protect consumers), while *focus* should then be targeted (to place only proportionate regulatory burdens on providers).

#### 4.6.2 Alternative dispute resolution

The exclusion from the definition of legal services of those exercising judicial and quasi-judicial functions from the scope of legal services regulation is understandable. They are carrying out an independent and neutral function on behalf of the state, rather than advising or representing one person or another.



However, I questioned in the interim report whether alternative dispute resolution should be excluded. For example, mediation is not otherwise subject to formal statutory regulation (though it might in some instances be required or overseen by a court), and online dispute resolution is likely to be a growing area of activity.

In such mediations, consumers are just as likely to be ill-informed and vulnerable as they are in relation to other legal services.

This could cause particular challenges where mediation is compulsory and a participant might feel, in some sense, 'compelled' both in process and outcome – even if this is only a feeling or matter of perception.

In addition, as Whitehouse (2017: pages 75 and 77) explains:

The interests of commercial stakeholders in the mediation industry may differ substantially from those of individual users, one-off players who may in effect be forced into mediation in the absence of access to the legal system or availability of any other form of dispute resolution....

If the state begins to exert its power or influence to persuade (or force?) parties to mediate, then mediation moves from the private realm to the public, and expectations relating to the public justice system begin to come into play.

Mediators will have a strong focus on settlement and might be perceived by one of the parties to have become too directive or to have lost their neutrality.

There could also be circumstances, for instance, where the previous actions of a cavalier mediator could result in even a successful party in litigation being disadvantaged on costs.

There is also a further factor in relation to mediation, and for me it is a critical consideration. If regulated advisors recommend that clients should undertake mediation, under the current structure, they are effectively removing them from a regulated environment (legal services) into an unregulated one (mediation).

Responses to the interim report were keen to emphasise that mediation is voluntary, and that the function of a mediator is not to advise or represent and that, accordingly, mediation should not be treated as a legal service.

In particular, because mediation is intended as an alternative to formal legal process, it is necessarily a 'non-legal' service. In addition, mediators are also sometimes not legally qualified, making legal services regulation inappropriate.

The responses also pointed out that, in many instances, mediators are 'regulated', principally by the Civil Mediation Council and the Family Mediation Council. These bodies have formal recognition, and have their own requirements for registration, accreditation, professional indemnity insurance, and compliance with a code of conduct.

My conclusions on these issues are as follows:

- (1) While the essence of mediation is voluntary participation, I agree with the observations of Whitehouse (himself an accredited mediator) that (2017: page 70):

recent shifts towards compulsion or near-compulsion to engage with mediation in a range of contexts (via potential cost penalties in civil litigation, and Mediation Information and Assessment Meetings in family law) have changed radically the historic perception and claim that a central characteristic of mediation was its voluntary nature.

*“In mediations, consumers are just as likely to be ill-informed and vulnerable as they are in relation to other legal services.”*

- (2) I accept that the essence of dispute resolution (such as mediation or conciliation) that does not result in someone making a decision on the issues in a judicial, quasi-judicial or arbitration capacity does not involve advice or representation. However, it does still amount to “assistance ... in pursuance of or in connection with legal rights and duties arising under the law of England & Wales”. It can, therefore, rightly be considered to be a legal service.
- (3) The intention of the recommendations of this report is to bring within the scope of legal services regulation those who are providing legal services but are not necessarily qualified as lawyers. I am not therefore persuaded that the legal qualifications or otherwise of mediators should be a determining factor.
- (4) The current approach to the ‘regulation’ of mediation is, in my view, better described as voluntary self-regulation, and does not meet the criterion of the ‘formal’ regulation that is the focus of this Review.
- (5) At the moment, mediation, conciliation and online dispute resolution can legitimately be carried on by providers who are not subject to any of these forms of voluntary regulation. As a respondent to the interim report put it:

anybody can call themselves a ... mediator. They ... may be a very poor mediator with no training or qualifications whatsoever. [It] means that people can practise as ... mediators with no oversight and without being held to account.

This only strengthens my view that these services should in future fall within the scope of legal services regulation. It is especially important where meaningful action or redress against rogue mediators is next to impossible, and the market alone is not an adequate moderator of when anyone can enter it.We should not be willing to contemplate a growing band of ‘silent sufferers’ in relation to mediation as we have seen for legal services generally (see paragraph 2.4.4).
- (6) Finally, the intention behind bringing mediation within the scope of legal services regulation would not be to require mediation to be carried out only by lawyers, or to try to encourage all mediators to behave like lawyers. The approach of this report would recognise the diversity of approaches and styles of mediation and mediators, and not seek to impose a one-size-fits-all structure.



Accordingly:

**Recommendation 11**

In principle, assisting a party to a dispute for which the governing law is that of England & Wales in reaching or progressing a resolution of that dispute (other than through judicial or quasi-judicial determination or arbitration) should be regarded as a legal service. This would include mediation and conciliation, and online dispute resolution.

Interestingly, where voluntary regulation of mediators exists, it applies the sort of regulatory tools that are envisaged in this report. There are requirements for registration, accreditation, professional indemnity insurance, continuing professional development, adherence to a code of conduct, and complaints handling.<sup>47</sup>

In one sense, therefore, the issue is not so much the absence of regulatory standards or unwillingness to submit to them. It is that they are only voluntary and can be avoided by those mediators who wish to practise beyond regulatory scope<sup>48</sup>.

It is likely, therefore, that those mediators who are members of an appropriate scheme, such as those operated by the Mediation Councils, will present only low risk to consumers. The aspects of their existing voluntary regulation could easily form the basis of compliance with future requirements under legal services regulation.

The recommendations in this report would mean that registration for all mediation and alternative dispute resolution services would become compulsory. This would bring within scope those mediators who are currently operating without registering voluntarily.

For those mediators who have already elected to comply with the requirements of the Mediation Councils, there should in fact be little change in their regulatory obligations or costs. However, their regulation would in future be mandatory and within the statutory framework of legal services regulation. There could, though, be the possibility of 'designated body' delegation for the Councils (see paragraph 6.2.6.4).

*“regulation ... is especially important where meaningful action or redress against rogue mediators is next to impossible, and the market alone is not an adequate moderator of when anyone can enter it”*

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47. See, for example, the Civil Mediation Council (<https://civilmediation.org>) and the Family Mediation Council (<https://www.familymediationcouncil.org.uk>).

48. However, only family mediators accredited by the Family Mediation Council can conduct Mediation Information and Assessment Meetings in family proceedings.

### 4.6.3 Not quite activity-based regulation

One of the anticipated challenges of activity-based regulation is the assumed need to define each activity subject to regulation. This would appear to underlie the conclusion of the Robertson review of Scottish legal services regulation that although activity-based regulation “offers the chance to introduce more risk-based profiling”, it can also lead to inflexibility and a tendency to “proliferate the number of regulators” (Robertson 2018: page 41).

As suggested in paragraph 4.5.3.3, the approach explored in this report need not require numerous definitions of separate legal activities. First, to bring legal services within the regulatory framework, the general definition of scope (as in paragraph 4.6.1) would suffice.

Second, to apply a requirement for BTE authorisation for high-risk activities, there would certainly need to be a definition of each activity (see further paragraphs 4.5.3.3 and 5.2.2). However, this is no different to the position now where reserved legal activities are defined separately.

Otherwise, definitions of legal services would only be necessary in relation to low-risk services (cf. paragraph 4.5.3.3). In both the highest-risk and low-risk categories, I do not anticipate that there would be many activities in each category. The challenge of definition should not therefore be too onerous.

For the rest, where the regulator felt that specific risks or circumstances justified the use of other (mainly DTE) conditions, there could be a need to define the risk or circumstances to which those conditions applied.

Here, though, the focus of regulation might not be on what we would normally understand as a ‘legal service’. Instead, the identified risk could apply, say, to handling client money or other assets, to operating a comparison website, or relate to one or more forms of client vulnerability (as discussed in paragraph 4.5.3.5).

For these reasons, for the future I would prefer a definition that refers to ‘legal services’ more generally rather than, as now, to ‘legal activity’. The latter has tended to refer to something specifically legal in nature (such as advocacy or preparing a legally binding agreement) as opposed to a wider aspect of legal practice (such as handling client money or offering online services).

*“an apparently broad extension of regulatory scope to all ‘legal services’ and all ‘providers’ might nevertheless not in practice be the all-encompassing approach that some fear”*

Accordingly, the future application of regulatory conditions should be delineated not simply by activity or service, but by a combination of what is done (*service*) and a qualifier of :

- 'for whom' (taking in *client or market segment characteristics*, such as vulnerability), and/or
- 'by whom' (taking in *provider characteristics*, such as individual or entity, technology, or ownership structure), and/or
- 'how' (taking in *processes*, such as handling money or conflict-checking).

In this way, an apparently broad extension of regulatory scope to all 'legal services' and all 'providers' might nevertheless not in practice be the all-encompassing approach that some fear.

## **4.7 A focus on providers**

### **4.7.1 Complexity and convenience**

The current regulatory framework requires a combination of reserved legal activity and authorisation in order to enter. Consequently, it applies a potentially complicated and confusing mix of regulatory attention to activities, individuals, entities and title-holders.

I have no doubt that regulation must extend to both individuals and entities, but not necessarily for the same activities, and not necessarily in the same way.

Under the Legal Services Act, both individuals and alternative business structures (ABSs) can be authorised to carry on reserved legal activities. In relation to ABSs, this is a convenient device to be able to bring entities that are not wholly owned or controlled by lawyers into regulatory reach. The reserved activities still have to be delivered by individuals who themselves hold the necessary personal authorisation.

Convenience aside, though, granting authorisation for a reserved activity to an entity does not make much sense. The reserved activities – and, for the future, those legal services that should require BTE authorisation – relate to very important or high-risk activities where the competence or integrity (or both) of those who carry them out should be assured.

Both competence and integrity are inherently qualities that can only be demonstrated by human beings, not by legal or social constructs (or, increasingly, by technological ones).

### **4.7.2 The meaning of 'provider'**

Under the alternative approach to regulation outlined in this chapter, the access to regulation would no longer be through a restriction of reserved activity and authorisation.

It could apply to any 'provider' of legal services, with layers of regulatory requirements being imposed based on the degree to which those providers wish to undertake higher-risk services. Therefore:

**Recommendation 12**

The future primary focus of regulation should be the 'provider' of legal services, whether an individual, entity, title-holder, or technology.

Constructing an appropriate definition of 'provider' will require further work, but it would need to cover:

- (a) those who are established to provide legal services as a business or professional activity; this would include the activities of those practising law in private practice, whether as solicitors, barristers, chartered legal executives, licensed conveyancers, patent and trademark attorneys, and costs lawyers, as well as will-writing and probate companies, paralegals or paid McKenzie Friends;
- (b) those who provide legal services in the ordinary course of or as part of a business or activity established for a different principal purpose (such as in-house legal departments, accountants, and tax advisers);
- (c) multidisciplinary providers, where legal services are part of a business or organisation whose principal purpose is to provide a range of services, a number of which form part of the main or dominant strategy of the provider;
- (d) those who provide legal services as a not-for-profit or pro bono activity (such as law centres and similar, but not unpaid McKenzie Friends for reasons given in paragraph 5.6.4); and
- (e) those who provide legal advice, document preparation and dispute resolution through lawtech as a commercial activity (whether or not paid for by the consumer or, say, through advertising or similar arrangements).

*"The future primary focus of regulation should be the 'provider' of legal services, whether an individual, entity, title-holder, or technology."*

There would probably also need to be exemptions for advice and assistance provided:

- as self-representation (except in circumstances where self-representation would defeat the underlying rationale for regulation, such as notarial acts or the administration of oaths);
- by those in a blood or other defined familial, domestic or social circumstances (on the basis that this should not be considered 'provision' or as giving rise to a formal adviser-client relationship leading to any reasonable expectation of

regulation or redress<sup>49</sup>); this would be akin to the exemption from registration under the Health and Social Care Act 2008 for “Any ... activity carried out ... for a member of their family or someone in a personal relationship, ... provided in the course of that family or personal relationship for no commercial consideration. A family relationship can include people treating each other as if members of the same family, so long as they are living in the same household. A personal relationship means a relationship between or among friends, including family friends” (Care Quality Commission 2015: page 16);

- by those who are simply offering access to legal information (such as authors and publishers, and websites that do not venture into giving ‘advice and assistance’);
- by those for whom legal services that do not require prior authorisation or accreditation are ‘subsidiary but necessary’ to their main business (such as surveyors, and town planners)<sup>50</sup>: this would need careful consideration so as not to encourage inappropriate bundling of some legal work with other activities in order to avoid legal services regulation;
- by those providers of legal services that do not require prior authorisation or accreditation who are subject to specific regulatory arrangements that will otherwise offer sufficient protection of the public interest<sup>51</sup>: this might apply, for instance, on a statutory basis to claims management companies, insolvency practitioners (see further paragraph 5.7.3), immigration practitioners (see further paragraph 5.7.4), and notaries (see further paragraph 5.7.5), and on an approval basis to others (see further paragraphs 4.5.3.4 and 6.5.3); and
- by those who are acting in their capacity as an officer of a public body (meaning any government department, local authority or other body constituted for the purposes of the public services, local government, or the administration of justice), or are otherwise currently and appropriately exempt under Schedule 3 to the 2007 Act (such as Law Officers of the Crown).

It is perhaps worth emphasising here that I do not see that the existence or nature of a contractual relationship, or payment, should be conclusive of the question of whether or not an adviser or representative is a ‘provider’. The important factors would be that:

- (a) the provider was, in some way, holding out the prospect of knowledge or experience relevant to the consumer’s legal issue; *and*
- (b) the consumer could reasonably infer that a relationship of client and legal adviser was being created.

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49. In offering a joint view about the extent of ‘the practice of law’, the US Federal Trade Commission and the Department of Justice emphasised that the existence of a “a client relationship of trust or reliance” should be a determining factor: see <https://www.justice.gov/atr/file/866666/download>.

50. This is based on the SRA’s current formulation: “a subsidiary but necessary part of the activity of a provider whose main activity does not involve the provision of legal services”.

51. The SRA refers to this as the ‘suitable external regulation exception’, which it currently extends to the Association of Chartered Certified Accountants, the Association of Taxation Technicians, the Chartered Institute of Taxation, the Financial Conduct Authority, the Insolvency Practitioners Association, the ICAEW, and the Royal Institution of Chartered Surveyors.

### 4.7.3 Individuals and entities have distinct characteristics

While the future regulatory framework might adopt a broader approach to who falls within its scope, there is nevertheless still a difference between individuals and entities.

Wherever specific skill or personal integrity is sought, I believe that regulation should be focused on individuals. Where a more collective, or process-based, outcome or regulatory reach is sought, it might be appropriate to allow either or both of individual and entity regulation.

A differentiated approach for the future, as outlined in this chapter, presents a renewed opportunity for the distinction between individuals and entities to be recognised.

Therefore:

#### **Recommendation 13**

Before-the-event authorisation should only be available to individuals, and not to entities.

This would be consistent, for example, with the notion of an individual being an officer of the court<sup>52</sup>, whereas an entity cannot be. Similarly, undertakings are essentially personal in nature (though they can be enforced against an individual's firm).

As a consequence, the current transitional exemption in section 23 of the Legal Services Act 2007 for certain not-for-profit bodies to carry on reserved activities would no longer be appropriate (see paragraph 4.11).

More generally, the regulator should address the question of application to individuals or entities, or both, for all DTE and ATE requirements, too. In doing so, regulation should then reflect an emerging, but important, distinction. Our historical regulatory framework has focused on what these days is often referred to as 'human capital'. This is the knowledge, skills and characteristics of economically productive individuals.



Increasingly, though, the legal services sector is populated by entities, technology and investment – all different forms of economically productive capital. It is arguable that too little regulatory attention has been given to these forms of organisational, physical, technological and financial capital. This is a further reason why greater flexibility could bring benefits in a reformed regulatory framework.

52. Solicitors become officers of the court by virtue of section 50 of the Solicitors Act 1974. Barristers are not officers of the court, and nor are others who conduct litigation. However, it is possible that those who act as, or pretend to be, solicitors when they are not could be subject to the court's inherent jurisdiction: see *Kanat Assaubayev & Others v. Michael Wilson & Partners Ltd* [2014] EWCA Civ 1491.

In particular, the approach in Part 2 of this report would allow the regulator to continue with entity regulation, and consider regulatory requirements and conditions that are appropriate to the different sizes and functions of entities through which legal services are provided in the twenty-first century.

#### **4.7.4 Fit and proper persons, and fitness to practise**

Where the skills and integrity of an individual are critical to the continuing provision of legal services for which personal authorisation or accreditation is required, or for acceptance as a 'registered manager' for registration purposes (see paragraph 4.8.3), it is only right that the regulator should assess whether that individual is a 'fit and proper person'.

This might be a BTE condition before, say, authorisation is conferred. It might be a DTE condition for, say, reaccreditation. It might also be an ATE condition, say, in relation to a registered manager, whose fitness as such might not need to be approved at the time of registration but might be relevant later in assessing whether or not registered manager status should be removed (cf. paragraph 4.8.3.3).

Consequently, as now, I would expect the regulator to set out its conditions and process for making such an assessment, whether on an initial or continuing basis. Such an assessment is not only about skills and competence, but also about character where, for example, clients, judges and the public at large are invited to attach some value or consequence to the integrity of the individual concerned.

This emphasises, again, that legal services and those who provide them raise concerns beyond those normally associated with consumer engagement, consumer protection and economic regulation.

This approach might include the regulator maintaining a generic list of those who would not be regarded as fit and proper, such as those with a criminal record, who have been struck off or otherwise deprived of a professional title, have been disqualified as a company director, or similar.

It should be an offence for such individuals to be a shareholder, director or manager of a registered legal services provider.

In the same way, and as Lord Best's working group on the regulation of property agents pointed out (2019: pages 18 and 54), the use of fit and proper person powers can also provide an effective mechanism for dealing with 'phoenix' providers.

These are businesses that are resurrected, often following insolvency, by the same individuals and sometimes from the same premises and with a similar trading name, having shed the debt of the previous business.



Adopting the same rationale, and as part of continuing monitoring, the regulator should review the regulated status and authorisation of those whose fitness to practise or manage is uncertain. This might result from, say, physical or mental illness, alcohol or drug dependency, or pending criminal or disciplinary charges.

There should also be a corresponding duty of candour on a registered individual and entity within which they work to disclose such conditions to the regulator.

Where fitness to practise is not beyond doubt, the regulator could have power to suspend or remove an individual's registration, or impose additional DTE conditions (such as supervision, or medical or similar certification) on the continuing right of the individual to work within the regulated sector.

## **4.8 Public registration**

### **4.8.1 The fear of over-regulation**

An argument against extending regulation in some form (even only at ATE levels) is that it could impose a regulatory burden on too many 'new entrant' providers and might discourage some from entering the market.

However, the reality of the current framework has, until only recently, applied the full range of reserved activity regulation, combined with DTE and ATE regulation, on all registered providers. This is because, as a matter of fact, the overwhelming majority of legal services were historically provided only by those who were legally qualified.

If such universal coverage was acceptable until 2007, it is difficult to see why a similar, but risk-based and targeted, argument should not hold water in 2020.

Through the Review I have been made aware of potential new providers who are being put off entering the market or investing in technological or other developments that could benefit consumers. At present, they are faced with an almost binary choice of having to operate with the full burden of the regulatory framework, or completely outside it.

It is not always appreciated that entrepreneurs and investors (especially those from outside the traditional sector) often welcome regulation and access to it because it provides more certain parameters for their decision-making and helps them to define and manage risk.



Indeed, sometimes, the businesses or intermediaries with which they would like to work also prefer regulatory cover or access for their clients and customers to, say, the Legal Ombudsman. This is not possible for unregulated providers.

Alternatively, these new entrants might adopt (or feel compelled to adopt) some rather artificial arrangements that leave them outside the regulatory structure but hiving off or farming out the reserved activity elements to another provider within that structure.

This makes the provision of a one-stop shop for consumers significantly less attractive – especially one that might also include elements that did not relate to law (see, for example, Case Study 2, page 154).

An alternative approach founded on potential entry for all providers of legal services, with only ATE regulation at the entry level, could still be either mandatory or voluntary. It seems to me that, where BTE or DTE conditions are considered necessary, then the mandatory application of regulatory requirements is appropriate and essential.

However, where the risks of the services in question, or to the consumers who use them, are not assessed to cross the necessary threshold, the policy choice of mandatory or voluntary submission to ATE conditions for low-risk legal services remains a valid one.

#### **4.8.2 The risk of under-regulation**

The argument against mandatory regulation of all providers stems from the point above that this might be regarded as a policy step too far. It might also raise the likelihood of some providers who could otherwise be tempted to offer low-risk services choosing not to do so.

Such an outcome would potentially restrict consumer choice and competition in areas of legal activity where the risks to consumers are not considered to be great.

In this sense, there could be a good case for keeping any mandatory requirements as limited, least burdensome and as low cost as possible so as not to discourage too many potential new providers from entering the market.

On the other hand, elective participation in the regulatory structure would leave open the possibility that some providers who pose a risk to consumers would choose to operate as unregulated businesses. As now, the providers from whom consumers might need most protection could continue to represent a danger.

### 4.8.3 A public register of providers

#### 4.8.3.1 Mandatory registration

The interim report left open the possibility of voluntary regulation in respect of low-risk services for which only ATE regulation would be appropriate. The overwhelming view from those who responded to the interim report on this point, however, was that registration should be mandatory and that no voluntary option should remain available.

On balance, I am persuaded that this would be the better approach. Accordingly:

#### **Recommendation 14**

The application of regulatory requirements should be supported by the existence of a public register of who is regulated and for what. Accordingly, before-, during- and after-the-event regulation and mandatory registration should apply all 'legal services' offered by 'providers' on a commercial basis or for reward.



As a consequence:

- (a) All providers of legal services (see paragraphs 4.6.1 and 4.7.2) for which BTE, DTE or ATE conditions apply must register as a provider of those services.
- (b) Any individual providing legal services who holds a legal professional title for which statutory protection exists (see Recommendation 44) must register unless any exemption applies.
- (c) The register of providers should be available publicly, and this register would also make clear the services for which any provider was authorised (where BTE authorisation is required) or regulated (where only DTE and ATE conditions were relevant).
- (d) Any provider of legal services (as defined) who was not registered would commit an offence if they offered those services to the public commercially or for reward where no exclusion or exemption applied to them.

Accordingly:

**Recommendation 15**

For the purposes of a future single register of providers of legal services, the registration should be in the name of the entity, partnership, business unit or individual within the jurisdiction providing the relevant services or with which a client has terms of engagement.

Where the registered provider is not an individual, there must also be an identified 'registered manager' (an individual who is a member, director or partner of the registered provider) within the jurisdiction who is personally accountable to the regulator for the compliance of the registered provider.

In this context, a 'business unit' is a separate functional or departmental group within a larger organisation. As such, the business unit is recognised internally as discharging a separate function in relation to legal services, should have a defined membership and, like other registered entities, have an identifiable and accountable 'registered manager'.

Consequently, the effect of registration would be to treat the registered unit in the same way as, say, a wholly-owned subsidiary but without the need for a separate legal entity. This might be particularly relevant to law centres, pro bono provision, and corporate legal departments (see paragraphs 4.11 and 4.12), as well as to multidisciplinary business arrangements (see paragraph 4.13).

For registration and regulation purposes, the important point is that those individuals who need to be authorised, accredited or otherwise personally regulated for the legal services they carry on must be part of the registered unit, and that there is a registered and identifiable manager for the regulator to hold accountable.

The 'registered manager' would fulfil much the same role as a Head of Legal Practice and Head of Finance & Administration under the Legal Services Act 2007. I see no reason for the registered manager to be a qualified lawyer. However, I would expect the regulator to set out its requirements and expectations of that individual as a 'fit and proper person' (see paragraph 4.7.4) for both initial and continuing registration.

It could be the case that an entity or organisation providing legal services might wish to include on the register both its own registration and that of any or all of the individuals who work within it.

Indeed, it would be the case that, if individuals hold a protected legal professional title or require any form of BTE authorisation or are subject to other personal DTE conditions in carrying on particular activities, they should be registered in their own right.

Through the registration process, all registered providers would be subject to at least ATE regulation. Consumers would be able to consult a single public register of providers as they contemplate using any particular source of advice and representation to help with their problem. The regulator would have authority over all providers, whether individuals or entities.

Powers to regulate at both individual and entity levels are important in order to avoid potential gaps. For example, it might be clear that a regulatory breach has occurred within a firm (entity). However, the regulator might not be able to identify or prove that any particular practitioner (individual) was responsible for that breach. Entity registration and regulation, and the requirement for a registered manager, enable the regulator to take action against the firm.

The current framework requires complex and varied public legal education to enable consumers to enquire effectively, and to understand who and what is regulated and the consequences of their choice.

The YouGov (2020) survey suggests that this is confusing (cf. paragraph 2.5). Further, other recent research in Scotland showed that almost two-thirds of consumers did not recognise the difference between 'a solicitor' and 'a lawyer'<sup>53</sup>, and this might explain why some consumers use regulated providers even for non-reserved services.

In respect of all registered providers, some form of protection and redress would be available to their clients. It is probably the case that, at an initial stage, this is as much as a consumer might need to know.

*“The current framework requires complex and varied public legal education to enable consumers to enquire effectively, and to understand who and what is regulated and the consequences of their choice.”*

#### **4.8.3.2 Benefits of public registration**

The benefit of a public register would be that a single point of enquiry could establish for consumers whether or not their prospective provider is registered, and for what. As the Professional Standards Authority noted in relation to their own proposal for a public register (2016b: page 5):

We believe that a single register ... will support multi-disciplinary working, individual and collective accountability and team-based regulation. The register could be established as a shared portal and ultimately as a single entity.

For low-risk activities requiring only ATE regulation, I envisage that the cost of registration should be modest (and the possible regulatory infrastructure costs could also be spread over a greater number of providers than now).

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53. See Law Society of Scotland (2018: page 29).

Although voluntary and based on different criteria to those proposed in this report, the Professional Paralegal Register<sup>54</sup> already exists as a model of registration for practitioners who do not hold a legal professional title but who practise in non-reserved legal services.

There is already demand for such paralegal registration (approaching 2,000), and the costs are manageable at less than £300 for full registration (a proportion of which is paid into a compensation fund), plus the cost of professional indemnity insurance for £2 million.

The Civil Mediation and Family Mediation Councils also maintain voluntary registers that also provide examples of current registration schemes.

For consumers, therefore, the choice might simply become, 'Is this provider on the register or not?'. This would be a far easier task for consumer education. It should therefore be an offence to claim to be registered when not.

It would no longer be necessary for a consumer to understand the nature of the provider's qualifications or title, the reserved or non-reserved nature of the activities undertaken, the context of the business within which a practitioner is working, and to whom any complaint should be addressed if the relationship does not go as expected.

Registration for at least low-risk ATE services would allow those responsible businesses and individuals who are presently part of the unregulated and unregulatable part of the legal services sector to improve their offering to consumers. This could probably be achieved at relatively little cost to them.

On the other hand, there could be great benefit in signalling to the market that it is no longer only legal professional titles that confer the possibility of regulatory protection and redress.

The new structure would also allow those currently unregulated businesses that wish to provide more than just low-risk, ATE-only, services to be regulated for DTE intermediate-risk services, too.

In addition, potentially on a limited and specialist basis, individuals who work within those businesses could *in principle* also be regulated for the highest-risk services requiring BTE authorisation (see further paragraph 5.6).

*"For consumers, therefore, the choice might simply become, 'Is this provider on the register or not?'. This would be a far easier task for consumer education."*

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54. See <https://ppr.org.uk>.

It would be a matter for the regulator to decide the conditions for such regulation, and for each business to assess the cost-benefit in assuming a greater regulatory burden and cost.

There is currently some difference in what is disclosed on existing (title-based) public registers of those who are authorised to provide legal services. It must be a matter for the regulator to set out what information needs to be in the public register and to apply those rules on a sector-wide basis. However, I would not wish to see any current disclosures being reduced.

The question of comparability and compatibility of information as between current professions' registers and a single public register would therefore be a matter for a period of transitional convergence. So, too, would be any issues relating to the compatibility of IT systems.

From a consumer education and protection perspective, there is also a question for the future about whether the adoption and use of all professional titles should be protected. In my view, there is a strong case for this (see Recommendation 44).

In relation to disclosure and transparency, those entities or sole practitioners who are on the register should also be required to declare in correspondence and on websites that they are registered with the regulator as a legal services provider. It should then be an offence to make any false or misleading claim to a protected title or to be registered when not.

#### ***4.8.3.3 Fit and proper persons and prohibited individuals***

For authorisation and registered manager purposes, the regulator should still make an assessment of whether the individuals concerned are 'fit and proper persons' for the purposes of their registration (see paragraph 4.7.4), either as a prior condition or as part of ongoing registration.

In addition, alongside the register of those who are entitled to practise, the regulator should also maintain for public inspection a 'barred' or 'prohibited' list of individuals and entities who have been removed from the register.

Those persons could not then be a 'provider' of legal services or the owner, manager, employee, or registered manager of a registered entity, and it should be an offence for them to become so.

The framework in New South Wales for unregistered health practitioners has similar provisions for prohibiting a person from providing services for a period of time and for placing conditions on the provision of services (see Australian Health Ministers' Advisory Council 2013: page 26).

Although the Law Commission was in favour of a similar prohibition (see Law Commission 2014), the UK and devolved governments unfortunately did not agree (Department of Health & Social Care 2019: paragraph 5.33). I would urge a different conclusion in relation to legal services.

#### 4.8.4 The future of alternative business structures

The approach to authorisation, regulation and registration outlined in this chapter would raise a question about the continuing need for the concept of 'alternative' business structures.

ABSs are not, in fact, different or alternative *businesses*: they are still carrying on the business of providing legal services, in much the same way as other law firms. They might, though, be combining those legal services with other services and products in a multidisciplinary structure: see further paragraph 4.13.

Nor are they alternative or different legal *structures*: they adopt the same organisational forms as other law firms, usually as companies, but also to a lesser extent as general or limited liability partnerships.

The only sense in which ABSs are 'alternative' is that their ownership, control or management is not wholly in the hands of those who are legally qualified. They are separately regulated and approved as 'entities', though entry into the regulatory framework still assumes authorisation for one or more reserved legal activities.

Although an ABS is itself authorised for reserved activities, the delivery of those activities to clients must nonetheless be carried out by an individual who is personally and separately authorised for the relevant activity.

Under the approach to registration outlined above, legal services requiring BTE regulation would only be carried on by *individuals* who were personally authorised and registered. Organisations could also be registered as providers of regulated legal services, but would not be given authorisation for BTE-regulated services.

As a consequence, there would be no need for separate recognition of ABSs: they would be registrable entities in the same way as other organisational providers of legal services. I would envisage that, as a transitional matter, existing ABSs would simply be transferred to the register of providers as entities.

As a result, there remains a question of whether there would be any continuing need for prior approval of 'non-lawyer managers' for entities. If necessary, the regulator could apply the fit and proper person requirements (cf. paragraph 4.7.4) to the owners and managers of all entities on the register.

The regulator would need to assess whether such before-the-event approval was a proportionate, targeted and cost-effective requirement. It is, though, likely that the ability of the regulator to sanction and remove any unsuitable individual from ownership or management might remain appropriate as an after-the-event power.

However, in any event, it is more than likely that underwriters will still want structural information for indemnity insurance purposes. This would include entity structure, the role and background of 'non-lawyers', the nature and extent of any third-party investment, and the projected growth and profit targets.

## 4.9 The challenge of lawtech

### 4.9.1 The nature of lawtech

The emerging and potential influence of technology on the delivery of legal services, dispute resolution and the practice of law has been considered by many writers in recent years. Most notably, Professor Richard Susskind has led sustained awareness and acceptance of the role and potential of technology within the legal sector.<sup>55</sup>

In addition, those with a more direct interest in the impact of technology on legal services regulation have also published their research and emerging thoughts, including the Legal Services Board (2018 and 2020), the Legal Services Consumer Panel (2019b), and the Law Society (2019).

In this report, I am adopting the definition of 'lawtech' used by the Legal Services Consumer Panel (2019b) report on lawtech and consumers. In this meaning, it refers to what I have elsewhere described as 'substitutive' legal technology (cf. Mayson 2020d: paragraph 2.3.2).

In short, 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.

The growth in remote access is at least in part generational (cf. YouGov 2020 on the tendency for those who are younger to prefer technology). But it is also likely, in part, to be the result of a shift in the working and buying behaviours of consumers resulting from enforced lockdown and social distancing measures introduced during the Covid-19 pandemic (see further paragraph 7.1).



The regulatory challenge in respect of lawtech arises from the possibility that consumers might choose to seek advice, assistance, document preparation or dispute resolution through the online provision of those services. At the time of engagement, it could be difficult or even impossible for a consumer to be sure whether or not any legally qualified or authorised regulated legal input has been used.

An additional challenge is that lawtech might not simply be the automation of human thought or processes but rather a completely different way of doing things. For example, disputes about 'smart contracts' will be litigated differently. Online dispute resolution is not a simple replication of traditional litigation.

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55. See, for example, Susskind (1996), Susskind (2008), Susskind & Susskind (2015), and Susskind (2019).



Machine learning is also likely to see patterns in data that human beings do not and could, consequently, draw conclusions that humans (whether clients, legal advisors, judges or society at large) might regard as wrong.

Lawtech includes<sup>56</sup>: interactive websites; live chat or virtual assistants ('chatbots'); cloud data storage; identity-checking and electronic signing; apps to access updates or advice; document review and classification; document drafting and assembly; robotic process automation (usually of high-volume, repeatable tasks); predictive technology based on data mining and analytics; and smart contracts, blockchain and distributed ledger technology.

There might also be increasing numbers of instances where lawtech is not a choice, but a requirement through, say, state-mandated online dispute resolution or other services. For many citizens – and especially the 'digitally excluded' who have no access to technology or lack confidence in using it – this is, in itself, likely to lead to an associated demand for help.

Where an individual's freedom of action or personal assets might be determined by an algorithm, or where there is the potential for inconsistency or unconscious bias in supposedly independent and objective systems, the lack of regulation and of accountability or liability for the technology could be particularly challenging.

We might accordingly give due weight to the following recent observation from Brownsword (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.

It is important not to overstate the potential for lawtech. It is undoubtedly the case that technological products, solutions and support will continue to emerge, and it is in relation to the risks of these developments that regulation needs to be responsive.

Indeed, technology and digital channels enable providers to develop, create and market products and services very quickly, and potentially to millions of people. The speed at which harm can be caused by misleading promotion or poor services is problematic for regulators. Equally, of course, that same speed can also distribute the positive benefits of innovation to otherwise vulnerable people (cf. paragraph 4.10).

Nor is the advancement of lawtech likely to be determined entirely by providers. Remus & Levy suggest (2017: page 541, emphasis added) that "the pace of *development* would depend largely on advances in natural language processing while the pace of *adoption* would depend on client pressures".

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56. See Legal Services Board (2018: page 10).

While we might suspect that consumer appetite is modest, we should not underestimate the power of unexpected events such as Covid-19 to increase those pressures.

It will also undoubtedly be the case that some consumers with the greatest need or vulnerability will not be able to take advantage of beneficial lawtech advances or innovation because of their exclusion from the digital world and inability to afford even this type of support.



Lawtech will therefore not be the answer to everyone's problems and needs. However, it might also be the case, in a post-pandemic world, that lawtech providers could be better funded, financially more resilient, and more entrepreneurial than many law firms.

In those circumstances, they could well be better placed to drive more consolidation, and put greater competitive and cost pressure on traditional law firms and client relationships. Remus & Levy offer a caution (2017: page 551):

amidst countless claims that technology alone can solve the access to justice gap, we should remain cognizant that without regulation, the development and adoption of legal technologies will be driven by the market – a decidedly ineffective means of ensuring access.

#### **4.9.2 Regulatory responses to lawtech**

Where lawtech is promoted, hosted or in some way intermediated by an otherwise regulated provider, there will be no difficulty in attaching accountability and liability to that provider for the consequences of the use of that technology.

In line with a general regulatory trend, Hook suggests that this requires that (2019: page 53):

a responsible legal services provider should only use AI when they have an appropriate understanding of the data on which the software application has been trained, an appropriate knowledge of how the underlying algorithm or deep learning works (or the ability to obtain an ex-post explanation), and are deploying the software in an appropriate environment.

However, this assumes that the relevant capability exists or can be developed – and even that the nature of the technology is such that an explanation is possible. Advances in artificial intelligence and machine learning could outstrip human cognition on both fronts. As Remus & Levy point out (2017: pages 546 and 550):

many clients and lawyers alike lack sufficient understanding of new legal technologies to determine when use is appropriate and when the risk of harm or error is low or high....

Requiring every outcome to be accompanied by a complete explanation of inputs (features that gave rise to the computer’s model) would be exceedingly expensive and time consuming. Most users would not be willing to bear that expense.

In such circumstances, relying on regulation that assumes appropriate knowledge and understanding may already be a lost cause – even if providers have an otherwise highly developed sense of ethical behaviour. Webley (2020: pages 13-14) suggests that this may be a factor in moving towards regulation of technology rather than of lawyers.

The difficulties arise under the current framework when there is no such regulatory ‘peg’ for providers who are not already within that framework. As such, the risk of lawtech is that it could reduce the costs, and increase the likely provision, of currently unregulated legal services. In doing so, it could exacerbate the regulatory gap (cf. paragraph 3.3).

*“relying on regulation that assumes appropriate knowledge and understanding of technology may already be a lost cause”*

The origins of the current regulatory framework lie in regulating the activities of individual practitioners. In essence, the regulatory challenge can be succinctly expressed as the need “to move from regulations designed to control human behaviour to regulation that seeks to supervise automated processes” (Zetsche et al 2017: page 51).

The long-term approach explored in this chapter could allow for the possibility of lawtech falling within the definitions of ‘legal services’ (cf. paragraph 4.6) and ‘provider’ of legal services (cf. paragraph 4.7.2).

Unlike now, there need be no requirement for a reserved legal activity; and the definition of ‘provider’ could incorporate those who own, design, code, host, advise on, or promote the use of, the relevant lawtech application and its outputs.

For the future, where the legal service (as defined) relates to the law of England & Wales, lawtech should be registered – as a minimum for low-risk activities subject only to ATE regulation. Where registration takes place, the need for an individual or entity registrant would ensure that there would be an accountable person within the jurisdiction, as well as a registered manager (see Recommendation 15).

Depending on the nature of the legal services provided and the regulatory requirements attached to them, it could be left for a lawtech organisation to decide who would be the most appropriate registrant.

As one lawtech provider put it to me: “It shouldn’t matter whether the registrant is the promoter, developer, host, coder, or whoever. It is up to them to sort out liability issues between themselves, as long as the consumer has at least one registrant based in England and Wales”. However, it seems to me that, at least in the short term, it will matter, and any judgement about who is the ‘most appropriate registrant’ must itself be subject to review by the regulator.

First, whoever the registrant is, that person must be willing to be fully responsible to the regulator for all regulatory aspects, requirements and consequences. Second, the regulator should be able to suspend or remove a registrant, or place them on a prohibited list (see paragraph 4.8.3.3).

In this way, there would be at least access to consumer complaint investigation and redress and any other minimum requirements of ATE regulation. Based on assessed risk, a legal regulator should also impose additional DTE or ATE requirements as appropriate (such as a specific lawtech code of conduct or tech standard, modified or enhanced indemnity insurance cover, or nomination of an accountable individual).

There is also a case for considering appropriate but mandatory technology insurance (or a hybrid of both indemnity and technology insurance). This could provide cover for technology failures that might have the potential to cause significant and swift harm to many consumers because of the one-to-many nature of technology-based products and services. Such products are already available in the market and should be affordable.

It is conceivable (but in my view unlikely) that BTE authorisation might even be required for lawtech if that was judged to be warranted by the public interest threshold.

Brownsword suggests (2019: page 8 and Appendix A) that “regulators should be guided by a three-pronged general principle ... that practice and provision in the sector should be lawful, socially acceptable, and geared for compliance and sustainability”.

I believe that the proposals in this report would meet Brownsword’s general principle, in particular by providing a socially acceptable regulatory approach that would “‘de-risk’ new technologies so that both providers and consumers are willing to adopt them” (2019: page 9).

It would also be geared for compliance and sustainability by not imposing disproportionate or burdensome obligations and, as such, neither over-regulate and impede innovation (cf. paragraph 4.10) nor under-regulate and expose consumers to unacceptable risks (cf. Brownsword 2019: page 6).

### **Recommendation 16**

Lawtech should fall within a future definition of ‘legal services’, and an appropriate person must be registered as a ‘provider’.

In relation to the regulation of lawtech, the regulator might need to develop and use its own automated tools and mechanisms for detecting online and other technological developments that need to be assessed for potential harm and risk to consumers and the regulatory objectives.

Finally, I should emphasise in this context two other potential benefits from the regulation of lawtech.

First, combined with the possibility of regulatory oversight of innovation (see paragraph 4.10), investment in technology and in lawtech particularly, we could send a strong message globally that we are at the forefront of promoting and supporting the development of modern, responsive legal services.

Equally, the regulatory framework within which that innovation and development could take place would also send a strong message that our investment in technology was not at the expense of exposing potentially vulnerable consumers to unregulated risk or harm.

These factors could combine to enhance the reputational benefits arising from innovation in tech-based products and services, while not running too high a risk that regulation might be perceived to create barriers to that innovation and discourage it.

Second, traditional providers of legal services have been subject to codes of conduct, obligations of ethical behaviour and peer pressure. In the same way, a community of regulated tech providers could develop other dimensions of their service and behaviour that enhance and supplement formal regulation.

With the encouragement and support of government, regulators and industry bodies, this would be to the benefit of providers and consumers.

Case Study 1 gives a sense of some of the issues relating to the regulation of lawtech.

## CASE STUDY 1: LAWTECH

LISA is an artificial intelligence (AI) 'lawyer' operated by Robot Lawyer LISA Ltd (RLL): see <https://robotlawyerlisa.com>. Unlike a human lawyer, LISA starts in the middle ground and allows two lay consumers or business people to create their own tailored legal contracts.

LISA is, in effect, a bilateral automated expertise system, using knowledge engineering to provide objective, impartial and transparent legal and commercial support, guidance and advice. As such, it eliminates the unilateral game-playing, delaying and cost-loading consequences that all too often follow when both parties engage human lawyers.

LISA's current services apply to non-disclosure agreements and property contracts (commercial leases, shorthold tenancies, and room licence (lodger) agreements). The evolution of LISA as lawtech shows how a regulatory framework constructed around reserved legal activities is problematic. Preparing a contract to grant a short lease (of three years or less) is not a reserved activity: Legal Services Act 2007, Sch 2, para 5.

LISA can be used in different ways, for example:

- (a) lay parties (such as landlord and tenant) use LISA themselves;
- (b) a lay intermediary (such as an estate agent) uses LISA on behalf of a landlord, and the tenant uses LISA to respond;
- (c) an estate agent uses LISA on behalf of a landlord, and the tenant instructs a human lawyer: if necessary, the agent can seek further advice from a human lawyer contracted with LISA;
- (d) a landlord provides heads of terms to RLL, which then uses LISA to draft a commercial lease: where necessary or appropriate, RLL can call on the services of a contracted human lawyer to check or amend LISA's draft.

There is no reserved legal activity involved, and so LISA is not – and cannot be – regulated directly for the provision of its legal services. However, if a regulated law firm were to use LISA, regulation would then apply to its use of the technology.

The perceptions of risk, and with whom the risk should lie, can be alleviated to some extent by RLL's insurance. Even so, intermediaries can be nervous about engaging with LISA on a client's behalf.

Also, depending on the choices of the parties, a variety of contractual arrangements will be necessary: as between the parties and RLL; as between intermediaries and the parties; as between intermediaries and RLL; as between RLL and their contracted human lawyers. These add complexity and cost.

Lawtech companies like RLL have to overcome the perceptions (even of sophisticated users) that the application of the technology must surely be regulated because it offers a legal product and service. This need is both time-consuming and expensive, and a commercial disincentive to meeting latent demand.

Under the proposals in Part 2 of this report, short leases and non-disclosure agreements could in future be treated at least as low-risk legal services, and RLL as a provider of legal services through lawtech. Consequently, registration, minimum regulatory requirements (including insurance), an accountable registered manager, and consumer redress would become possible.

*(Case study by kind permission of Chrissie Lightfoot, CEO of Robot Lawyer LISA Ltd)*

#### 4.10 Innovation, waivers and sandboxes

It is often asserted that if regulation is too restrictive, or captured by those it is intended to regulate, it will stifle innovation. Generally, incumbent providers have little incentive to experiment if regulation protects their business models and preferred ways of practising from competition.

This is supported by the CMA's review of evidence (2020b: paragraphs 1.15 and 7.9):

the evidence from the research specifically points to the need to guard against regulations which serve firms with vested interests – such as incumbent firms – and which have a disproportionate impact on smaller firms....

[B]usinesses making use of new technologies and new business models can bring in new customers, expand the size of the market and stimulate competition. But such developments will challenge existing regulatory approaches and the assumptions behind those approaches and policymakers and regulators need to adapt the regulatory framework to accommodate such developments.

This is also supported by evidence that regulatory liberalisation is more likely to result in new entrants to a market being more innovative than incumbents (see, for example, Legal Services Board 2018).



In order to allow initiatives that strict regulation would not normally permit, regulators have often used their powers to offer waivers to some businesses. This can be controversial – particularly if the existence or content of waivers is not made public.

I see a number of difficulties in relation to waivers:

- (1) They send a confusing message to consumers. They can be told by one provider, correctly, that a certain course of action is not permitted by regulation. However, the SRA has over the years granted a significant number of waivers to regulatory requirements relating, for example, to authorisation, working in unregulated firms, professional indemnity insurance, accountants' reports, or contributions to the Compensation Fund.

Consumers can see in the marketplace something that they have been led to believe is not possible. They might then understandably be suspicious of the validity and efficacy of the waived offering.

The issue is not whether these waivers resulted in beneficial outcomes. It is that they allow something that consumers are told is, in all other circumstances, not permitted.

- (2) They are an indication that the scope of the regulations in question is inappropriately drawn or inadequately defined. They are obviously impeding an outcome that the regulator now believes would be beneficial.

In other words, the problem lies not with the power to issue waivers to a select few, but with the underlying regulation that applies to everyone else.

- (3) They can give rise to transparency concerns, if the waivers are not publicly disclosed.
- (4) In some cases, it might not be clear that a proposed initiative that is not currently within the scope of regulation will be beneficial for consumers or the market generally. A waiver might, in those circumstances, be a gamble.

However, without some form of 'controlled experimentation', a potentially valuable innovation might never see the light of day because of regulatory restrictions. Restrictions that are applied before a promoter has established whether or not a product or service is commercially viable could well be counterproductive.

Across a number of regulated sectors, we have recently seen the use of 'sandboxes'. These are defined and limited permissions under which providers can conduct a trial of an initiative that is technically not permitted by regulation, but subject to the conditions, monitoring and oversight of a regulator.

The use of sandboxes is therefore not new to regulation. They have been a feature of financial services regulation for some time, and the Solicitors Regulation Authority first embraced the idea in 2018 with its Innovation Space. A sandbox is also a key feature of the reforms to regulation being implemented in Utah.<sup>57</sup>

The proposals in this report are intended to provide much greater flexibility for regulators. My hope is that this will allow flexible, appropriate and targeted regulation to apply, and that the need for waivers will be significantly reduced. They should also reflect the principles of 'anticipatory regulation' (see Armstrong et al 2019).

While my reservations about waivers apply equally to sandboxes, it is still likely that innovation and entrepreneurialism in the legal services sector will produce new initiatives for which controlled experimentation would remain appropriate.

It is important to recognise that "the regulatory sandbox is one way to achieve proportionality of regulation where abolishing or amending rules is not politically feasible" (Zetzsche et al 2017: page 59).

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57. See paragraph 4.5.4 and further current detail at: <https://sandbox.utcourts.gov>.



Indeed, the Chancellor of the High Court (Sir Geoffrey Vos) is quite clear that regulators “must provide a sandbox environment for new technological products and algorithms to be tested, without imposing rules that stifle innovation” (LSB 2020: page 23).

We should also be mindful of the wider interest in furthering the international and competitive position of UK legal services, as well as in providing every opportunity for exploring the development of solutions for viable and cost-effective access to legal advice and representation for a greater number of citizens and businesses. For these reasons, the appropriate use of regulatory sandboxes should be welcomed and supported.<sup>58</sup>

Accordingly:

#### **Recommendation 17**

The regulator should have powers to grant waivers and to establish and maintain a regulatory sandbox to allow regulated and supervised exploration of suitable initiatives beyond the strict scope of the regulatory framework. Such permissions should be subject to appropriate and published criteria, decision-making and authorisation processes, registration and disclosure requirements (consistent with the need to protect proprietary and confidential information), and time limits.

## **4.11 Law centres, law clinics, charities and pro bono provision**

### **4.11.1 Introduction**

The world of law centres, law clinics and pro bono work is extensive and important. It is supported by AdviceUK, Advocate (formerly the Bar Pro Bono Unit), CILEx Pro Bono Trust, the Free Representation Unit, the Law Centres Network, LawWorks (the Solicitors Pro Bono Group), Support Through Court (formerly the Personal Support Unit), as well as Citizens Advice Bureaux and many more organisations.

This work is not a substitute for legal aid or for the funding of law centres and advice agencies. Yet it contributes hugely to the challenge of delivering access to justice for the vulnerable and reducing otherwise unmet legal need. For example, LawWorks supports a network of about 280 independent advice clinics in England & Wales, responding to 60,000 enquiries a year (of which two-thirds result in advice).

Interestingly, those most closely involved in the provision of not-for-profit and pro bono advice and services are also often the most adamant that, just because legal services might be delivered without payment, they should nevertheless offer the same assurances of competence, quality and consumer protection as those that are delivered at full price.<sup>59</sup>

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58. As in the recently announced Lawtech Sandbox: see <https://technation.io/lawtechuk-vision/#the-case-for-leadership>.

59. See also the Joint Pro Bono Protocol for Legal Work at: <https://www.lawworks.org.uk/why-pro-bono/what-pro-bono/pro-bono-protocol>.

There is no suggestion, therefore, that regulatory obligations should in some way be reduced or significantly modified. Equally, regulators acknowledge that not-for-profit providers rarely pose compliance problems for them.

Pro bono provision represents an area where the lack of flexibility in the 2007 Act has created challenges. The precise scope of some of the reserved legal activities creates some uncertainty about when exactly an employed lawyer might act pro bono. In addition, section 15(4) introduces unwelcome restrictions for in-house lawyers, and the 'special bodies' transitional provisions appear to have become rather permanent.

Certain types of advice can also bring pro bono provision into the reach of other regulators. For example, debt advice has to be licensed under the consumer credit advice rules of the Financial Conduct Authority.

Immigration advice might also fall within the ambit of the Office of the Immigration Services Commissioner (a variation on the current regime is suggested in paragraph 5.7.4).

Complying with anti-money-laundering requirements can also make it difficult to help clients quickly.

There therefore does remain the question of how law centres and pro bono provision should best be recognised and accommodated within the regulatory framework. I propose to deal with this separately in relation to 'stand-alone' provision and to pro bono legal services offered from an otherwise regulated provider such as a law firm.



#### 4.11.2 Independent not-for-profit provision

Where legal services are offered on a not-for-profit basis, the funding of such ventures is often precarious, and dependent on much personal and community goodwill. In those circumstances, the cost and burden of regulatory requirements will weigh heavily on the viability of the organisation.

Operating within the current 'all or nothing' framework – especially where there are reserved legal activities involved – can have a disproportionate effect on the nature, extent and sustainability of provision.

Even so, from the consumer or users' perspective, the same issues arise in relation to individual competence and integrity, as well as to whether the organisation and its processes are reliable and comply with regulatory requirements.

If the laudable goal of equivalence of treatment for paid and free provision is to be achieved, it is difficult to see why or how law centres and similar should be treated any differently. They should therefore be subject to the same mix of individual and entity regulation as will apply more generally (see paragraph 4.7.3).

This chapter recommends an approach to regulation that would be risk-based and differentiated. In such a structure, both a law centre, and an individual volunteering lawyer, should (as appropriate to circumstances) be registered. This would allow lawyers to treat their pro bono or law centre volunteering separately from their usual employment or practice.

LawWorks also reports that 40% of its network of clinics are supported by law schools. Again, the approach outlined in this chapter could reduce the regulatory challenges, by allowing entity registration for the clinic, supported by individual registrations in respect of lecturer-supervisors and for services for which BTE authorisation or DTE regulation are required.

I accept that charities and other not-for-profit bodies would face the loss of entity-level authorisation for reserved legal activities and of the benefit of the 'transitional' protection under section 23 of the 2007 Act (see paragraph 4.7.3). This would mean that individuals within those bodies offering services that in future would require personal BTE authorisation or DTE accreditation would need to be personally registered as appropriate.

The bodies themselves would also need to be registered. On the basis that the exemption under section 23 was intended in 2007 to be transitional, I believe that it is time to contemplate moving to a more permanent settlement where all providers are, in principle, subject to the same regulatory requirements for providing the same services.

I am mindful of the concern expressed by the Chartered Institute of Taxation and the Association of Taxation Technicians (see Case Study 3, page 166) specifically in relation to tax advisory charities who have large caseloads reflecting a need for advice for those who cannot afford to pay for it. I agree with them that it would be "a counter-productive result if this problem were worsened by the costs of regulation".

The intention of the proposals for pro bono practice is not to create disincentives, but to protect consumers, by treating all provision of legal services to those who are in need or vulnerable on an equal footing.

I would not wish to affect negatively the interests of either consumers or providers, and the regulator would need to be mindful of striking the right balance of burden and cost (see also Recommendation 28).

Hopefully, the aggregate burden and cost of regulation for not-for-profit provision in the future could be more sensitive to circumstances and, in some senses, more elective than it is under the 2007 Act. I expect that entry-level registration for ATE purposes should not entail any great fee, and would not therefore think that entity registration should present a cost barrier.

*“The intention of the proposals for pro bono practice is not to create disincentives, but to protect consumers, by treating all provision of legal services to those who are in need or vulnerable on an equal footing.”*

On this basis:

**Recommendation 18**

A law centre or other similar not-for-profit organisation should become a registered entity or unit for regulatory purposes, and the body responsible for compliance with during- and after-the-event requirements. If higher-risk activities are carried out for which before- or during-the-event obligations exist for individuals, the relevant individuals should also be registered in accordance with those obligations. If there are no such obligations, it should be sufficient that individuals are otherwise covered by the entity registration.

I would wish to endorse the following statement from the submission by LawWorks to the interim report (with thanks for their permission to quote it) that lawyers and others provide pro bono voluntarily, in good faith and without financial motive or handling client funds, most often for vulnerable individuals in different settings, for example through the ‘clinics model’ in which free legal advice sessions are ‘hosted’ through universities and community facing organisations. So whilst recipients of legal pro bono should be treated as equally as ‘consumers’ as those who pay for legal services, we believe it is possible to provide appropriate protections for pro bono customers (beneficiaries) while also applying more flexible and ‘light-touch’ (and enabling) regulation that is more bespoke to the context in which pro bono is delivered.

In terms of a regulator imposing and monitoring compliance with ATE and DTE requirements for pro bono work, I believe that the future flexibility would exist to be mindful of the many different circumstances and forms of pro bono provision. The appropriate regulatory conditions could be applied in the interests of minimising burdens and costs on these important, but often economically fragile, services.

I would also encourage the regulator to make use of delegated or ‘alternative’ regulatory arrangements (see paragraphs 6.2.6.4 and 6.5.3) wherever possible, including perhaps oversight from the Charity Commission or Citizens Advice.

### 4.11.3 Law firm and in-house pro bono provision

Law firms and corporate legal departments are also major sources of pro bono advice and representation to citizens who could not otherwise afford legal services. The same sentiment exists about users not being in any way disadvantaged because they are not paying for the advice, whether in terms of competence, quality or protection.

In terms of the recommendations in this chapter, pro bono provision should fall within the definition of 'legal services'. The firm or organisation from which the pro bono activities are carried out should be regarded as a 'provider'.

This would allow specific pro bono regulation and requirements to be readily applied to such provision without otherwise complex or inconvenient 'work-around' arrangements.

In the same sense in which the entity and individuals would need to be registered for 'stand-alone' provision (as in paragraph 4.11.2), so the pro bono activities within a law firm or other organisation should similarly be covered by the necessary registrations. If an organisation wishes to establish its pro bono activities as a separate registrable unit in accordance with Recommendation 18, it should be allowed to do so.

Accordingly:

#### **Recommendation 19**

The pro bono activities of a law firm or in-house legal department can be provided without a need for separate registration where the organisation is registered and those activities comply with the Joint Pro Bono Protocol.

One of the results of this recommendation would be that employed lawyers could undertake through their employer, on a pro bono basis, activities for which they already held the appropriate personal BTE authorisation or DTE accreditation. For other legal services provided through a firm or chambers adhering to the Joint Pro Bono Protocol, they would be part of their organisation's registration.

With no 'reserved legal activities' in the future, there will be no need for pro bono activities to be subject to any equivalent of section 15(4) of the 2007 Act.

## 4.12 Corporate legal departments and in-house lawyers

### 4.12.1 The growth and challenges of in-house provision of legal services

Most of the organisations that maintain in-house legal departments will not regard 'legal services' as their main activity. However, the principal activity of the in-house legal team will certainly be the provision of legal services to their organisation.

Analysis of the legal services market shows that a significant and increasing volume of lawyers (about 20%) and legal services are now in in-house settings. There is little doubt that a tension is inherent in this relationship when the client for legal services is also the adviser's employer. The usual expectation of 'independent' legal advice is often stretched.

*“a tension is inherent in this relationship when the client for legal services is also the adviser’s employer”*

Equally, those in-house advisers who are professionally qualified would typically prefer to maintain their professional independence, ethics and standards and not bow to any organisational or commercial pressures to modify their advice to make it more palatable to their internal clients.

In these circumstances, it is arguable that those with professional obligations might benefit from further regulatory support (see also the discussion of ‘inverse vulnerability’ in Mayson 2020e: paragraph 3.6).

The existence of such support could strengthen their position when dealing with internal clients. It could also provide an independent benchmark or standard against which to justify their professional advice. In principle, they should not be at risk of dismissal or disadvantage simply for observing their professional obligations.

Further, effective corporate governance should ensure that in-house lawyers are able to function effectively and are supported in doing so.<sup>60</sup> This might entail express conditions in their employment contract, and a direct reporting line to the Board (or to the chairman or a senior independent non-executive director).

Even so, I agree with a submission in response to the interim report that we should not presume that “corporate governance alone is sufficient to address the public interest – there will be times when general counsel need recourse beyond their board, to their regulator (e.g. when the concerns derive from, or are perpetuated by, behaviour at board level)”.

This point is emphasised by Gillers (2013: page 385):

A dilemma arises if a company’s lawyers discover that officers, perhaps top officers, perhaps those with whom they work, are either causing the organization to act unlawfully towards others or violating their legal duties to the organization for personal gain. Since the officers are not the lawyers’ clients, we would expect lawyers to take steps to protect the company, which has no legitimate interest in violating the law or in becoming the victim of management illegality. But lawyers will be reluctant to antagonize corporate officers because their jobs, assignments, or retentions depend on their good will. Yet their duty is to protect their client.

These are not just private or commercial matters, and we cannot afford to assume that effective corporate governance always exists and is always effective. Constant vigilance, and robust independent advice from in-house lawyers, is required.

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60. For a discussion about best practice, see Moorhead et al. (2019).

As we have seen in recent years, corporate failures can lead to consumer and societal detriment. In-house lawyers have to be able to sound alarm bells without the chilling effect of potential reprisal. The public interest in effective and fearless legal representation is engaged in much the same way as it is in private practice.

#### **4.12.2 Separate registration**

The question of whether or not to establish an in-house legal department is ultimately resolved by the relevant organisation's policy and preferences.

In the current framework, there are, for instance, employed lawyers in law firms who are regulated for the provision of legal services to the public (including, in the present context, a business or other organisation). There are also in-house lawyers whose role is to advise that business or organisation directly as their employer.

It seems to me that the regulatory distinction between these two groups is problematic. In both situations, the individual lawyers are personally regulated, and should be held accountable to the same professional standards without distinguishing their practising environments.

However, only the law firm in the first situation could presently be subject to entity regulation. Consequently, lawyers in the first could, if need be, be protected by the regulator from unwarranted pressure from their employer.

In-house lawyers in the second situation are part of organisations whose purpose and practice does not include delivering legal services to the public. Those organisations cannot, therefore, presently be subject to entity regulation, and lawyers in them cannot easily be protected by the regulator.

To my mind, this consequence is unfortunate if the role of regulation is conceived to protect in some way both the client and the provider.

It is also questionable to justify the distinction on the basis that the position of an in-house lawyer is akin to client self-representation, which attracts no regulation. This might be a plausible argument if an agent of an organisation, as an officer or employee of it without any legal qualification, purported to advise or represent the organisation.

However, once the organisation engages a regulated provider of legal services, whether as an independent contractor or as an employee, it becomes more than arguable that the usual 'lawyer-client' obligations should arise. This should be the case irrespective of the employed status of the lawyer and the inherent conflict in advising the organisation that pays the salary every month.

Accordingly, for those organisations that recognise and wish to secure their position through strong, independent and effective legal advice, albeit employed and delivered internally, there is a case for an in-house legal function being registered as a separate regulated business unit or 'entity' (even if it is not legally constituted as such): see paragraph 4.8.3.1).

In this way, the legal department's delivery of internal legal services could be subject to the same regulatory obligations as any other registered provider.

Individuals within such a registered in-house unit might also need to be registered personally if they carry on activities for which BTE authorisation would otherwise be required. This would emphasise their position as regulated advisers and, if relevant, as officers of the court.

I raised in the interim report the possibility that an organisation might choose not to maintain a registered in-house unit. In doing so, it might have been taken to be acknowledging that it did not wish its internal legal team to carry on the activities normally expected of 'independent' in-house lawyers.

As a result of the feedback to the interim report, I think it would be preferable (as with registration for low-risk activities) not to allow voluntary exclusion from the regulatory framework.

This would ensure that environments that might inherently provide greater risk or exposure for in-house lawyers could not keep themselves beyond regulatory reach. It would also avoid any sense of a 'two-tier' approach to in-house practice and regulation.



With the existence of an independently regulated legal department, legal professional privilege should in principle attach to communications between the organisation and an in-house lawyer. In short, the organisation in these circumstances should not feel compelled to instruct external providers in order to protect its position.

Lawyers and others who wished to be part of an in-house team would therefore know that they would be joining a fully regulated legal department where their input as a qualified, independent and regulated individual is likely to be valued and respected as such. They would also know, in those circumstances, that they should be well placed and supported to resist any improper pressure from their employer.



Accordingly:

**Recommendation 20**

An in-house legal department should be registered as a distinct business unit, so that the department's delivery of legal services would be subject to the same regulatory obligations as any other registered provider.

Individuals within such a registered in-house unit should also be registered personally if they carry on activities for which before-the-event authorisation or other personal accreditation would otherwise be required.

There are three final practical issues in the context of in-house lawyers.

The first arises from the trend for general counsel and in-house lawyers to be engaged in more collaborative relationships with their business colleagues. This is to be welcomed when it leads to better targeted and valued legal advice that can be more closely aligned with the business context of the clients.

However, the need for that legal advice to remain independent needs to be recognised by all concerned. That is an issue that would ultimately be supervised through the separately registered legal department, with accountability of the 'registered manager' to the regulator.

I do not believe that the fine detail of this needs to be set out in legislation. However, clear, detailed and practical guidance from the regulator must be developed quickly to allow in-house legal departments to navigate the dividing line with confidence. This guidance should be developed in close consultation with experienced in-house lawyers.

Second, the cost and burden of regulating a legal department as if it were a separate entity must not be disproportionate. It must not increase the perception of dedicated in-house provision as being commercially or operationally less attractive.

My expectation is that the cost of registration would be modest (see paragraph 4.8.3.1), and any additional costs for BTE-authorised individuals should be no more than now. For many in-house departments, therefore, the costs of registering the in-house department itself should not be onerous.

In the case of in-house legal departments, although the costs of maintaining registration would need to be covered, there would not be clients who would be able to make a complaint to the legal services ombudsman (see paragraph 5.3.2). Their cost of registration should not therefore need to include a contribution to ombudsman costs.

The issue of cost could be particularly important for in-house legal departments that have only one or very few people. In some cases, the registration of the department might also cover an individual without the need for the separate registration of the latter.

For example, a legal department that comprises, say, one paralegal managing alcohol or gaming licences could be covered by just the 'unit' registration. Such licensing would be a low-risk, ATE-only, legal service (see paragraph 4.5.3.3) for which individual registration would not be necessary (though not prevented).

Another department might have one intellectual property practitioner managing the company's patent and related matters. The department would be covered by 'unit' registration.

Where its work involves legal services for which BTE-authorisation is required (such as conducting patent litigation), the practitioner concerned would also need to be individually registered. If there are other services for which the regulator has decided that personal DTE accreditation is a condition of practice, that would also need to be reflected in an individual registration.

Third, the provision of pro bono (or even paid-for) advice and representation by members of an in-house legal team to clients outside the organisation could in future be treated as discussed in paragraph 4.11.3. This would also be helped by distinct 'entity' treatment of the in-house function. However, this could lead to a modest increase in the registration cost.

#### **4.13 Multidisciplinary businesses**

Before the Legal Services Act 2007, the combination of legal services with almost any other kind of business activity was prohibited. Firms of solicitors had to be wholly owned by solicitors, and were prevented from 'hiving off' related activities into separate, unregulated businesses.

Those firms were therefore prevented from having other categories of lawyers (such as barristers or legal executives) as co-owners, from promoting valued management professionals to ownership positions, from joining in business with, say, accountants, estate agents or technology providers, and from taking in third-party equity investment from venture capitalists or the public.

Since alternative business structures (ABSs) were allowed, with effect from 2011, multidisciplinary businesses and external investment of many forms and combinations have emerged. It is not my intention here to review the nature and performance of ABSs.

However, I would note that many ABSs only offer legal services, and the position of these businesses in the proposed regulatory framework was addressed in paragraph 4.8.4. Accordingly, the ABS structure became a route to new forms of legal practice, not all of which were 'multidisciplinary practices' in the sense of this paragraph.

Businesses that are truly multidisciplinary and include, for example, elements of different professional services (such as law and accounting), or different types of business (such as retail and law, as in the Co-operative Group), can face significant structural requirements under the current regulatory framework.

These requirements can be expensive in terms of creating separate legal entities and compliance functions. They can present commercial and economic disincentives, too, by leading to a 'disrupted' customer experience and costs that prevent a provider from offering legal services at as low a price as might otherwise be possible (see, for example, Case Study 2 page 154).

It is likely that those wishing to promote multidisciplinary services will accept that the inherent complexity of their business will lead to different regulatory requirements for distinct parts of their enterprise (say, law and accounting). But they will certainly question whether any requirement for, effectively, different regulatory regimes *within* the same service sector should be necessary.

In this context, the effects of complying with, for instance, the distinction between reserved and non-reserved legal activities, or the separate business rule, will add unwelcome complexity into commercial, compliance and governance arrangements (these matters can also be seen in Case Study 2).

*“the current regulatory framework ... can present commercial and economic disincentives, too, by leading to a 'disrupted' customer experience and costs that prevent a provider from offering legal services at as low a price as might otherwise be possible”*

## CASE STUDY 2: MDPs AND STRUCTURAL CONTORTION

The Farewill group is a multidisciplinary business that offers wills, probate services and cremation. It also has a multidisciplinary team that includes software engineering, design and user research, brand, acquisition and data analysis, sales and partnerships, customer operations, and management functions for operations, legal, finance, talent and governance.

Formed in 2015, Farewill now produces one in 30 of UK wills. But it cannot offer its customers a seamless service. The probate element of Farewill's business is a reserved legal activity, and so Farewill Legal Services had to be established as a separate group company with its own licence as an alternative business structure (ABS).

Consequently, while a customer can start their relationship with will-writing in the unregulated part of the group, once it is necessary to prepare probate papers, the customer must pass *entirely* into the regulated ABS. Lorraine Robinson, Head of Legal at Farewill, explains:

"To deal with the customer from there on, Farewill Legal Services must be set up for all aspects of the transaction, from day-to-day customer interactions to handling payment and fees. And it must do that in an SRA-compliant way. That's another business unit and a separate compliance function, to service one element of a larger transaction."

In short, "we have to introduce friction at this point into the customer journey". "There has to be informed consent to referral, and it doesn't really make a whole lot of sense to them – to be honest it just sounds like a lot of lawyerly red-tape – as it's still a Farewill group business they're dealing with, after all. Plus, they're bereaved and just want probate, not a lesson in legal services regulation."

"We understand the rationale behind the separate business rules to prevent a regulated business using regulatory credentials to acquire customers and then hive the work off into unregulated businesses. We're different – our unregulated business is the flagship brand, acquiring customers across the group – and the referral is going up, rather than down, the regulatory ladder."

"There are also additional risks and costs to running separate business units with ethical walls between. These costs range from increased handling time, multiple systems and additional training to mitigate risks across the regulatory line, and greater regulatory overheads. They ... reduce the savings we can pass on to our customers."

*(Adapted from LSB (2020) with kind permission of Lorraine Robinson and the LSB)*

In the context of the approach recommended in this report, I would suggest that the creation of a separate legal entity should remain open to those who find that this would be preferable for strategic, commercial or operational reasons.

For those who believe that an integrated structure would permit a more seamless and cost-effective customer service and experience, I would support the legal service component of a multidisciplinary business being treated as a separate business unit for registration purposes, with a registered manager, in much the same way as if it were an in-house legal department (cf. paragraph 4.12).

Accordingly:

**Recommendation 21**

The legal services practice of a multidisciplinary business must be registered either as a separate legal entity or as a distinct business unit, so that its delivery of legal services would be subject to the same regulatory obligations as any other registered provider.

Individuals within such a registered entity or business unit should also be registered personally if they carry on activities for which before-the-event authorisation or other personal accreditation would otherwise be required.

Finally, I should make it clear that I am here drawing the distinction that is also present in the definition of ‘provider’ in paragraph 4.7.2. A multidisciplinary business, where legal services are a mainstream component of the business along with other mainstream non-legal components, would in part be a provider of legal services. The legal services element would need to be registered, as appropriate, as an entity or unit.

This is different to a non-legal business where legal services are a ‘subsidiary but necessary’ service to the mainstream business. For this type of business, registration would not be required. However, if personal authorisation or accreditation is needed for one or more of the subsidiary legal services, the unit and relevant individuals would need to register.

In these circumstances, though, the regulator might wish to make use of its powers to delegate to a ‘designated body’ (see paragraph 6.2.6.4). This would allow, for instance, the Royal Institution of Chartered Surveyors to remain the regulator in practice for a firm of chartered surveyors in circumstances where the firm employed, say, specialists in planning law and the legal services regulator required such specialists to maintain personal registration and DTE accreditation (cf. paragraph 5.6.3).

*“The current structure will only admit those who are legally qualified. This is an unnecessary restriction that inhibits further access to legal advice and representation as well as to regulated innovation, competition and technological substitution.”*

#### 4.14 Summary

The regulatory structure of the Legal Services Act 2007 generally imposes the full burden of regulation on all regulated providers, irrespective of the risks arising from their chosen areas of practice. It also excludes from regulation (and therefore deprives consumers of redress from) those who offer only low-risk services.

An alternative approach need not be seen necessarily only in terms of an increase in the scope of sector regulation. The position now is that in fact all legal services are within the scope of regulation if they are provided by someone who is already legally qualified and authorised to practise.

Unfortunately, the current structure will only admit those who are in some way legally qualified. This is an unnecessary restriction that inhibits further access to legal advice and representation as well as to *regulated* innovation, competition and technological substitution.

A different approach to regulation could address these concerns and consequences, to the benefit of consumers and providers. Regulation – and its costs and burdens – should be targeted and distributed more appropriately to the risks of the activities actually undertaken by providers.

In other words, while *scope* should be broader (to protect consumers), the *focus* of regulation should be targeted (to place only proportionate regulatory burdens on providers).

There should also be a public register of all providers of legal services falling within the structure, also disclosing (where relevant) the legal services for which each provider is registered.

The premise of the alternative approach to regulation set out here is that, in the future, authorisation and the application of BTE, DTE and ATE requirements would not be imposed *only* on those who hold one or other of the existing professional titles.

Instead, all providers of legal services should be capable of entering the regulated domain for at least defined low-risk legal services and ATE regulation.

Beyond this, BTE authorisation would be required for certain defined important and high-risk legal services. A risk-based approach should determine whether additional DTE requirements should be applied to other services.

Such an approach would be consistent with the observation of the Competition & Markets Authority in their market study (CMA 2016: paragraph 6.26) that the objective of regulation should be to ensure that consumers are protected primarily from the worst consequences of poor-quality delivery. It should not be to remove all risks that consumers or society might potentially face.

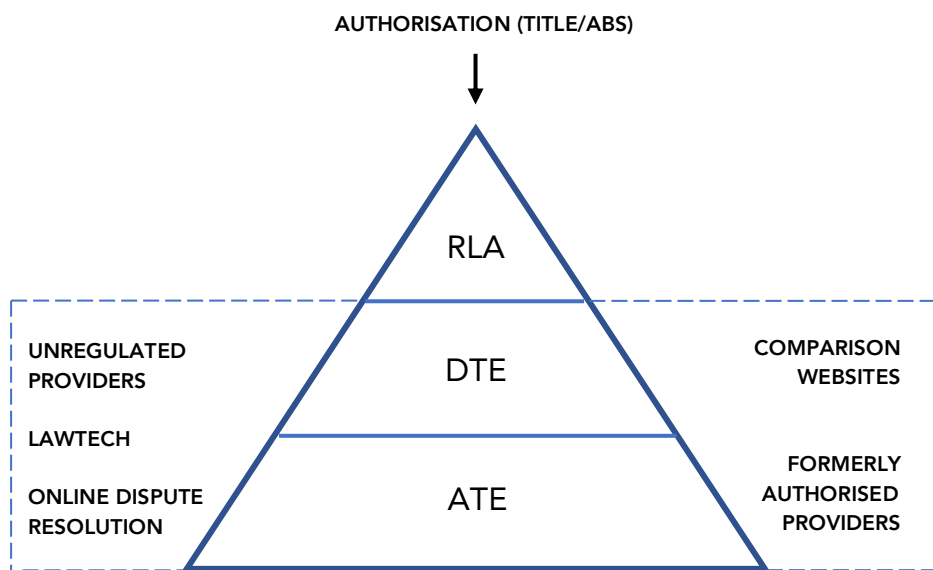
This approach would not assume the disappearance of professional titles or of any need to regulate them. Instead, it would offer an *additional* route to those without professional titles who might then in future enter and position themselves within a risk-based framework of regulation.

I would note in closing that the approach suggested here is consistent with that suggested for the healthcare professions by the Professional Standards Authority (2017: paragraph 6.7):

Those presenting the highest risks would require a licence to practise in addition to registration in order to practise their profession. A second group ... would be both registered and accredited.... A third, those presenting the lowest risk of harm, would be required to be registered.

In summary:

**From the current approach to regulation ...**



**... to an alternative**

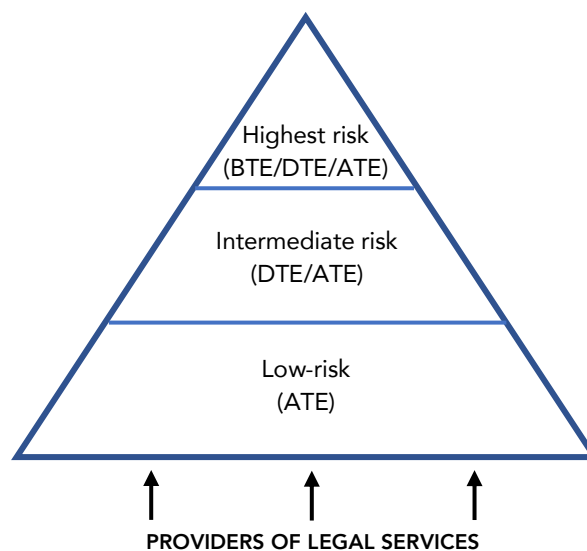


Figure 4.14: Summary of the difference in approach

There are a number of consequential issues that flow from such a change in approach. These are considered separately in Chapters 5 (activity and title) and 6 (structural issues).





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## CHAPTER 5

### ACTIVITY AND TITLE

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#### 5.1 Introduction

Chapter 4 outlined the foundations of a longer-term alternative approach to legal services regulation under which all providers of legal services could be registered and regulated. They would then be subject to a risk-based framework that would apply different requirements for before-, during-, and after-the-event regulation, depending on the degree of assessed risk to the public interest in the services provided.

This chapter will now explain this proposed approach to risk and activity in more detail, and consider the future role of professional titles within it.

#### 5.2 Before-the-event regulation

##### 5.2.1 The purpose of prior authorisation

The proposal in Chapter 4 is that the highest-risk legal services should require before-the-event authorisation before any individual can be allowed to offer those services to anyone (whether members of the public or employers) commercially or for reward.

An initial point to be made here is that prior authorisation should not be seen or understood as favouring the interests of a particular class of providers, such as those with a professional title. In principle, the consequence of what we currently characterise as reservation should be a need for any *provider* of the relevant activity to be authorised.

With a move towards the differentiated application of before- (BTE), during- (DTE) and after-the-event (ATE) conditions as set out in Chapter 4, BTE authorisation would be the equivalent of reservation.

Reservation might presently be seen in its *outcomes* to protect a certain set of interests – those of lawyers. But there is also a question about the interests intended to be protected by its *purpose*. Perhaps the easiest way to find a common rationale for the purpose of the current reserved activities is to connect them to some form of State interest.

Rights of audience, the conduct of litigation, the administration of oaths, and notarial activities are all based, in some form, on an individual's position as a state-appointed or state-recognised officer (such as barrister, solicitor, commissioner for oaths, and notary public). The state's interest is therefore clear.

In addition, the others also stem from a different form of state interest, either in the collection of taxation (stamp duty on property transactions, or taxes on death) or in the integrity of public registers (for land registration or grants of probate).

While all of these have incidental benefits of consumer protection, it is difficult to see in their history that this was the real purpose for reservation (cf. Mayson & Marley 2010). Equally, however tempting it might be to think that state interest and public interest are the same, I do not believe that this would be the correct judgement.

I certainly would not argue that the proper collection of taxation is not in the public interest. However, there are other forms of taxation to which this logic could apply but for which the underlying transactions or events do not presently give rise to the reservation of that activity (such as the preparation and submission of tax returns) – and I think should not.

In short, it could be argued that the current reserved activities relate most closely to what, in terms of the public interest articulated earlier (in paragraph 4.2), would be justified by reference to the public good rather than to consumer protection.

Consequently, a regulatory structure has been built around the public interest need to secure the highest levels of competence, skill and integrity for a narrow range of legal activities. These were, as a matter of history, demonstrated predominantly by barristers, solicitors and notaries.

The regulatory requirements for this protection of the public interest were then simply carried over to all other legal services, without reference to any further rationale for their regulation. It is time that these decisions were revisited.

Returning to the articulation of the public interest, therefore, I would now draw a distinction between the public interest and state interest. I would then suggest that state interest alone should not be sufficient for reservation or its future equivalent.

I would also emphasise the distinction between the public good and consumer protection elements of the public interest. This could lead to the identification of additional activities or services under either of those limbs that are not presently within the parameters of reservation (although I see no current need for this).

## **5.2.2 The future basis of prior authorisation**

For the future, therefore, I believe that some legal services should be subject to BTE conditions because they are of the highest and enduring public interest (either for reasons of public good or risk to consumers). But this might not be the current set of reserved legal activities.

As a consequence:

### ***Recommendation 22***

The current list of reserved activities should be reviewed. This process should identify clearly the public interest basis of the need for before-the-event authorisation. This need should be established by reference to public good or

consumer protection and should be explicitly articulated, to confirm that the current reservation can continue to be justified. Other high-risk activities should also be reviewed against these same criteria to see whether prior authorisation should in the future be extended to them.

### 5.2.2.1 Public good authorisation

Any revised approach should in my view lead to greater differentiation among services that are thought to require prior authorisation. For example, even if rights of audience were in principle to remain subject to BTE regulation, it need not follow that *all* rights of audience should require prior authorisation (in contrast, perhaps, only to some continuing form of DTE and ATE regulation).

It might be tempting to think that those who appear as advocates in the most senior courts should be regulated, and that perhaps those who appear in magistrates' courts and many tribunals would not need to be. However, the vulnerability of parties and the relative importance of the issues and consequences to them could suggest a *greater* need in tribunals and the lower courts.

Under the 2007 Act, the reserved activities are set out in the statute. I can see that it would be potentially appealing in a reformed framework for those legal services that need to be subject to BTE authorisation to be similarly prescribed.

Nevertheless, I would pose the question whether this might only be required for those services that are judged to warrant regulation for the public good (and not necessarily, therefore, for those that are required only for consumer protection).

To my mind, this would probably apply, for example, to most rights of audience and the conduct of most litigation. To promote and protect the public good of the rule of law and the effective administration of justice, constitutionally it would be justifiable to 'enshrine' these requirements in an enabling Act of Parliament.

In this sense, the *requirement* for prior authorisation in relation to 'public good' legal services would be identified in statute, with an appropriate definition of each service. The regulatory *consequences* that then followed from that requirement would not need to be fixed in statute, but should be determined (and amended) as appropriate over time by the regulator.



Further:

**Recommendation 23**

Rights of audience and rights to conduct litigation should be linked, in the sense that, if the conduct of litigation in certain defined proceedings does not fall within the definition of legal services or is subject to an exemption from it, the same exclusion should generally apply to the exercise of rights of audience in those same proceedings.

It would also be sensible, in my view, to give the judiciary more than consultation rights in relation to the establishment and oversight of these public good legal services. This could assure the judges, the state and the general public that the underpinnings of our constitutional arrangements are appropriately overseen and protected.

Accordingly:

**Recommendation 24**

The regulator should be required both to consult and to receive the formal approval of senior judges in relation to the regulatory conditions proposed by the regulator for public good legal services, as well as to any exemptions<sup>61</sup> from them proposed by the regulator.

A group of senior judges should be established for this purpose by the Lord Chief Justice, the President of the Supreme Court, and the Master of the Rolls. In relation to rights of audience and the conduct of litigation, this would take England & Wales to a position that is closer to that in, say, Scotland and Australia (and possibly the US), where judges continue to play an active role in at least public good legal activities.

The concept of specialist authorisation is already used within legal services regulation (and is in some circumstances described as 'limited licensing': cf. paragraph 4.5.2.4). I believe that this could provide a useful approach for the future.

In line with a new approach to specialist BTE authorisation and DTE accreditation (see paragraph 5.6.3), the regulator could determine that certain types of proceedings should attract specific conditions. Those conditions should then, in principle, be applied in the same way to all practitioners and providers, irrespective of their professional background.

To take an analogy: passing a driving test leads to a general authorisation to drive on public highways. It does not, however, allow the licensee to drive a heavy goods vehicle or a public service vehicle. Separate, specialist authorisations are required.

We already have a number of instances where specific and limited prior authorisations are given. These include rights of audience for solicitors (in the higher courts), for chartered legal executives (in relation to civil, criminal or family proceedings), for costs lawyers (in relation to costs proceedings), and for patent and trademark attorneys (with a higher courts advocacy certificate).

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61. On exemptions, see paragraph 4.5.3.4.

Accordingly, even where some authorisation already exists (such as general rights of audience for solicitors), it does not have to follow that the authorisation should be universal. Additional authorisation or accreditation requirements could be attached, as in the case of solicitors who wish to exercise rights of audience in the higher courts.

These links between authorisation and professional titles are considered further in paragraph 5.6.

In addition to rights of audience and the conduct of litigation, I believe that notarial activities also satisfy the necessary threshold for public good authorisation, as do immigration advice and services. However, for the reasons given in paragraphs 5.7.4 and 5.7.5, I do not believe that these should in the future fall within the scope of legal services regulation.

Although the administration of oaths serves a valuable public function, modern circumstances and different modes of authentication probably no longer justify a requirement for public good authorisation. However, the administration of oaths could remain subject to appropriate DTE accreditation (see paragraph 5.6.3).

#### **5.2.2.2 Consumer protection authorisation**

Given the shifting nature of legal services and consumer protection concerns, it is more of an open question whether those activities that are thought to warrant BTE authorisation under only the consumer protection limb of the public interest (as set out in paragraph 4.2) should be defined in statute.

While the public good authorisations might be seen as reflecting and protecting enduring elements of civil society, the purely consumer protection authorisations could result from rather more short-term or even transient developments in the sector. Having the flexibility to apply regulatory tools in a quicker, targeted way is more likely to meet these needs than statutory prescription.

Given that the public good authorisations will apply to contentious legal services, authorisations for consumer protection reasons will, by definition, be non-contentious. Just as the services for which public good authorisation are required should, in my view, be limited in number, so too should any for consumer protection authorisations.



This is not said as a matter of principle, but to reflect that authorisation should require a high threshold of risk and not many legal services are likely to pass it.

Potential candidates for consumer protection authorisation might include (for illustration or consideration rather than as recommendations, and subject to the comments that follow):

- 'conveyancing services', as currently defined for licensed conveyancers in section 11(3)(a) of the Administration of Justice Act 1985;
- the transfer or first registration of unregistered land;
- preparation of a will or other testamentary instrument;
- preparation of a letter of power of attorney;
- the administration of the estate of a deceased person;
- preparation of costs budgets and bills;
- intellectual property services (as defined in section 275A(7) of the Copyrights, Designs and Patents Act 1988 and section 83A(7) of the Trade Marks Act 1994)
- tax advice (see Case Study 3, page 166);
- advice relating to social welfare and benefits (including housing, discrimination and special educational needs).

Although I have included will-writing, powers of attorney and estate administration as illustrations, I am not in fact in favour of them becoming subject to BTE authorisation: see further paragraphs 5.4 and 7.3.1.1. I am also not immediately persuaded, given the likely future of conveyancing, at least in relation to registered land, that it needs to be subject to BTE authorisation (though I would be in favour of DTE accreditation).

Indeed, avoiding the need for statutory determination through reservation or its future equivalent might allow these services, or the drafting of costs bills, or tax advice, to be subject to DTE regulatory conditions without the need for practitioners to undertake more costly or burdensome BTE qualification and prior authorisation.

To be clear, because the recommended approach would no longer be 'all or nothing', it could still be open to the regulator to impose a DTE requirement that, for example, those who write wills, draft costs bills, or give tax advice should hold some form of qualification or accreditation to demonstrate their competence for the activity or service in question (see further paragraph 5.4). It is the requirement for prior authorisation that might not be imposed.

In these terms, the regulatory structure could adopt a different approach to authorisation for public good reasons as compared with authorisation for consumer protection reasons. For instance, paragraph 5.2.2.1 proposes judicial involvement and oversight in relation to public good legal services.

Such involvement and oversight would not be necessary, or possibly even appropriate, in relation to other legal services where the primary need for regulation relates to consumer protection. Arguably, no judicial involvement is required in regulation that does not have a public good rationale, but more consumer or lay engagement is.

These legal services could then be subject to different processes within the overall regulatory framework. (Decision-making in respect of legal services subject to authorisation is addressed again in paragraph 6.2.4.)

The issue of regulating tax advice might be one for broader intervention than only as a legal service. HMRC recently issued a call for evidence in relation to raising the standards of tax advice. This raises many of the same issues as those that are found in the wider legal services market (2020: paragraphs 55 to 58):

55. The government believes that there is a case for intervention in the market for tax advice in order to protect consumers. With over 12 million customers represented by tax advisers it is a significant population with diverse needs. Most regulated advisers will hold professional indemnity insurance but there is little in place to support consumers, especially when dealing with unregulated advisers. Where consumers are employing an adviser who does not belong to a professional body, generally the only recourse they will have is the ability to instigate a claim on the basis of negligence: this is dependent on the adviser still being in business and the consumer having the funds to pursue legal action.

56. HMRC's insight work has shown us that consumers are generally unaware that some sections of the market are self-regulating or that there is no requirement for their adviser to have specific expertise in order to provide advice.

57. HMRC research also shows that most consumers when choosing a tax adviser went by recommendation, typically by word of mouth from people in the business network or friends and family. Clients thought that going by recommendation meant the adviser could be trusted to do a good job because other people had a good experience with them.

58. The same research found that businesses thought relevant qualifications important but tended not to ask as they assumed all advisers had them and belonged to a professional body. Customer insight also tells us that cost is frequently the leading factor in how consumers select an adviser.

It might be that the approach advocated in this report could provide some basis for addressing the issues identified by HMRC.



### CASE STUDY 3: THE REGULATION OF TAXATION ADVICE

A challenging area for regulation is tax advice (see also the joint submission in response to the interim report from the Chartered Institution of Taxation (CIOT) and the Association of Taxation Technicians (ATT), available at: <https://www.tax.org.uk/policy-technical/submissions/independent-review-legal-services-regulation-'findings-proposals-and>).

Tax litigation would remain subject to the BTE requirements for authorisation in respect of rights of audience and conducting litigation (paragraphs 4.5.3.3 and 5.2.2.1). The regulator might reasonably decide that specialist accreditation should also be required (paragraph 5.6.3).

Tax compliance services, of the sort carried out by HMRC-recognised tax agents, could be considered low-risk and require only firm-level registration for ATE-only regulation (paragraph 4.5.3.3). Where these are performed by agents who are otherwise regulated (say, by the ICAEW), the provisions for alternative regulatory arrangements could apply (see paragraph 6.5.3).

For the 30% of recognised tax agents who are not affiliated to a professional body, and for whom no alternative arrangements would exist, registration would represent a change. It would include a requirement for some professional indemnity insurance and compliance with a code of conduct that applied to all registered tax advisers – probably based on the current *Professional Conduct in Relation to Taxation* (paragraph 5.3.1).

The need for registration could also extend to the increasing use of technology for compliance processes and online advice, and so bring the providers of such services within the scope of regulation. This could benefit both consumers and HMRC.

I do not expect the cost of registration to be off-putting, and would not therefore anticipate, as CIOT and ATT fear, that agents would be 'outlawed' and removed from the market. However, I think that it is reasonable for them to be subject to some regulation. They seek to earn a living out of inherent legal complexity from those who are subject to significant information and power asymmetries (in relation to both providers and HMRC).

For tax advice on more complex or high-risk matters, it may be that the regulator will wish to impose conditions for DTE specialist accreditation (as appropriate and from, perhaps, ICAEW, Law Society, CIOT, ATT, and STEP). Again, there could be specific requirements for professional indemnity insurance and code compliance, and scope for alternative regulatory arrangements.

CIOT and ATT rightly refer to the distinction between advice and the 'promotion' of tax avoidance schemes. With registration, tax advisers and agents would appear on the register; promoters of avoidance schemes would not, and consumers would therefore be 'on notice' that no regulation or protection applied to their use of them. To the extent that the promoters were engaged in providing advice without being registered, they would be committing an offence (paragraph 4.8.3.1).

For the position of tax advisory charities, see paragraph 4.11.



### **5.2.3 Conclusions on authorisation**

The purpose of BTE authorisation would be to assure the competence and experience of those practitioners who were allowed by the regulator to provide the highest-risk legal services. The risk should be assessed relative to the public interest.

At the moment, because of the reserved legal activities, consumer choice for all regulated legal services is limited to authorised providers who can carry on those activities. The reserved activities are themselves slanted more towards protecting the state's interests than those of consumers.

The alternative approach of this report might well still deny some element of consumer choice where the public good suggests that BTE authorisation is justified. However, in applying a risk-based approach to other legal services, the regulator can be mindful of the opportunity for greater consumer autonomy.

Further, as discussed in paragraph 5.2.2, a distinction between public good and consumer protection authorisations might suggest a role for the judiciary in relation to the former to ensure that the appropriate recognition and protection of matters of constitutional importance and public confidence are taken into account.

A more targeted approach in the sense explored here would also be consistent with Brownsword's observation (2019: paragraph 4.1.1):

Consumers have a broad range of interests. They have interests in both their freedom (including their practical options, their privacy, and their autonomy) and their well-being (including their physical and psychological well-being, their financial interests and their reputational interests). However, consumers do not all necessarily value these interests in quite the same way. For some consumers, the role of regulators is to help them to make informed choices; but, for others, it is protection against harm and promotion of one's welfare that is the priority. Accordingly, regulators need to be clear about which interests – the interest in autonomy and informed choice or the interest in welfare – they are prioritising in their consumer protection regimes and whether this is the right approach.

In terms of legal services to be subject to consumer protection authorisation, I would suggest that the decision should be directed at Brownsword's notion of harm and welfare.

## **5.3 After-the-event regulation**

### **5.3.1 Setting the minimum**

Once regulatory scope has been determined through an appropriate definition of 'legal services' (see paragraph 4.6), ATE regulation would effectively set the base level of regulatory intervention. This would be applied to all legal services falling within the definition, but would be the only regulatory intervention for those legal services that are identified as carrying the lowest risk to consumers (see paragraph 4.5.3.3).

Consequently, the issue for consideration here becomes the minimum ATE conditions that should be applied to such ATE-only services.

For reasons explored in paragraph 4.8, there could be strong public policy and consumer protection arguments in favour of leaving ATE conditions at a basic level. However, the need for, and objectives of, protection must determine how minimal such a basic level should be.

Accordingly, on the basis of feedback to the interim report:

**Recommendation 25**

The minimum conditions for ATE regulation should include<sup>62</sup>:

- (a) requirements for accreditation (if appropriate and as determined the regulator) in relation to specific legal services offered by a provider;
- (b) access to consumer complaints investigation and redress;
- (c) requirements for disclosure and transparency in relation to regulatory status, terms of engagement, pricing (as appropriate), and complaints;
- (d) compliance with standards of conduct, set out in a code of conduct applicable to all regulated legal services, and against which a provider's conduct and service can be assessed;
- (e) a minimum level of professional indemnity insurance; and
- (f) power for the regulator, as a result of any formal complaints investigation, professional disciplinary proceedings, or other comparable evidence, to issue a prohibition order<sup>63</sup> removing a provider from the register.

The question of whether any form of qualification or accreditation should be a precondition for entry into ATE regulation and onto the register of providers is a matter that I would leave to the discretion of the regulator. Accreditation might not be necessary or appropriate in all circumstances, especially for those providing the lowest-risk legal services.



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62. What is suggested here is similar to that adopted in New South Wales and South Australia in relation to unregistered health practitioners (see Australian Health Ministers' Advisory Council 2013: page 25).  
63. For further reference to prohibition orders, see paragraph 4.8.3.3.

In relation to disclosure and transparency, the Better Regulation Commission rightly observes that the *utility* of transparency is the critical criterion. Too often when transparency requirements are introduced (2006: page 45):

there may be too much focus on providing exhaustively complete information, often driven by a desire to avoid legislative or regulatory risk, rather than finding more meaningful and effective ways to communicate with customers.

Care must therefore be taken in identifying and specifying targeted and purposeful disclosure requirements.

The requirements for standards of conduct, set out in a code of conduct applicable to all providers, are important. A common code of conduct would be a key part of the regulatory infrastructure that would alleviate concerns that providers of the same services were somehow being held to account against a different set of standards.

This approach is also in line with that suggested for healthcare professionals by the Professional Standards Authority (2016b: page 7, emphasis in original):

We propose that ... becoming registered would involve signing up to a *statement of professional practice*, a shared set of core standards that would apply to all ... practitioners on the single register. The statement of professional practice would define the standards of conduct, behaviour and ethics required of all registrants, irrespective of their profession or occupation.

Also, as suggested in paragraph 4.5.2.2, additional and specific codes of conduct could be introduced for particular types of legal service where the regulator felt that the risks or circumstances of that service justified additional attention or expectations. Such codes already exist: see, for example, *Professional Conduct in Relation to Taxation*<sup>64</sup>.

During the course of this Review, I have heard suggestions that 'the unregulated' represent something of a cavalier approach to the provision of legal services because – unlike regulated lawyers – such providers do not carry professional indemnity insurance. The evidence does not support this generic assertion.

I have spoken to many who are presently in the community of unregulated legal services providers. Many of them voluntarily take out indemnity insurance; and others belong to organisations that require insurance as a condition of membership (such as the Institute of Professional Willwriters).

Again, requirements for a level of indemnity cover, consistent with the regulator's assessment of the degree of consumer risk attached to particular low-risk legal services would give a degree of further assurance that services subject only to ATE regulation are not, in some sense, 'lesser' services.

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64. Available at:  
[https://www.tax.org.uk/sites/default/files/Professional\\_Conduct\\_in\\_Relation\\_to\\_Taxation\\_2019.pdf](https://www.tax.org.uk/sites/default/files/Professional_Conduct_in_Relation_to_Taxation_2019.pdf).

*“A common code of conduct would be a key part of the regulatory infrastructure that would alleviate concerns that provides of the same services were somehow being held to account against a different set of standards.”*

Even low-risk services carry some potential for significant market detriment. For instance, an online document provider might offer standard documentation, either as a template or as the basis for online document assembly. If the standard document on which the bare product or assembled document is provided contains an error, there will be detriment.

It would seem right that indemnity cover should be available to protect innocent users of the service. Even so, the potential for that error to be multiplied by mass use (one-to-many), could lead to multiple claims that, in the aggregate, challenge the limits of the cover available (see also paragraph 4.9.2 in relation to technology insurance).

I would hope that the insurance market would be able and willing to provide cover, and that the cost relative to the low-risk nature of the services in question would not be too great.

I understand concerns that any requirement for indemnity cover will drive up the costs of becoming a registered provider of legal services, and might deter currently unregulated providers from continuing in practice. However, there are a couple of factors that give me cause for optimism.

First, the cost of solicitors’ indemnity insurance is in part driven both by the breadth of the cover they require and their insurers’ need to meet other terms (such as run-off cover, and inability to cancel policies for non-payment of premiums or non-disclosure).

Inappropriate or challenging minimum terms can make the legal market difficult for indemnity insurers. There is a history of insurer insolvencies (such as Quinn Insurance, Lemma Europe, Balva, ERIC, Enterprise Insurance, CBL Insurance Europe, and Alpha Insurance).

A balance needs to be struck by providing sufficient cover and protection that does not drive insurers out of the market, potentially leaving providers without cover and clients without redress.

The proposed arrangements in this report for more targeted conditions based on the relative risks of legal services actually provided by practitioners should mean that firms will be more likely to focus their practices and comply with more targeted regulatory obligations. Over time, the claims history of firms should therefore support better pricing of risk and indemnity premiums by insurers.

Second, for those providers whose business is more narrowly focused, particularly on a specialist legal service, there could well be a clearer relationship between their practice risk and (relatively lower) indemnity insurance premiums. There is already some evidence of this in the market, with indemnity premiums for licensed conveyancers typically being lower than for solicitors.

That said, if the regulator assesses that indemnity cover at a certain level is an appropriate and proportionate requirement, those who are not willing to bear the consequential cost should probably not be in the market, and for good reason.

I remain open-minded about whether contributions to a compensation fund should be a condition of minimum ATE regulation in addition to indemnity insurance. I do not envisage that those providers who assume any direct custody of client's money or other assets would be subject only to low-risk, ATE-only regulation.

It might be that the regulator should consider a regulatory or fidelity bond as an alternative to compensation fund contributions for ATE-only registrants.

### **5.3.2 A revised role for a legal services ombudsman**

The alternative approach to regulation explored in this report envisages broader scope for investigation and redress for consumer complaints than currently exists. This would suggest an expanded jurisdiction and role for an ombudsman compared with those under the 2007 Act for the Legal Ombudsman.

This expansion would allow complaints and concerns to be raised across an increased number of those who provide legal services than is currently possible. It would achieve the desirable outcome of ombudsman coverage for consumers and small organisations in respect of all providers rather than the incomplete arrangement that exists at the moment.

In the context of legal services to consumers, I am persuaded that those who need help are not simply 'consumers' in the way in which that expression is usually meant. Too often in legal services, those who need support from legal advisers are experiencing disproportionate vulnerability, whether from forced participation, their personal circumstances, or their physical, mental or emotional condition.

No amount of public legal education or before-the-event precautions are likely to offset this vulnerability. Nor is consumer dispute resolution that falls short of a dedicated, sector-specific ombudsman. Specialisation and complexity of legal services, and significant asymmetry between provider and client, point to more than 'simple' alternative dispute resolution.

The existence and use of enforcement powers is a necessary component of effective investigation and redress. These do not exist with the 'simpler' and usually private resolution schemes.

An effective ombudsman is more than a consumer dispute resolution process. It will have wider powers, and will be a key component in building trust and confidence in the sector (cf. Viewpoint 2, page 62).

I do not consider that voluntary submission to the jurisdiction of an ombudsman is an adequate response to the risks to the public good and consumer protection identified by the CMA (2016) and this Review. Consumers would remain at risk of the worst – but avoidable – forms of harm and exploitation.

As set out in Mayson (2020f: paragraph 8.1), the approach of the Legal Services Act 2007 was to create a ‘hybrid industry ombudsman’ through a public body established by statute but with jurisdiction over private sector activities and funded by that sector.

A legal services ombudsman should not be seen as a consumer or private ombudsman taking a transactional view of consumer-provider complaints. Instead, the emphasis should be more towards a public interest perspective. This would allow an ombudsman to offer a broader contribution to the effective provision of legal services and to public confidence in the legal sector.

I believe that this remains fundamentally the right approach. An ombudsman can achieve outcomes that are different to those of regulators and the courts, and that are more targeted and cost-effective, and less burdensome, for consumers.

Strong powers of investigation can also redress significant imbalances of power as between a consumer and a provider. However, it might be that the dissatisfied consumer’s perception of the imbalance is such that an ombudsman’s understandable quest for impartiality might still come across as a system that is tilted against them.

Where there remains a significant imbalance of power between consumers and providers, it is preferable that there should be a statutory basis for ombudsman solutions, especially where there is a strong public interest in the sector (cf. Gill & Hirst 2016: page 16).

Gill & Hirst (2016: page 49) also record the helpful view expressed to them that:

the role of regulators was to lay down minimum standards for compliance through their rule making activities, while the role of ombudsmen was to go beyond this and promote ideas around fair treatment of the individual (which could not be easily captured in regulatory approaches).

In Mayson (2020f: paragraph 8.3), I explored some ideas for additional functions that could advance such a ‘fair treatment’ role. These included the power to receive concerns and any unresolved disputes between clients and providers, as well as formal complaints, from disaffected clients and other interested parties.

They could also include ‘own-initiative’ investigations of providers based on expressions of concern, as well as thematic reviews of issues. This should now be regarded as a ‘normal’ and accepted part of an ombudsman’s powers, given that almost three-quarters of ombudsman schemes have them (International Ombudsman Institute 2016).

There is also the question of a legal services ombudsman acting as a form of 'triage' for all issues raised by complainants. This could avoid the confusing distinction for consumers between 'service' and 'conduct' complaints, and their different treatment and remedies (cf. Viewpoint 2, page 62). Given the number of complaints and contacts made with the Legal Ombudsman, the current reality is that a form of triage role is already being carried out.

As a single point of entry, the ombudsman could classify all enquires as complaints or matters of concern, as unresolved service disputes to be pursued by the ombudsman, as conduct matters to be referred to the appropriate regulator or professional body, as triggers for further investigation or a thematic review, and so on.



This could encourage greater consistency in process and outcomes, as well as in the timing of investigations and resolution. It would also allow the ombudsman to take account of multiple complaints about the same provider and then conduct a 'group investigation' rather than a series of individual investigations.

As a consequence:

**Recommendation 26**

There should be a revised legal services ombudsman service, established by and reporting to the Office for Legal Complaints, with jurisdiction to receive all complaints from consumers and other interested parties in respect of all registered providers of legal services. However, powers of redress should continue to be restricted to complaints from those within the current ombudsman scheme rules.<sup>65</sup>

In addition (to the extent that these are not addressed in any short-term reforms as suggested in paragraph 7.3.2):

**Recommendation 27**

There should be powers for the legal services ombudsman to:

- (a) establish a process for receiving from anyone expressions of concern, short of a formal complaint, about a registrant;

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65. The scheme rules are available at: <https://www.legalombudsman.org.uk/wp-content/uploads/2019/03/Scheme-Rules-1-April-2019.pdf>. They apply to: individuals; micro-enterprises (businesses with fewer than 10 employees or turnover or assets of €2 million); charities, clubs, trusts, etc (with an annual income net of tax of less than £1 million); and personal representatives or beneficiaries of the estate of a deceased person.

- (b) exercise 'own-initiative' powers to investigate providers in respect of whom the Ombudsman is aware of expressions of concern (whether or not these are manifested in one or more formal complaints);
- (c) exercise a power, if it wishes, to make a group determination of several complaints in relation to the same provider and to connected circumstances; and
- (d) refer any complaint about the competence or conduct of a registrant to the regulator for investigation and appropriate disciplinary action.

A reconceived role could also allow a legal services ombudsman to adopt a range of techniques for resolution, including a people-intensive, hand-holding role where appropriate, but also extending to mediation and e-mediation.

A fuller role would take a new or reconstituted legal services ombudsman beyond the current remit as, essentially, a complaints-handler, and would need a different approach compared to current practice. It would become less transactional and more systemic.

Some respondents to the interim report have questioned, in the words of one of them, "whether the Legal Ombudsman will have the capacity and expertise to deal with the complaints that will arise from consumers of newly regulated legal services providers".

There is an interesting assumption here that the 'newly regulated' will necessarily generate relatively more complaints than established providers. There is also a hint that the cost of dealing with those complaints would not be covered by the new providers' contributions through the registration fee to the ombudsman's costs. I do not consider either points to be a given.

It is also important that the scope and operation of any ombudsman scheme should be carefully calibrated to manage what are too often unrealistic expectations of what an ombudsman can do for those who express complaints or concern about registered providers.

It is perhaps to be expected that those whose complaints are rejected by an ombudsman should feel dissatisfied and aggrieved. But this does not mean that the scheme in question is 'corrupt by design' (cf. Viewpoint 2, page 62).

The resourcing and funding consequences of any change in the ombudsman's reach and role would certainly need to be examined. But it would be a newly conceived role rather than an incremental development of the current remit. A direct comparison with the current Legal Ombudsman is not therefore necessarily instructive.

Consequently, recent concerns about the performance of the present Legal Ombudsman should not form a basis for arguing that a reconceived and expanded role for a future legal services ombudsman should not be considered.

Finally, this might be a useful place to record the observations of one disillusioned complainant about some of the components that might be included in a more helpful approach to the investigation and resolution of expressed dissatisfaction: see Viewpoint 3 (page 175).



### VIEWPOINT 3: A CONSUMER VIEW OF MORE EFFECTIVE REGULATION

These are the observations of a consumer who has been through the complaints process under the current regulatory framework. They are suggestions for components that should be considered for a revised complaints-handling scheme leading to redress:

1. A triage system, including a serious case team to guide correct regulatory referrals.
2. A case-handling system where cross-referencing between regulatory agencies can be set up promptly for complex multi-specialism cases.
3. Easy-to-follow diagrams to assist consumers in finding the right regulatory agency and the best order to approach them in. These diagrams should also identify the stages of an investigation, and when and in what circumstances a complaint might be referred to another regulatory agency.
4. Regulatory agencies should be required to answer in real time any enquiries about their current guidance and in relation to any changes in regulation that are under way, being reviewed or subject to any interim measures.
5. A public statement of how a regulatory agency will approach any actual or apparent conflicts between the public interest, a complainant's interests and a provider's interests.
6. Regulatory agencies should require that risk assessments are carried out by those they regulate on all significant dealings (as for the Information Commissioner, where a data protection impact assessment is required for high-risk activities that could potentially result in harm or any significant economic or social disadvantage to individuals).
7. Consistency in the application of the law and regulations, and of the regulatory agency's own guidelines. (The public need faith in regulation, and protection from those providers who factor in to their business models a recurring cost of regulatory penalties.)
8. Consumer-focused investigation methods to enable complete information-gathering.
9. A duty to communicate with the complainant where the agency's own promised deadlines or timelines might not be met.
10. Accountability by regulatory agencies, and transparent publication, of their own performance on complaints about their service.
11. A duty to investigate and/or refer actual or suspected criminal offences indicated by regulatory breaches, including taking reasonable steps to identify and inform others who might have been affected by the breach.
12. A duty to inform complainants of any other action that they might be able to take in relation to a complaint or other regulatory agency that they might approach.
13. If the substance of a complaint reasonably indicates that there might be a risk to the complainant's financial security, home, land, assets or other property, to offer a rapid alert system to, for example, the police, banks or the Land Registry.

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## 5.4 During-the-event regulation

### 5.4.1 General proposition

It is legitimately a matter for a regulator to determine that providers of certain legal services that do not pose the highest risk but that are also not low-risk should also be subject to additional requirements through DTE accreditation or supervision.

These requirements were discussed in paragraph 4.5.2.2 as practice conditions. Like authorisation requirements, they should be applied on a uniform basis across the sector, irrespective of the background of the provider.

In this way, the regulator and consumer can be assured that those who provide the relevant service are subject to the same regulatory requirements, both initially and over time, whether they have a professional title or not. As with BTE authorisation, therefore, where continuing DTE conditions are imposed, there should not be automatic or perpetual 'passporting' for any providers, whether title-holders or not.

Equally, there should no longer be any competitive advantage for currently unregulated providers of non-reserved services, or corresponding disadvantage for title-holders bearing the full burden and cost of being over-regulated for lower-risk activities.

In assessing the need for practice conditions in relation to particular services or circumstances, the regulator should base this assessment on the assurance that would be required for those providers who have *not* taken the title route. This would determine the regulator's minimum necessary 'baseline' in respect of any given service or activity.

Once the necessary requirements are established, the regulator should then assess the comparative assurance provided by the general qualification and experience of those categories of providers who wish to be registered. Practice conditions for particular services (such as accreditation for specialist services: see further paragraph 5.6.3) can then be imposed, as appropriate.

These conditions could relate to all providers, or be varied to reflect specific professional qualifications or experience.

However, it is important that in setting regulatory requirements (generally, as well as in relation to DTE conditions) the regulator should be discouraged from imposing requirements that are higher than necessary. This would be consistent with the proposition that regulation should set the minimum required standards. Consequently:

#### **Recommendation 28**

There should be a new general statutory duty on the regulator to apply only the minimum necessary regulatory requirements to address identified risk, in order to keep the burden and cost of regulation as low as possible.

I have recommended that BTE authorisation should only be available for individuals who demonstrate that they have met the necessary criteria for authorisation (see Recommendation 13). For DTE conditions, these could be satisfied by both individuals and entities.

For entities, though, it would be necessary for them to have one or more individuals within the firm who had achieved any necessary personal accreditations or, where relevant, met any other conditions.

*“there should be a new statutory duty on the regulator to apply only the minimum necessary regulatory requirements to address identified risk”*

It is important to emphasise the point made in paragraph 4.5.2.2, that DTE conditions would be a form of ‘negative licensing’. Unlike BTE authorisation, specific approval from the regulator would not be required before providers could offer their services commercially or for reward, only compliance with the regulator’s requirements.

In relation to these intermediate-risk services, the regulator would identify practice conditions both generally for all such services, and specifically to reflect the assessed higher risk of specific services. However, prior authority to offer those services (beyond being registered) would not be necessary.

Where DTE conditions are applied to specific services, the register should record that the provider is registered for those services. However, if a provider was subsequently shown not to be meeting the relevant DTE conditions, the regulator would have the power to suspend or remove registration until such time as the conditions were met.

To illustrate the application of specific DTE regulation, two particular instances will now be considered – costs lawyers, and will-writing and estate administration.

#### **5.4.2 The case of costs lawyers**

Under the current framework, costs lawyers can be regulated (by the Costs Lawyer Standards Board) or unregulated. There is no protection for the title.

Regulated costs lawyers are instructed by many different types of clients, including individuals, small and large businesses, and other legal professionals. In the course of civil litigation, they are often instructed to prepare costs budgets for litigants, and these will ultimately govern the recovery of costs as between the parties.

They are also engaged in costs-only proceedings, assisting lay clients, other legal professionals and the courts in determining costs to be paid between the parties.

Too often, though, costs work is being carried out by other authorised persons who lack the relevant knowledge and experience of costs law. Similarly, unqualified and unregulated costs practitioners are carrying on non-reserved costs activities, and conducting costs litigation, under the 'supervision' of authorised persons who have neither the skills nor the resources to perform this supervision adequately or effectively.

Without some regulatory approach that can require assurance of specialist and up-to-date knowledge and experience of this technical area of practice in respect of all who offer their services commercially or for reward, consumers are at risk of significant detriment.

The day-to-day work of costs lawyers will vary significantly. Some regulated costs lawyers will be exercising reserved rights frequently, at detailed assessments, interlocutory application hearings, and case management conferences. They may be representing clients in all courts and tribunals, including criminal courts, courts martial and the Supreme Court.

Other regulated costs lawyers will have practices that are based around bill and costs budget preparation, costs negotiations, and other non-reserved activities.

Unregulated costs lawyers can, in fact, carry out almost identical activities, though there will be no regulatory protections for consumers against the individual lawyer (see Case Study 4, page 179). There is no requirement for costs lawyers to be regulated for non-reserved activities.

While there is such a requirement for the exercise of reserved activities, unregulated costs lawyers can actually perform these activities as employees of another authorised person (usually a solicitor). In regulatory terms, the unregulated costs lawyer is under the supervision of the authorised person.

Indeed, authorised persons can personally conduct costs litigation, even though they do not ordinarily practise costs law. However, with costs law becoming increasingly complex and specialised, the scope and level of knowledge of these authorised persons is limited, leading to harmful 'dabbling'. Errors can lead to significant and avoidable shortfalls in costs recovery, to the detriment of the lay client who had incurred these costs.

In the future, therefore, the exercise of rights of audience and the conduct of litigation in costs proceedings should, as now, be restricted to those costs lawyers who have personal authorisation for these services. Under the Legal Services Act 2007, regulated costs lawyers are authorised to carry on the reserved activities of exercising rights of audience and conducting litigation on issues that relate to costs.

For other legal services relevant to costs, the regulator could impose practice conditions (such as specific accreditation, in line with the proposals in paragraph 5.6.3).

#### **CASE STUDY 4: THE CHALLENGES OF COSTS LAW**

Mr & Mrs A owned a substantial property that they agreed to rent to Mr & Mrs B, with an option to purchase. Mr & Mrs B moved into the property, never paid rent and refused to give up possession. Mr & Mrs A instructed a solicitor and sued Mr & Mrs B (who represented themselves).

The outcome of the subsequent trial was not what Mr & Mrs A wanted, but there was a costs order in their favour. Their solicitor mishandled their instructions to appeal, and the relationship broke down; the solicitor sued Mr & Mrs A for unpaid fees, and they counterclaimed for negligence.

In the meantime, the solicitor had sent the original case file to an unregulated costs draftsman to prepare the bill of costs relating to the action against Mr & Mrs B. This bill was defective in a number of ways and deprived Mr & Mrs A of a significant recovery of costs under the terms of the court's order. Mr & Mrs A's solicitor had not certified this bill as accurate and refused to rectify the position.

Mr & Mrs A consulted an independent, regulated costs lawyer. They could not be advised to sign the bill of costs as drafted because it was not accurate. But negotiations had already been commenced on the unsigned bill by the unregulated costs draftsman, so it would need to be formally withdrawn.

However, this could only be done with the benefit of the original case file, which Mr & Mrs A's solicitor refused to hand over because of the claim for unpaid fees. Following a compromise agreement between Mr & Mrs A and their solicitor, the case file was finally handed over to their independent costs lawyer.

A new bill of costs was drawn up. As a result of the assessment process, Mr & Mrs A recovered more than £20,000 in costs from Mr & Mrs B. This was more than double the amount of the first bill of costs prepared by the unregulated costs draftsman, against whom Mr & Mrs A had no recourse or protection.

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### 5.4.3 The case of will-writing and estate administration

The potential for will-writing to give rise to failures in estate planning or drafting that will not be known for many years has exercised regulators and policy-makers for some time. So, too, has the potential for default or misappropriation of assets in the administration of a deceased person's state.

Both services also hold scope for causing loss and disadvantage to third parties (actual or possible beneficiaries) as well as to the client.

In the case of will-writing, modern circumstances are changing the risk profile. The increasing complexity of family relationships and arrangements, and increased longevity giving rise to questions about mental capacity to make a valid will, increase risk and add complexity.

The current regulatory system continues to expose consumers to the risks of incompetence or inexperience in will-writing, including partial intestacies arising from poor drafting, unintended trusts, and issues relating to foreign wills. In practice, these risks are as likely to arise from regulated and unregulated providers. See Case Study 5, page 181.

However, such changes are arguably best met not by a single requirement for BTE authorisation for all will-writing, but through the more differentiated approach allowed by risk assessment and the application of appropriate DTE conditions advocated in this report.

So, for example, while will-writing and estate administration might not require BTE authorisation, the regulator could in future require accreditation for those providers who offer these services (see paragraph 5.6.3).

As with BTE accreditation or certification, there are already examples that could provide the basis of such schemes (for example, from the Law Society, and the Society of Trust and Estate Practitioners).



## CASE STUDY 5: WILL-WRITING DETRIMENT

In their response to the interim report, the Society of Trust and Estate Practitioners (STEP) offered the following case studies as examples of situations where problems have arisen requiring the intervention of STEP-qualified practitioners:

1. A will-writer made a gift of the nil-rate inheritance tax band to a separate pilot trust. [Pilot trusts are lifetime settlements, usually created with a nominal sum of money, with the intention that more substantial amounts will be added at a later stage, often following the settlor's death.] However, there was no need to place the assets in a pilot trust because the terms of that trust could have easily been set out in the will. One view for the will being drafted in this way was to make the matter look more complicated than it was. This enabled the will-writer to charge more for the will and the separate trust as the clients were seeing two documents when one would have done.
2. A will-writer advised husband and wife clients to place two properties in trust as an asset protection measure, because the husband had recently been diagnosed with cancer. However, the will-writer believed the tax rules to be those in place before the changes introduced by the Finance Act 2006, and that the gift into a settlor-interested trust would be a taxable non-event. This is not the case, and a chargeable transfer has been made which the clients were not expecting, with the value of the properties potentially exceeding the husband and wife's nil-rate band.
3. Wills were offered online for those whose needs were apparently simple (cash assets of no more than £10,000 to a single beneficiary). However, the terms and conditions were not clear to testators. Buried deep within them were unfavourable terms, including forcing testators to appoint the will-writing firm as executors. This in turn gave the executors permission to appoint others for the administration of the estate. Although the administration should also be relatively simple, unnecessary third parties can be involved, with additional fees charged for the service (including unidentified and possibly unnecessary disbursements). This can significantly reduce the amount available for distribution to the beneficiary.

*(Reproduced with the kind permission of STEP)*

## 5.5 The future role of professional titles

### 5.5.1 A change of emphasis

The current narrow gateway of entry into the regulatory framework applies almost entirely to those who have secured a professional title (such as solicitor, barrister, chartered legal executive, licensed conveyancer, patent or trademark attorney, notary, chartered accountant, and so on).



As such, it represents a barrier to entry for those who do not hold a professional title. Further, for those who do not wish to undertake the necessary process for qualification, or cannot afford it, this also creates a permanent exclusion from the regulated market in their own right.

The alternative approach outlined in Chapter 4 would address the question of the barrier to entry by allowing those who do not wish to carry on higher-risk activities to enter the regulated sector and being subject to at least ATE regulation.

This would not replace professional titles as an entry route to regulation, but instead provide an alternative route to entry for at least the lowest-risk legal activities.

I do not envisage that professional titles would or should disappear in the future, or that they should be merged (as in the recurrent issue of fusion of barristers and solicitors).

Consequently, a professional title should continue to give some access to the regulated sector and assurance to consumers, as now.

As such, the regulatory emphasis would change from titles being the only route for individual entry, to them being one of two routes – albeit perhaps still the principal basis in fact.

During the course of this Review, a number of comments have been made – pejoratively, in my view – that allowing into the regulated sector those who do not hold a professional title will somehow result in a ‘race to the bottom’.

The claim that only professionally qualified lawyers can provide competent, high quality and ethical legal services is, at best, arrogant. It was quite clear from the will-writing investigation carried out in 2013, for instance, that the legally qualified were just as likely to produce wills of questionable validity and quality as unregulated providers.

It is simply not true that a professional qualification is more likely to guarantee competence, quality and integrity. It does not prevent dabbling by incompetent or inexperienced professionals. The existence of redress mechanisms is both false assurance and cold comfort.



I would rather see all providers of specific services falling within the regulatory framework so that appropriate actions can be taken in respect of all of them. I see this as preferable to false assurance in relation to some of them, and no assurance in relation to others.

The claims of regulated professionals that providers should be only the professionally qualified rests on the assumption or assertion that regulation guarantees competence, ethics and good service. It does not, and cannot. But it might offer some redress if things go wrong. On that basis, the logic can apply equally to those who are not professionally qualified.

### 5.5.2 The continuing importance of professional titles

The centrality and importance of professional titles in the framework of the Legal Services Act 2007 cannot be denied. Nor can the recognition attached to those titles in the minds of many members of the public and in other jurisdictions.

However, there is a difference between recognition of the word (such as 'solicitor', 'barrister', 'notary') and an informed understanding of what is attached to it in terms of competence, licence and protection. For the vast majority of consumers, we have the recognition but not the understanding (see YouGov 2020).

This begs some fundamental questions about the true value of professional titles as market signals or sources of assurance.

There are also other titles in the legal sector, some within the 2007 Act and some not, where even the recognition might be questionable. These include 'licensed conveyancer', 'chartered legal executive', 'costs lawyer', 'will-writer' and 'paralegal'.

To add to the potential confusion, there are other titles within the Act that do not ordinarily signify any connection to legal services at all, such as 'chartered accountant' and 'chartered certified accountant'.



Only some of these titles are protected by law, making it a specific offence to use them when not appropriately qualified.<sup>66</sup> For the others, there is only more generic protection arising from a wilful pretence or false implication to be entitled to carry on a regulated activity or taking or using a title the provider has not been awarded.<sup>67</sup>

In addition to being protected from misuse, professional titles often confer advantages in other jurisdictions. For example, significant benefits are often conferred on legal

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66. See: Solicitors Act 1974, section 21 (solicitor); Legal Services Act 2007, section 181 (barrister); Administration of Justice Act 1985, section 35 (licensed conveyancer); Copyright, Designs and Patents Act 1988, section 276 (patent attorney or patent agent); and Trade Marks Act 1994, section 84 (registered trade mark attorney or agent).

67. Legal Services Act 2007, section 17.

professional titles in terms of mutual rights to establish a presence and to practise abroad.

There are also numerous references to professional titles in other legislation and statutory instruments not related to the regulation of legal services.

It will be important, therefore, that future changes to the framework for the regulation of legal services do not inadvertently undermine or remove the current consequential benefits of, or references to, professional titles.

There is accordingly a patchwork of specific authorisations and benefits that do or do not attach to different titles and to individual holders of a title, and to the protections that are (or are not) available in respect of their misuse.

### **5.5.3 The continuing role of professional titles**

If title were no longer the only route to entry into regulation, the way is opened for those who do not hold a title to enter the regulated legal services market. However, it leaves hanging the question of how professional titles might continue to operate and confer any advantage on title-holders in any future regulatory arrangements.

In today's complex and fast-changing world, it is no longer credible or tenable to suggest that a degree or professional qualification earned several years ago has fully equipped a practitioner beyond whatever the 'Day 1' requirements happened to be at that time.

While there are certainly pitfalls in driving towards early specialisation or over-specialisation, nevertheless the 'general practitioner' notion of broad regulatory authorisation is under increasing pressure to maintain its credibility and effectiveness (in much the same way as for a general medical practitioner). As Dunlap observes (2014: page 2821):

most lawyers are not generalists competent to answer any question at hand, but specialists in the law of particular disciplines and jurisdictions.

Just because someone has qualified, for example, as a solicitor, it does not follow that they would necessarily be as competent or experienced as, say, a barrister in advocacy, or as an experienced will-writer who has completed the requirements for membership of the Society of Trust and Estate Practitioners (STEP).

This does not, however, imply that there is no role for a local 'general practice' law firm, made up of a number of appropriately regulated specialist practitioners.

*“Professional title should no longer be the only route into legal services regulation.”*

As an example, the Solicitors Regulation Authority is currently considering its regulatory approach to solicitors exercising rights of audience in the higher courts. In its consultation paper (SRA 2019a), it referred to persistent concerns about the standards of solicitors' advocacy, particularly in criminal cases, about solicitors retaining work beyond their competence, and about advocacy training.

Perhaps more disturbingly, a thematic review of criminal advocacy (SRA 2019b) found that solicitors relied heavily on the number of years' post-qualification experience as a measure of competence and to justify undertaking little ongoing professional development.<sup>68</sup>

Nor is this issue confined to solicitors. Other recent research has found judges noting instances of junior barristers taking on cases that are beyond their experience. These matters are critically important. They go beyond mere professional performance, and potentially influence a jury's decision-making, the delivery of criminal justice, and the public's protection from harm (see Hunter et al 2018).

In circumstances like these, it seems more than appropriate for the regulator, on a risk-based assessment, to require those who wish to pursue certain activities to secure specific authorisation or accreditation in order to do so. However, this is not intended to imply that a professional title should offer no consequential rights or benefits in relation to authorisation or accreditation. These issues are explored further in paragraphs 5.4, 5.6.3 and 5.6.5.

This would address ways in which the necessary assurance and compliance could be achieved for regulated providers. In principle, the same requirements should be applied to those who hold a professional title as to those who do not. To do otherwise would be to create an unlevel regulatory playing field.

This approach recognises that there might once have been (and in many cases continues to be) a compelling need for lawyer advice and regulation, justifying the restriction of certain specific activities to those who are legally qualified. This could be particularly important in preserving the value of some inherent preferences and cultural links that have evolved within and through professions over time.

For example, the fearless commitment of established legal professions to supporting independence of advice and representation in the maintenance of the rule of law (cf. paragraph 4.2.1) has benefits for society overall that regulation should not undermine.

However, it also allows an alternative in relation to those activities or situations where such a monopoly has become inappropriate in the twenty-first century, or where the modern assessed risk is not so great as to restrict consumer choice to the services of someone who holds a professional title.

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68. This is probably a good example of the 'Dunning-Kruger effect' referred to in Mayson (2020f: paragraph 2.2.2). The consequence of this is that "people tend to hold overly optimistic and miscalibrated views about themselves. We propose that those with limited knowledge in a domain suffer a dual burden: Not only do they reach mistaken conclusions and make regrettable errors, but their incompetence robs them of the ability to realize it" (Kruger & Dunning 1999: page 1132).

## 5.6 Future routes to regulated practice

### 5.6.1 Introduction

The recommendations in this report propose that:

- title is no longer the only route into regulation;
- concerns about the passporting or universality of authorisation for legal services that carry risk to the public interest should be addressed; and
- regulation should be applied differentially in relation to the degree of assessed risk.

In these circumstances, the basis on which title can offer admission to regulation in relation to different legal services needs to be considered.

It is likely that the holders of professional titles will have completed the necessary education and training to justify a regulator treating them as sufficiently competent and experienced for many regulatory purposes.

However, there is a legitimate question about the extent to which approval should be automatic, and certainly about whether it should be permanent. In summary, the issue posed by this paragraph is whether those who hold a professional title should, in regulatory terms, be any more privileged or disadvantaged than those who do not.

The proposition in this report is not that professional titles should no longer confer any meaning, benefit or value in a future regulatory framework. It is that they should not be the *only* route into it. It might well be that those with a title will be allowed by the regulator to do more within the regulated sector than those without a title.

### 5.6.2 Before-the-event authorisation

This report envisages that a limited number of legal services will remain subject to a requirement for prior authorisation before an individual would be allowed to offer any such service to the public commercially or for reward.

Given the presumption that activities requiring prior authorisation are, by definition, of very high public importance or very high consumer risk, the requirements for authorisation should be robust. The nature of, say, advocacy and litigation, might well be such that a regulator would conclude that barristers and solicitors, respectively, were best placed to be authorised.

Equally, perhaps only more limited or specific authorisation or rights of practice would be granted to those who hold certain professional titles (continuing the current approach for, say, chartered legal executives, intellectual property lawyers, and costs lawyers).

The same approach might then be extended, *with appropriate evidence of attainment and integrity*, to others who have the requisite background and experience (including,

for example, paralegals, social workers in care proceedings, CPS associate prosecutors<sup>69</sup>, and paid McKenzie Friends).

This would suggest that:

**Recommendation 29**

The regulator should have and retain the flexibility to grant authorisation on as broad or narrow a basis as the particular circumstances of the legal service in question and of the provider justify.

*“the regulator should have and retain the flexibility to grant authorisation on as broad or narrow a basis as the particular circumstances of the legal services in question and of the provider justify”*

### 5.6.3 Specific specialist approvals

In some cases, even though there is currently general authorisation arising from a title, separate authorisation for other activities is already required. This applies, for instance, to solicitors who wish to exercise rights of audience in the higher courts. It also applies to chartered legal executives who wish to conduct litigation or exercise rights of audience in, say, family proceedings.

In other cases, there might be a need to have the power to authorise particular individuals in specific, limited circumstances. For example, section 191 of the Legal Services Act 2007 (although not in force) would allow the employees of housing management bodies to exercise a right of audience or to conduct litigation in certain housing proceedings in a county court before a district judge.

These approaches point to the possibility of an approach to managing the risks associated with specialisation, complexity and vulnerability. This could be relevant both to BTE authorisation for high-risk services (such as rights of audience) as well as to accreditation for other services (such as the administration of oaths).

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69. These are designated non-legal employees of the Crown Prosecution Service on whom the powers and rights of audience of a Crown Prosecutor are conferred (including bail applications, and the conduct of criminal proceedings in the magistrates’ courts – including the youth court (cf. paragraphs 5.6.5, 7.3.1.2 and 7.4.2) – other than trials of either way offences tried summarily or offences punishable with a term of imprisonment): <https://www.cps.gov.uk/publication/directors-instructions-cps-associate-prosecutors>.

This would suggest that:

### **Recommendation 30**

The regulator should have power to approve appropriate routes to authorisation and accreditation for specific or specialist services. It could, as appropriate, confer regulatory approval on the basis of a pre-existing title, or through separate qualification or accreditation. The latter could be available both to those who already have a professional qualification and to those who do not.

In this way, the regulator might identify areas of specialist advocacy or litigation in respect of which all providers would need specific prior authorisation. This might apply, for example, to intellectual property, tax law, family proceedings, and detailed assessments in costs proceedings.

The regulator could then determine whether, on the basis of professional qualification alone, authorisation for these specialist services was sufficient. If not, it would have to determine the particular requirements that practitioners must satisfy (most likely a form of additional qualification or certification).

Consequently, although barristers might retain a general authorisation for the exercise of rights of audience, they would nevertheless still need a specific authorisation before they could offer services *directly to the public*.<sup>70</sup> This would be specific authorisation on the basis of potential client vulnerability rather than to assure technical competence.

This should not mean that service-based authorisations lead to premature specialisation by members of the Bar. It would require specialist accreditation only for those areas of advocacy where lack of specialisation creates increased risks to the administration of justice or to vulnerable clients.

Nor would it lead to full 'activity-based' regulation where, for instance, the giving of general legal advice or writing opinions would require separate approval of some kind. Again, though, for highly specialist areas of law, this might be needed.

Similarly, it might be that, irrespective of professional qualification and background, all practitioners authorised for criminal litigation should be required to have a criminal litigation accreditation. This might be modelled in the same way as, for instance, the Law Society's existing criminal litigation accreditation<sup>71</sup> or the certification process for criminal litigation and advocacy authorisations by CILEx Regulation<sup>72</sup>.

Also, there is already a CPS Advocate Panel<sup>73</sup> which allows almost 3,000 quality-assured advocates to undertake criminal prosecution advocacy for the CPS in the Crown Court and higher courts. There are also specialist CPS panels for fraud, proceeds of crime, extradition, counter-terrorism, and serious crime.

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70. Such a 'public access' scheme already operates under the current regulatory framework: see <https://www.barstandardsboard.org.uk/for-barristers/public-and-licensed-access.html>.

71. See <https://www.lawsociety.org.uk/support-services/accreditation/criminal-litigation/>.

72. See <https://cilexregulation.org.uk/i-am-an-applicant/cilex-practitioner/>.

73. See <https://www.cps.gov.uk/advocate-panels>.

I would expect the regulator to accept all of these Panel appointments as sufficient evidence for specialist accreditation purposes, and so reduce the cost and burden of authorised or accredited registration.

The Law Society’s response to the interim report<sup>74</sup> fairly alluded to:

a looming crisis in the supply of criminal solicitors, who normally provide all the other solicitor services in addition to advocacy, including police station and magistrates court advice and representation. The prospect of multi-layered regulation is likely to increase the cost for such solicitors and have a negative impact on this already fragile market.

A potential crisis in supply does not provide reason in itself to remove appropriate regulation from practitioners or in some way to shield them from it. More important is the wider public interest in the integrity of the justice system and protecting from substandard or inappropriate representation those who are often involuntarily bound up in that system.

However, I do not regard either the cost or burden as likely to be multi-layered, expensive or disproportionate to the regulatory objectives. The regulator should have the ability to offer a ‘composite approval’ approach to registration (see paragraphs 5.6.5 and 5.6.6) that would allow criminal practice potentially to be covered by a single registration and accreditation.

The regulator would also be able to apply targeted and appropriate accreditation to specialist practitioners who should either already have chosen to seek that accreditation, or face little difficulty in demonstrating their knowledge and experience in order to gain it.

A similar approach could be taken in relation to, perhaps, contested divorce, domestic abuse and children proceedings. Again, the Law Society and CILEx Regulation have already developed accreditation and certification schemes that could be adapted to meet future requirements for specialist authorisation.



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74. Available at: <https://www.lawsociety.org.uk/policy-campaigns/consultation-responses/independent-review-of-legal-services-regulation-response-to-interim-report/>.

Once specialist approval has been defined and appropriate accreditation or certification mechanisms established, those might equally be available to appropriately trained and experienced tax advisers, paralegals, social workers, CPS associate prosecutors<sup>75</sup>, police station accredited representatives<sup>76</sup>, and so on.

There is also some reason to believe that specifically authorised or regulated specialisation could lead to lower indemnity insurance premiums. For example, the smaller, specialist community of licensed conveyancers, for example, typically enjoys lower premiums than conveyancers in solicitors' firms. The same is also true for law centres.

I am aware that any prospect of regulatory approval for those who do not have a professional title is anathema to some. In suggesting that the possibility of specific specialist approval should be available to those who are not legally qualified, I am not advocating a 'free-for-all' or any intent to dumb down either the requirements for practice or the outcomes for clients.

If anything, it is a response to the assessment by Turfler (2004: page 1945 and 1946) that:

the public does not see lawyers' claims to exclusive authority as legitimate in all situations. Thus, lawyers' claims to exclusive authority will be accepted by the public as legitimate in certain situations and in a certain realm of activities, such as complex transactions or representation before a court, but not in all situations, such as routine transactions or representation before an administrative agency. Lawyers' claims to legitimate, exclusive authority will grow weaker as those claims encompass more activities over which the public believes lawyers lack superior knowledge and skill....

The public is encouraged to distrust lawyers when lawyers are seen as overreaching, and it begins to question the legal monopoly, especially when the needs for legal services of many are unmet.

*"I am not advocating a 'free-for-all' or any intent to dumb down either the requirements for practice or the outcome for clients."*

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75. This could then replace the current voluntary scheme between the CPS and CILEx: cf. <https://www.cps.gov.uk/publication/memorandum-understanding-between-crown-prosecution-service-and-institute-legal>. The regulatory uncertainty about CPS associate prosecutors would then have been addressed.

76. These representatives are non-solicitor employees who go to police stations to advise and assist people who would otherwise have no legal representation, and are usually called to a police station after the duty solicitor has spoken to the client by telephone; for details, see: <https://www.sra.org.uk/solicitors/accreditation/police-station-representatives-accreditation>.



In healthcare, different types of practitioners have different rights to issue prescriptions. Not all of those practitioners are full medical practitioners but include, for instance, nurses, paramedics, and physiotherapists. This is a comparable example of specialist or targeted approvals.

I see no reason why routes to approval should not be equally robust for all applicants. The question of how much broader legal knowledge or experience might be necessary or desirable for approval in relation to certain specialist services would be a matter for the regulator to consider and determine.

This, and establishing all of the requirements for approval, would need to follow appropriate investigation and consultation.

It is not inconceivable that, for certain services, the regulator could decide that existing titles (with or without any necessary additional authorisation or accreditation) would remain the only route to authorisation.

Whatever the route to authorisation or regulated practice, the outcome would in the future be public information available from the single public register of legal services providers. So, too, would be the specific authorisations or accreditations also required by the regulator.

In this way, prospective clients, consumers and other stakeholders generally, can assure themselves of the regulatory status of providers who hold themselves out as competent in one or more areas of legal practice.

The Law Society also fears<sup>77</sup> that what is proposed is “a complex system”, that will increase costs, “with key suppliers such as high street generalist practices negatively affected”:

The unintended consequences could well be many small firms leaving the market, the legal sector contracting, and the cost of legal services increasing, leading to further unmet demand. There would also be serious implications for diversity, with many smaller firms having [black and minority ethnic] partners, staff and suppliers. In many cases smaller firms deal with a higher proportion of vulnerable clients, who could also be affected.

These are serious and legitimate concerns rightly expressed by a representative body. On balance, though, I do not accept the predictions – or at least not to the extent that they outweigh the overall benefit of a reformed regulatory framework.

If smaller firms are dealing with a higher proportion of vulnerable clients, then in my view it is more important, not less, that those practitioners should be competent and their vulnerable clients properly protected.

I do not believe that the costs of the revised regulatory approach suggested in Part 2 of this report will be higher than now. Indeed, I strongly suspect that these firms do not need to be as comprehensively and expensively regulated as they are currently.

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77. See: <https://www.lawsociety.org.uk/policy-campaigns/consultation-responses/independent-review-of-legal-services-regulation-response-to-interim-report/>.

But if they do, and they find the associated costs challenging, it may be that it is their underlying business model that needs attention.

Almost by definition, a wide-ranging 'general practice' increases potential harm and detriment to consumers. In a modern, complex, specialised world, there are significant risks to consumers arising from practitioners who 'dabble' in different areas of practice, or who lack expertise, experience or support to offer the minimum expected level of services or supervision.

It is not unreasonable for those risks to be managed through regulation aimed at consumer protection. It is also likely that a more 'open' approach to regulation will encourage alternative providers to seek to meet consumer needs in other viable and cost-effective ways.

Insulating incumbent providers from either appropriate regulation or regulated competition is not an attractive proposition.

Finally, I note that there is evidence of the approach explored here gaining support in the United States. A recent paper by the ABA Commission on the Future of Legal Education (2020) acknowledged (in observations that apply equally in England & Wales) that, "Our established system of legal education and licensure is preparing the next generation of legal professionals for yesterday rather than for tomorrow" (page 3), and that "certification is not required for many critical and complex specializations" (page 4).

This leads to a need to "explore expanded specialization certification, periodic re-licensure or re-certification, and other initiatives focused on protecting the public. Our goal should be for all legal professionals to operate at the top of their respective licenses" (page 8).

#### **5.6.4 McKenzie Friends and others**

The position of McKenzie Friends is worth special mention. The first difficulty, in my view, is that the true notion of a McKenzie Friend would not support the existence of what are often now referred to as 'paid' or 'professional' McKenzie Friends. I do not believe that such paid representatives should be referred to as McKenzie Friends at all.

However, I am not opposed to them being admitted in some form into the regulated exercise of rights of audience or the conduct of litigation. What must follow, though, is that these practitioners, as regulated providers of those services, should be required to hold the same specialist accreditation as all other providers.

Many paid McKenzie Friends currently work in family courts. With the appropriate authorisation (narrow and specialised, as envisaged in paragraph 5.6.3) for, say, family law or children law, judges and clients could be assured of competence and experience that is equivalent – at the minimum level required by regulation – as other practitioners. Their clients would also be as protected.

I repeat here the comment in paragraphs 4.5.2.3 and 6.4.2 that there might be little or no difference for these services between the regulatory minimum and the higher standards expected of fully qualified legal professionals.

The proposal here should again not be taken as advocating a 'free pass' or 'dumbing down'. Rather, it assumes equivalence as between all those individuals who choose to practise in the authorised areas on the basis of the authorisation and accreditation requirements set by the regulator.

The second difficulty is that the regulatory framework was not designed to cope with the growth in unrepresented litigants that has led to the increase in those who seek the assistance of McKenzie Friends.

*“the regulatory framework was not designed to cope with the growth in unrepresented litigants that has led to the increase in those who seek the assistance of McKenzie Friends”*

This has placed judges in an extremely challenging position, trying to balance the requirements of the Legal Services Act with their understandable wish for litigants to be helped by some representation rather than none at all.

I am not persuaded by resistance to paid McKenzie Friends on the basis that the existence of such providers who do not have a recognised professional title causes confusion for consumers. Such providers already exist. My concern therefore is less about consumer confusion and more about the absence of consistent judicial practice and of appropriate consumer protection.

It is certainly the case that some paid McKenzie Friends have a higher hourly charge-out rate than many junior barristers. Provided that both compete on a level playing-field (by requiring appropriate registration, competence and consumer protection), differences in fees can become a legitimate market and competitive issue.

For those McKenzie Friends who are not paid, my view is that judicial discretion should remain as it does now, to allow someone to help a litigant. However, those providing such support and assistance should remain as true McKenzie Friends.

Consequently, unpaid McKenzie Friends should not be able to exercise any function for which regulatory authorisation is required (including addressing the court or preparing documents that would otherwise amount to the conduct of litigation). If these individuals are not on the register of legal services providers, they must not carry out these activities or be paid for any assistance they offer.

### 5.6.5 Recognising the realities of practice

I am conscious that legal needs and issues do not arise in neatly presented elements of legal services, either for clients or practitioners. Most of the time, they will be part of a set of circumstances that can often need a breadth of advice and support. The issue for regulation is that either or both of the individual adviser and the firm within which they work should be sufficiently competent for that breadth.

Individuals without sufficient breadth of expertise and experience will, at worst, be incompetent or negligent in the advice given. At best, they will be dabbling in areas outside their current competence. Clients should not be exposed to those risks.

It is protection from those risks that lies behind the recommendations in this report for authorisation and specialist accreditation where the inherent risks are considered to be too great for society or for consumers.

Similarly, firms should not be able to offer a range of services for which they do not have the necessary expertise or experience among the totality of those who work for them.

Nevertheless, I would encourage the regulator to consider allowing individuals a 'composite approval' for legal services that would incorporate differentiated BTE, DTE and ATE regulation. Firms should also be eligible for composite approval for DTE and ATE regulation. These composite approvals would present an alternative to requiring separate or multiple applications and approvals (multiple registration is also considered in paragraph 5.6.6).

For example, barristers might, by virtue of their title, be authorised for the exercise of some or most rights of audience as a BTE-regulated service. All associated DTE and ATE conditions could also be included (say, for assurance of continuing competence, adherence to a code of conduct, the need for professional indemnity insurance, and access to consumer redress).

As with other advocates (see paragraph 5.6.3), the regulator might require barristers to have specialist accreditation for the exercise of certain rights of audience. However, I would expect this to be limited to areas where either the underlying law is especially technical, complex or specialised (such as intellectual property, tax and pensions law), or where the nature of the court or its jurisdiction is particularly specialised (such as youth courts: see further paragraph 7.4.2).

The 'composite approval' for solicitors might not include any automatic BTE authorisations (such authorisation should be dependent on practice area and experience: see paragraph 5.6.3). In practice, for instance, many solicitors do not carry out conveyancing, and others do not conduct litigation. Consequently, they should only be authorised by a regulator to provide those legal services for which they need and have current expertise and experience.

However, the 'composite approval' of regulatory permission for barristers, solicitors, and chartered legal executives (as the most 'generalist' professions) could perhaps include general approval for all low-risk and intermediate-risk legal services.

They would, of course, remain subject to the practical constraints of the requirements or expectations of any codes of conduct (say, to act in their clients' best interests and not undertake work for which they are not competent) and their indemnity insurance.

This general approval would necessarily not apply to those services for which specific additional requirements have been applied by the regulator – say, for will-writing, estate administration, or handling client money (paragraphs 5.4 and 5.6.3).

Similarly, there could be composite approvals available to all providers for certain areas of practice. These could include all necessary BTE, DTE and ATE authorisation and approvals for, say, each of: residential conveyancing; wills, trust and probate; family law and mediation; personal injury; clinical negligence; mental health; employment; SME commercial contracts; SME taxation; and so on.

As suggested in paragraph 4.5.3.4, this would allow practices and regulation to reflect the reality of the life events (circumstances or issues) that bring clients to a need for legal advice and representation. This may or may not – but in any event need not necessarily – reflect a lawyer's view of what is 'specialisation'.

As before, if any aspect of these services requires BTE authorisation, the full composite approval would only be available to the individuals who had that authorisation. However, firms could be regulated for DTE and ATE conditions on a similar basis.

In these circumstances, firms would be subject to the further requirement that they would have to ensure that there were always sufficient individuals or processes within their regulated entities to comply with whatever conditions applied to the services within the relevant composite approval.

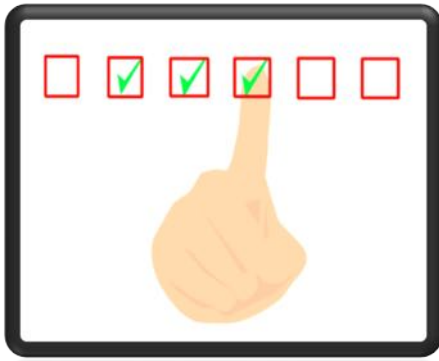
As a result of these proposals, there would be continuing recognition and benefit for title-holders in a regulator-controlled framework. However, it would reflect the particular circumstances and services actually offered by particular title-holders and operate in line with regulation applied to all providers.

In all cases, this approach would impose regulation on providers of regulated legal services only in respect of the risks of the services actually undertaken, rather than universally or generically.

### **5.6.6 Multiple registration**

One of the issues that, understandably, exercised some respondents to the interim report arose from the presumption that a new regulatory approach based on activity, risk and registration would lead to a need for burdensome, and possibly expensive, multiple registrations for a range of regulated activities subject to different BTE, DTE and ATE conditions.

Where prior authorisation is required for certain legal services, it seems entirely appropriate that the fact of these authorisations should be recorded separately in the public register. As recommended earlier (see paragraph 4.7.3), such prior authorisations should only be available to individuals.



The organisational setting in which BTE-authorized individuals carry on their regulated activities would not be relevant to their need for personal registration, or be a substitute for it, though their organisational affiliation and location should certainly appear on the register.

Equally, where defined low-risk services are being carried on, those should also be recorded on the register. Except where personal accreditation is required by the regulator for such services, the registration could be recorded in the name of the organisational provider.

For the rest, I would expect that all title-holders would be named on the register. This registration would include any personal authorisations or accreditations that they held, as well as the name and location of the provider organisation within which they work. Technologically, it should be possible to have a link between the individual and entity entries.

As suggested above, individuals who are not title-holders would be on the register if they held any necessary authorisation or accreditation. If no such personal authorisation or accreditation was required, individual registration might remain voluntary.

These individuals are much more likely to be specialists or working within specific areas of practice. Unlike barristers, solicitors and chartered legal executives, therefore, they would have no general approval for all low- and intermediate-risk services (see paragraph 5.6.5).

I would therefore expect all businesses and organisations providing legal services to be registered (including sole practitioners), and all personal register entries should include the individual's organisational affiliation.

Organisational or entity registration should include a record of any legal services for which its staff hold personal authorisations or accreditations, as well as any approvals that relate only to the entity. As above, technology should provide links between entity and individual register entries.

In this way, a prospective client, consumer or other interested enquirer could determine who is registered as a legal services provider, what they are registered for (where specific authorisation or accreditation is required), and the organisational setting in which those services are delivered.

Where an individual or an organisation is covered by a 'composite approval' of regulatory permissions for a particular area of practice, that should also be recorded on the register. This would remove the need for multiple, detailed entries by activity.

The register is intended to be a public indicator to consumers and others of the assured competence and experience of individual providers or within entity providers.

A key question therefore relates not just to claimed competence, but to the truth and credibility of those claims.

Accordingly, it should be a matter for the regulator to investigate, decide, monitor and oversee whether, and on what basis, an individual should maintain authorisation or accreditation for multiple services (or 'composite approvals', as in paragraph 5.6.5) over a period of time.

This decision should take account of the need for a practitioner to demonstrate continuing competence and experience of a sufficient level to reflect the risks associated with the services or composite approval in question or with the types of client served.

A firm should also be as free as possible to innovate and to create a more complex business model that involves a wider range of services, or a number of interrelated services (see also paragraph 4.13 on multidisciplinary businesses).

However, it must then accept the regulatory consequences arising from a greater number of registered services (or for regulation by a number of different sector regulators). The associated burdens and cost of regulation must become a factor in its commercial assessment of the overall cost-benefit of maintaining that more complex business model.



The larger City, commercial and international law firms are also likely to have a wider range of legal services, and a larger number of individuals who will need to be registered. I think that it is only right that the name and location of the firm, and the regulated individuals in it, should appear on the public register.

However, the main purpose of the register is for the information and protection of consumers. Where individuals are personally authorised or accredited in respect of any legal services for which specific approval is required then, as with all other individual providers, the authorisation and accreditation should be recorded on the register.

Beyond that, it would be a matter for the regulator to decide what other information would need to be recorded for the firm and the individuals in it. I anticipate that there would be little public need for any further information or accreditation, given the nature of large firm practice and client base.

I expect that a similar approach would apply to large-scale commercial and international mediation, where it is unlikely that individual consumers or micro-organisations would be affected. It could also be relevant to barristers whose advisory practices do not involve public access (see footnote 70).

That said, where the firm is offering or supporting pro bono activities for individuals and small businesses who are covered by the ombudsman scheme (see paragraph 4.11.3), the requirements for registration, disclosure, authorisation and accreditation should be the same as for all other pro bono providers.

In conclusion, I do not accept that the form of activity-based regulation suggested in this report would inevitably lead to complicated or burdensome requirements for impractical, multiple registration (and see Recommendation 28). The registration 'logic' would proceed as follows:

- (1) The principal registrant should be the entity, organisation or unit that provides legal services and with which the client has terms of engagement. For self-employed barristers and other sole practitioners, they will be the 'entity' for these purposes.
- (2) As well as organisational details, this entity registration will cover:
  - (a) any low-risk legal services (cf. paragraph 4.5.3.3) that the entity wishes to offer;
  - (b) any higher-risk services for which separate authorisation or accreditation is required (which will actually be held by individual members of the organisation: see (3) and (4)), or for which 'composite approval' has been given to the entity (see paragraph 5.6.5); and
  - (c) any other regulatory practice conditions met by the entity itself (such as for handling client money, or holding additional insurance).
- (3) An individual who holds a protected legal professional title (see Recommendation 44) must also be registered in their personal capacity, unless an exemption applies (such as for a 'non-practising' lawyer; see paragraphs 4.7.2 and 6.3.3).
- (4) An individual who is personally authorised or accredited for BTE or DTE purposes in respect of specific legal services must also be registered in respect of those services. This could apply to individuals who are title-holders (as in (3)) and to individuals who are not. This element of registration could apply to specific legal services or to any 'composite approval' given (see paragraph 5.6.5).
- (5) Individuals within (3) and (4) should be linked on the register to the entity provider in (1), and vice versa.



- (6) Where an entity is registered for certain low-risk or pro bono legal services (or has a composite approval that covers such a service), it will not be necessary for the individuals actually providing those services to be separately registered unless the regulator has required separate personal accreditation for them.

## 5.7 Co-existing regulation

### 5.7.1 Introduction

As we have seen in Chapter 4, the underlying structure of legal services regulation, with its reliance on reserved activities connected to authorisation through professional title, has presented challenges in bringing within the scope of regulation other activities or providers that do not fit with the requirements of that narrow entry gate.

As a result, some legal activities have become the subject of 'parallel' regulatory frameworks, such as those for immigration, insolvency, and claims management (see Mayson 2020c: paragraphs 4.2.3, 4.3.3, and 4.3.4).

There are also instances of other forms of regulation that apply to certain activities of those who happen to provide legal services. These include requirements relating to data protection, money-laundering, and proceeds of crime and bribery.

### 5.7.2 Claims management

With the Legal Ombudsman's jurisdiction over claims management companies having now been moved to the Financial Conduct Authority, the opportunity to retain the legal services elements of claims management companies within the scope of legal services regulation has probably disappeared.

If these legal activities are only a subsidiary but necessary part of claims management (cf. paragraph 4.7.2), such an outcome might not be too complicating for consumers to continue living with. If more than that, perhaps the relevant provider should be registered for those legal services (possibly with approved alternative regulatory arrangements: see paragraph 6.5.3).



### 5.7.3 Insolvency practice

Insolvency practitioners are most likely to be accountants, subject to the regulatory oversight of the relevant chartered institute or association, although some might be solicitors. The latter would be subject to the framework for legal services regulation and the particular terms of the insolvency legislation. Chartered accountants will be subject to regulation by their own professional bodies. The Insolvency Practitioners Association also has regulatory status and powers.

Insolvency practice clearly involves the application of law, and would undoubtedly fall within any definition of 'legal services'. It is a highly specialist area entailing significant potential risk to consumers, who might suffer detriment as creditors of insolvent organisations. Many voluntary liquidations have vulnerable consumers.

However, the relative concentration of insolvency practitioners within the accounting professions, and the relative lack of consumer complaints about insolvency practitioners, suggest that seeking to subject all insolvency practitioners to legal services regulation might not be justified.

In any event, the Insolvency Service is currently analysing responses to its call for evidence in relation to a review of the current regulatory landscape for insolvency practitioners<sup>78</sup> and I shall accordingly make no further comment on this subject.

### 5.7.4 Immigration advice and services

There is no doubt that immigration advice and services satisfy the public interest tests for regulation. Such regulation promotes the public good of bestowing citizenship, or declining or removing it, in accordance with the law.

It also protects potentially highly vulnerable individuals from scams, and from incompetent or inappropriate advice and services.



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78. See: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/816560/Call\\_for\\_Evidence\\_Final\\_Proofed\\_Versionrev.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/816560/Call_for_Evidence_Final_Proofed_Versionrev.pdf).

At present, lawyers who offer immigration advice and services are regulated in accordance with the Legal Services Act 2007 by the appropriate regulator for their professional title (usually the Solicitors Regulation Authority for solicitors, the Bar Standards Board for barristers, or CILEx Regulation for chartered legal executive immigration practitioners).

There are other immigration practitioners who are regulated by the Office of the Immigration Services Commissioner (OISC) under the Immigration and Asylum Act 1999.

There are, consequently, two different regulatory regimes for immigration practice.

A recent review by JUSTICE of immigration and asylum appeals came to the disturbing conclusion (2018: paragraph 7.6) that “serious problems still exist with the regulation of legal advice and assistance in this area”, citing:

examples we encountered of unsupervised and unqualified persons giving advice and assistance on immigration matters, representatives who had exploited vulnerable clients, and those who were incompetent and, in a few cases, dishonest.

The existence of disturbing shortcomings was also identified by Gibbs & Ratcliffe (2019: page 14):

Some evidence suggests that lawyers do not always have a solid understanding of the law, as shown by a series of cases successfully appealed by the Criminal Cases Review Commission. All these cases involved people who entered the UK as asylum seekers or refugees, and were then prosecuted and punished for offences linked to their entry to the UK, such as not having the correct travel documents. All pleaded guilty to the charges put to them, and none were advised that they may have had a defence available to them. But they did indeed have a viable defence.

Although regulated, immigration advice and services are not reserved legal activities (even those elements that involve making representations in civil proceedings before a court or tribunal).

Accordingly, if carried out even by otherwise regulated lawyers, no special authorisation is required, and there are clear risks and dangers to consumers of non-specialists ‘dabbling’ in a potentially complex area of law with inherently vulnerable clients.

On the other hand, regulation under the OISC offers no ombudsman process. Consumer complaints are vital for the Commissioner’s enforcement activities. However, there is no distinction between conduct and service issues, and disciplinary powers are very limited (typically restricted to an ‘in or out’ decision that cancels, or refuses renewal, of a practitioner’s licence).

The OISC can also prosecute unregistered (and therefore otherwise unregulated) immigration advisers. The legal regulators can rarely be persuaded to devote their resources to such prosecutions, even if advisers are falsely holding themselves out as legally qualified.

Finally, the OISC is an arm's length body of the Home Office (with whose interests the Commissioner's work might not be fully aligned). It is also established as a corporation sole, thus avoiding the regulatory and representative conflicts and tensions that arise elsewhere in the current legal services framework.

Under the SRA changes that took effect in November 2019, non-reserved activities can now be carried on by a solicitor in an unregulated firm. However, at the request of the Immigration Services Commissioner, these changes are not currently in place in respect of immigration advice and services.

Instead, transitional arrangements are in force that continue the position as it was under the SRA's previous regulatory arrangements. These require immigration services to be provided from a firm regulated by the SRA or another legal services regulator, or, in certain circumstances, through non-commercial organisations, such as law centres.

At the time this final report was being written, the SRA was consulting on changes to these transitional arrangements. Their intention is to draw a clear distinction between the rules that apply to a practitioner who is regulated by the SRA and those that apply to providers regulated by the OISC.

From a consumer standpoint, this structure seems unnecessarily confusing. As in other areas of non-reserved legal services, the advice and representation involved are the same. Regulatory differences arise not from the service itself, but from who provides it.

Those seeking immigration advice and services are most likely to be vulnerable and unfamiliar with the legal system and the language in which it is conducted. They are more likely to focus on the need for advice, and the nature of the advice and representation. They are less likely to be concerned with whether the person providing it is regulated as a lawyer or as someone regulated by the OISC.

*“Those seeking immigration advice and services are most likely to be vulnerable and unfamiliar with the legal system and the language in which it is conducted.”*

Against this background, I would strongly advocate streamlining the regulation of immigration advice and services. Without needing to undermine the UK-wide coherence of the current immigration framework, there could be a number of benefits from the closer alignment or combination of legal services regulation and OISC powers.

Immigration advice and services would in principle fall within the definition of 'legal services'. Accordingly:

**Recommendation 31**

There should be an exemption from the future definition of 'legal services' in respect of immigration advice and services, as defined in section 82 of the Immigration and Asylum Act 1999. The Law Society, the Chartered Institute of Legal Executives, and the Bar Council should cease to be designated qualifying regulators for the purposes of section 84 of that Act. All immigration practitioners should be regulated by the Immigration Services Commissioner, irrespective of their professional qualification.

### **5.7.5 Notarial activities**

Notaries perform important public duties, in relation to both domestic and international matters. They verify the capacity of their clients to enter a transaction, confirm the identity of clients, prepare and authenticate various legal instruments, verify translations, sometimes take evidence, and meticulously record all of the relevant information.

Notaries maintain detailed records in an indelible and unalterable format (also known as a protocol), including copies of all documents certified with copies of the relevant clients' identity attached. Every notarial act requires the notary's registered signature and seal of office. The Master of the Faculties maintains a register of the signatures and seals of every notary.

This record-keeping forms a demonstrable trail for each document verified through the notary to the client. Not only does this provide a certain level of reassurance for the other parties in a transaction, but it also serves a wider purpose in helping to combat international fraud.

Due to the nature of the work of notaries, any error made is likely to be discovered after the fact. If a wrongfully certified document is accepted for use in a foreign transaction, problems may only arise in the future, after decisions and actions have already been taken based on the accuracy of that document.

Similarly, if for some reason a notary's records are needed to trace someone through a past document, that will be the time when any gaps in those records will appear. It is this status of notarial activities as 'credence' services that may provide some additional justification for their regulation.

The reliance that parties to (particularly) commercial – and often international – transactions can place on notarised documentation allows trade, and the resolution of disputes, to be undertaken with greater confidence or convenience.

Notarial services encompass, for example, powers of attorney, shipping documents, trademark and patent documents, bills of exchange, wills and trust documentation, cross-border financial documents, and documents relating to foreign property rights.

*“The reliance that parties to commercial – and often international – transactions can place on notarised documentation allows trade, and the resolution of disputes, to be undertaken with greater confidence or convenience.”*

For example, a notary can arrange a power of attorney relating to the purchase, sale or management of property abroad, which means that an instructing party does not need to go physically to the country concerned in order to complete the transaction.

Without regulatory protection for notarial activities, confidence in the activities and promises of English participants in international trade could be compromised, to the detriment of the nation’s growth and economic well-being. The challenge of blockchain-verified documentation is also likely to be increasingly felt.

The public interest case for the prior authorisation of those who carry out notarial acts, and for their continuing regulation for both public good and consumer protection reasons seems to me to be unarguable.

In the current framework, notarial activities remain the one reservation in England & Wales that is limited to just one regulator, the Master of the Faculties.

In addition, the Master is also responsible for the regulation of notaries who do not fall within the jurisdiction of the Legal Services Act 2007. These include, for example, notaries appointed in the Channel Islands, Gibraltar, New Zealand, Queensland, and Papua New Guinea (though not in Scotland or Northern Ireland).

However, there are reasons why notarial activities do not fall comfortably within the framework of the 2007 Act. One is the different nature of notarial services (authentication and verification), which no other legal professionals perform. They are more attuned to similar services carried out by foreign notaries in other jurisdictions around the world.

Another is the principal duty of a notary to the transaction in question (rather than to the client). This is very different to the obligations of lawyers, and leads to a tension in the professional principle in section 1(3)(c) of the 2007 Act that authorised persons should act in the best interests of their clients.

Indeed, these factors can reasonably point to a principal point of difference: that notaries are *public officers*, which is also reflected in their admission oath. No part of their work can be done by, or delegated to, someone who is not a notary. There is no concept internationally of someone who is not a notary being authorised to carry out a notarial act.<sup>79</sup>

Although the authorisation of notaries also extends to other reserved activities, many notaries are also qualified as solicitors. In their exercise of reserved activities other than notarial functions, I understand that very few notaries in fact carry those on in their notarial capacity. Instead, they act as solicitors.<sup>80</sup>

I am therefore quite clear that, for the future, other regulators should not be allowed to authorise the carrying on of notarial activities. Indeed, I would go further:

### **Recommendation 32**

There should be an exemption from the future definition of ‘legal services’ in respect of notarial services. Regulation of notaries should therefore revert exclusively to the Master of the Faculties (who would correspondingly lose the powers in the Legal Services Act 2007 to authorise notaries for any legal services other than notarial activities). Notaries should also not be registered under the future legal services regulatory framework for any services provided in their capacity as a notary.

Those individuals who are currently qualified and authorised as notaries who wish to offer both notarial services and legal services would need to separate their notarial and legal services activities – as the vast majority already do.

Consequently, they would need to be regulated both by the Master of the Faculties for their notarial services and by the legal services regulator for any legal services that they wished to offer.

If exemption is not an attractive prospect, an alternative approach to the regulation of notaries through a ‘designated body’ is suggested in paragraph 6.2.6.4.

## **5.7.6 Money-laundering**

Since the beginning of 2018, the Office for Professional Body Anti-Money Laundering Supervision (OPBAS) has been responsible for overseeing the effectiveness of 22 professional bodies in meeting the standards required by the money-laundering regulations. These professional bodies include eight who are also approved regulators under the Legal Services Act.

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79. This point, in part, influenced the court’s thinking in *R. (on the application of ICAEW) v. Lord Chancellor and Others* [2019] EWHC 461 and acceptance that allowing the ICAEW to regulate notarial activities could lead to the acts of English & Welsh notaries being questioned and possibly not even being recognised.

80. This would not, however, prevent the Master of the Faculties, as the regulator of notaries, taking into account the misconduct of notaries perpetrated as part of their practice as a solicitor.

OPBAS's powers relate to the professional bodies, and not to regulated individuals or entities. Nevertheless, the regulation of money-laundering adds a further veneer of co-existing regulation to legal services that any reformed framework would need to accommodate.

In some instances, for example, requirements for disclosure under anti-money-laundering obligations can be at odds with the duties of those regulated to provide legal services to maintain client confidentiality or respect legal professional privilege. Uncertainty in the application of these incompatible obligations can create serious concerns for practitioners.

Money-laundering requirements might in future be better and more effectively applied on a uniform and consistent sector-wide basis through DTE conditions and compliance.

This would help address concerns that have been expressed in recent years. For example, in 2018, the Financial Action Task Force reported that the existence of a multiplicity of regulators did not help in securing a consistent approach to anti-money-laundering supervision.

OPBAS also found in 2019 that the legal regulators were 'variable' in their money-laundering supervision and did not share intelligence enough. It also concluded that some did not fully understand their role as a supervisor. However, in its latest report in March 2020, OPBAS recognised strong improvement, albeit with remaining inconsistencies in approaches to enforcement.

Under the recommendations in this report, it is perhaps most likely that OPBAS's powers should in future relate to a single regulator (see paragraph 6.2). This would offer potential for reducing the complexity of OPBAS's supervision. However, I regard it as beyond the scope of my terms of reference to make a specific recommendation on this point.





## 5.8 Summary

For the future, regulation would clearly distinguish legal services on the basis of them being assessed to carry high, intermediate or low risk to the public interest or to consumers. BTE, DTE and ATE conditions would then be applied as appropriate to that assessed risk.

Regulatory approval to carry on legal services would then flow from either general or, more likely for most practitioners, specific authorisation or accreditation. In principle, the route to these approvals would be open for all appropriately qualified and experienced practitioners, irrespective of their background.

Professional titles would therefore no longer represent the only route to authorisation and regulation – although in practice for some services that might still be the case, based on the risk or importance of them. A title would accordingly continue to offer a route to authorisation or accreditation, and would probably confer benefits at least in relation to those legal services for which additional conditions have not been imposed.

The important message of this chapter relates to legal services where there is heightened risk arising from either the complexity of the underlying law or circumstances, or the particular vulnerability of the clients. In those circumstances, the regulator should be expected to impose specific conditions on the practice of those services offered commercially or for reward.

The conditions would apply to all providers in the sector, whatever their background or setting of their practice. The regulator would decide on what basis (or to what extent) any pre-existing qualification, title or certification would be taken to meet the conditions imposed.

If the regulator's judgement is that the conditions are not met, or only partly met, by title, then additional accreditation or compliance would be sought – whatever the nature of the practitioner's background.

The playing field for each legal service would be level for providers, and protection for consumers of that service would be identical.



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## CHAPTER 6

### STRUCTURAL ISSUES

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#### 6.1 Introduction

Chapter 4 set out the basis of an alternative approach to legal services regulation for the future. Chapter 5 then addressed specific issues relating to activity, risk and the future role of professional titles.

This chapter picks up the remaining regulatory issues arising from the proposals in Chapter 4. These principally relate to the consequences for the future structure of the regulatory framework.

#### 6.2 A single regulator

##### 6.2.1 Current constraints

Under the Legal Services Act 2007, the Legal Services Board (LSB) was established essentially as an oversight and coordinating body. Although the Act contained powers under which the LSB might itself become an approved regulator (or licensing authority for alternative business structures), they have never been used.

The recommendations in this report will require decisions and risk assessments to be made across the sector, and regulatory requirements to be imposed. In the interests of the public, consumers and practitioners alike, such decisions and requirements should be made on a consistent and sector-wide basis.

The current structure has a number of approved regulators, overseen by the LSB. These are regulators who are each attached to a professional title. The different histories, size and scope of the current approved regulators lead to relative disparity of approach and resourcing. They also result in fragmentation and duplication of regulatory resource across the totality of regulated legal services.

This potentially creates confusion for clients and consumers, and cost-inefficiencies in the provision of regulation (with costs borne differently by the regulated communities and, ultimately, the fee-paying clients).

If regulation is no longer based fundamentally on titles, this structure loses its force. A multiplicity of front-line regulators, and an oversight regulator, needs revisiting given the potential inconsistencies, confusion, inefficiencies and costs involved. I have also heard observations that the current framework might be 'top heavy'.

In addition, there are continuing issues about regulatory independence and the role of representative bodies, the effectiveness of the internal governance rules, and consumer perceptions of the professions and their regulators that they are 'looking after their own'.

The Competition & Markets Authority (CMA) has rightly observed that "such potential for conflict risks compromising public trust in the sector" (2020a: paragraph 5.15).

As with public confidence more broadly (see paragraph 3.8), it is the perceptions that matter, not the basis for any underlying truth.

### 6.2.2 A new approach

A more focused role for fully independent regulation, of the sort explored in Chapter 4, offers an opportunity for a rationalisation of the structure and functions of current regulators.

It would lead to what Michael Blair QC (2019) has helpfully described as 'unified', as opposed to 'diversified', regulation. He points out that financial services regulation has been swinging between these two structural approaches. Also, in healthcare, for example, GPs, nurses and midwives each have separate representative bodies but a single regulator.

Accordingly:

#### **Recommendation 33**

There should be a single regulator for the legal services sector (the Legal Services Regulation Authority).

The Legal Services Regulation Authority (LSRA) would be a new regulator, and would replace rather than be an adaptation of the current Legal Services Board. All references in Chapters 4 and 5 to the future role or functions of a legal services "regulator" should therefore be read as referring to the LSRA.

The principal challenge in the regulatory 'architecture' is to consider the proper balance of Michael Blair's unification and diversification. To express the point slightly differently, it is between reflecting the need for consistency and cost-efficiency on one hand, and the need for specialisation in the application of regulation on the other. Legal services has a need for both.

A single regulator will be better able to assess and monitor risks and regulatory responses on a consistent, coherent and cost-effective basis across the whole sector. In addition, "the principle of accountability, in the context of legal services, is best met by a regulatory framework that is independent from both professional bodies and the government" CMA (2020a: footnote 283).

In a framework structured more explicitly towards risk-based regulation, such independence and focus is important. As the CMA has recently noted (2020a: paragraph 5.55): "it may be easier for an independent regulator to take an approach that differentiates between providers on the basis of different risks".

It is also more likely that a single, independent regulator can carry out the required functions in a more responsive and timely manner (CMA 2020a: paragraph 5.95):

an independent regulator would enable regulation to be designed in a more flexible manner, allowing a new regulator to respond to changes in the sector without the need for further primary legislation. Such an approach requires a degree of trust in the objective judgment of the regulator which would be compromised absent its independence from the profession.

As a consequence:

**Recommendation 34**

There will be no continuing need for the concept of an ‘approved regulator’, and the role of professional bodies in the regulation of legal services should be brought to an end.

The most compelling reason for this conclusion is that a professional or representative body simply cannot be perceived to be carrying out its legitimate and proper role in representing its members at the same time as exercising effective regulatory and disciplinary control over the regulated activities of that membership.

*“a representative body simply cannot be perceived to be carrying out its legitimate and proper role in representing its members at the same time as exercising effective regulatory and disciplinary control over that membership”*

This point was expressed by the CMA (2020a: paragraphs 5.19 and 5.20):

it is not clear that any form of internal separation would be able to deliver proper independence because separation alone cannot resolve the intrinsic conflict of interest between representative and regulatory functions.... [A]ny incomplete separation will still create internal governance issues that could affect regulatory outcomes.

In addition (CMA 2020a: paragraph 5.43):

When a regulator is also responsible for representative functions, it is necessarily conflicted when determining its priorities in situations where no outcome is possible that will fully serve the interests of both its functions.

Now is the time to recognise this inherent, fundamental and problematic conflict, and to remove it from the structure of legal services regulation. This is not to say, though, that there is no role for professional bodies in their oversight of title-holders in relation to title and as members of their bodies (see paragraph 6.4).

There is, however, one area of legal services where the need for regulatory specialisation, or at least special focus, could be paramount. I return to this in paragraph 6.2.6.4.

### **6.2.3 Appointment, reporting and accountability**

The question of the independence of legal services regulation from government and political influence is important. This has a direct bearing on how and by whom appointments to the LSRA should be made, and on the accountability of the LSRA for its work and decisions.

Like the CMA (2020a: paragraph 5.2), I am clear that it is “a key principle of better regulation that a regulator should be independent of those whom it regulates”. Further (CMA 2020a: paragraphs 5.6-5.7):

This is distinct from the objective that legal services should operate independently of government in order to uphold the principle that every person is subject to the law, including lawmakers. Often referred to as the ‘rule of law’, this principle, in the context of the judiciary, ensures that the legal sector can make decisions in the public interest free from actual, or perceived, interference from government institutions.

We do not question the importance of maintaining independence of legal decision-making from Government involvement. However, in our view, maintaining this independence does not require regulation to be overseen by the existing professional bodies or weaken the arguments for separating out the regulatory and representative functions. There are many successful examples of organisations established as public bodies that effectively operate independently of government while remaining open to public scrutiny and hence accountability.

Where the rule of law, and a public interest objective to protect and promote it, requires an independent legal profession (or, as I might prefer, independent legal advice and representation: cf. paragraphs 4.2.2 and 5.5.3), independence from government is essential if public confidence in the administration of justice and in legal services is to be achieved.

This can be done if regulators and practitioners are manifestly free from political influence or interference. Concerns have been expressed in relation to the current regulatory framework that, in the eyes of a significant number of professionals and other jurisdictions, it can be seen as having eroded the independence, standards and values of the legal profession.

A case can be made to this effect because of the separation from formerly self-regulating professional associations of regulatory bodies that are then overseen by the LSB. The Board is then itself considered by some (wrongly, in my view) to be an organisation subject to government control.

On the basis that self-regulation is no longer a credible option, I believe that the separation and accountability proposals in this report would alleviate these concerns about regulatory and professional independence.

I regard it as important that, as a regulator of services for which the public interest is a primary objective, and in which the state and the wider public has a legitimate stake, there should be both independence from government as well as some form of public scrutiny and accountability (cf. De Vrieze 2019).

Independence of the Authority can be assured by (cf. De Vrieze 2019: pages 16-24):

- a secure legal foundation in an enabling statute;
- a clear mandate, role and responsibilities derived from the regulatory objectives;
- publicly announced vacancies and merit-based appointments to the board;
- fixed terms of office (with staggered terms of board members, to avoid a sudden change in direction);
- the appointment to the board of those with relevant experience (rather than political or other affiliation);
- limitations on the ability of lay board members to join regulated entities for a period of time after their term of office ends; and
- the ability to determine its own budget and appoint its own board members and staff.

It is important that the Authority should be seen to be independent of political influence and departmental 'sponsorship'. In addition, therefore, to insulate the LSRA further from a perception of political influence, the specific circumstances in which the Lord Chancellor<sup>81</sup> would be able to take action in relation to legal services regulation or to give any directions to the Authority should be set out in statute.

There should also be a statutory duty on the Authority to advise the Lord Chancellor publicly on any matters relating to legal services regulation that it considers appropriate. This would confirm the Authority's active role in regulatory policy and its development and in its oversight of the sector. The duty mirrors that of the Gambling Commission in the Gambling Act 2005 (section 26).

This is not to suggest that communication and collaboration as appropriate between the LSRA and the Ministry of Justice should not take place. This will remain important, but it should not be a reporting relationship.

*"Where the rule of law requires independent legal advice and representation, independence from government is essential if public confidence in the administration of justice and in legal services is to be achieved."*

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81. I am assuming that the Lord Chancellor would remain the relevant minister. I confess to hoping that at some point the constitutional role and responsibilities of the Lord Chancellor might be separated from the functions of the more overtly political position of Secretary of State for Justice, and carried out by different individuals.

Independence and autonomy for the regulator must also be balanced by effective accountability. In this context, 'accountability' means "an obligation to explain, answer for, and bear the consequences of the way in which the ... regulator has discharged duties, fulfilled functions and utilized its resources" (de Vrieze 2019: page 26).

Accountability can include (cf. De Vrieze 2019: pages 26-33):

- publishing and submitting at least an annual report to Parliament (rather than to government), that covers a review of performance, financial outcomes, and a work plan for the next period;
- regular scrutiny by a Parliamentary committee, to receive and follow up on the annual report, and possibly approve the annual budget;
- appropriate public transparency (of strategy, board meetings, consultations and decisions);
- formal procedures for independent review of decisions and performance; and
- being subject to the Freedom of Information Act.

Given the remit and public interest nature of the Authority's role, I would suggest that Parliamentary scrutiny of its performance against regulatory objectives should be undertaken by the Justice Select Committee (or possibly even a Joint Committee of both Houses of Parliament). However, I acknowledge that such committees have no statutory basis and are a matter for Parliament.

These measures should ensure that the regulatory objectives are being pursued in a responsible way (with the minimum necessary intervention: see Recommendation 28), and that the Authority is exercising appropriate governance and decision-making in a cost-effective way.

Although not receiving public money, the LSRA should also be subject to scrutiny for its financial management, value for money, efficiency and effectiveness by the National Audit Office and the Public Accounts Committee.

Accordingly:

**Recommendation 35**

The Legal Services Regulation Authority should be established as an arm's length regulatory agency. In addition:

- (a) the Authority should report directly to Parliament in its performance as a regulator (by laying an annual report and through scrutiny by the Justice Select Committee or perhaps by a Joint Committee of both Houses);
- (b) the Authority should also be subject to scrutiny in relation to its financial performance by the National Audit Office and the Public Accounts Committee;
- (c) there should be no general power for the Lord Chancellor to give directions to the Authority;
- (d) there should also be a statutory duty on the Authority to advise the Lord Chancellor publicly on any matters relating to legal services regulation that it considers appropriate;



- (e) the chair of the Authority should be a public appointment, overseen by the Commissioner for Public Appointments; and
- (f) the appointment of other members of the Authority's board (with a continuing lay majority) and of a chief executive should be made by the Authority following an open and public process.

I would also add here that while I agree with the principle of regulatory boards having a lay majority, I do not support a requirement for a lay chair. The most important factor is the independence of decision-making by the board itself. The chair should be appointed in an open competition on the basis of merit. Those who might have relevant professional experience and other personal qualities should not be excluded.

*“The chair should be appointed in an open competition on the basis of merit. Those who might have relevant professional experience and other personal qualities should not be excluded.”*

I should also emphasise here that I do not regard it as necessary for the overall composition of the board in some way to be representative of the regulated community. I would echo Sir John Kingman's view (2018: paragraph 1.18):

the purpose of a regulator's board ... is not to represent all the multiplicity of views of relevant vested interests and somehow reconcile them in discussion, but rather to ensure that the regulator is doing a highly effective job in protecting and promoting the public interest.

#### **6.2.4 Decision-making and transparency**

Chapter 4 envisages a future in which the need for regulatory flexibility (or at least the avoidance of too much statutory inflexibility) would leave more decisions and actions to be taken within – but not prescribed by – the regulatory framework. This raises the question of where such decision-taking should most appropriately lie.

It might be, as now in effect, that activities subject to before-the-event (BTE) authorisation would continue to be decided by Parliament and set out in statute. In that case, as suggested in paragraph 5.2.2, I would propose revisions to the current reserved activities.

Once the 'public good' services requiring BTE authorisation have been identified, defined and confirmed (see paragraph 5.2.2.1), I believe that the powers in the current Act to add or remove reserved activities should be retained for legal services requiring BTE authorisation in the future legislative framework. I would, however, suggest one further change.

At the moment, these powers are exercised by the Lord Chancellor, on the recommendation of the LSB. For the future, I would suggest that the necessary secondary legislation for *public good* revisions should be approved by affirmative procedure in Parliament. This would follow a recommendation made by the LSRA, after appropriate consultation, and with the approval of the senior judiciary.

As suggested in paragraph 4.5.3.4, the definitions of legal services requiring BTE authorisation should be broadly drawn. These could then be subject to very specific exemptions proposed by the LSRA (after consultation and, in the case of public good authorisations, approval by the senior judiciary).

This would allow the regulatory framework to reflect risk and maintain proportionality in the actual scope of requirements for prior authorisation.

In relation to the *consumer protection* BTE authorisations, the need for greater flexibility and speed – to reflect changing circumstances and assessments of relative risk – suggests that decisions leading to change should primarily be made by the LSRA.

The appropriate process for consultation would still need to be followed. There might also be a case for the change being implemented through a statutory instrument subject to the negative procedure in Parliament.

There should then be no need for the Lord Chancellor to have any power to accept or reject recommendations made by the LSRA. Indeed, in pursuance of the proposed new statutory duty on the LSRA to advise the Lord Chancellor on matters relating to legal services regulation (see Recommendation 35(d)), I would see the processes envisaged here as an exercise of that duty.

The provisions of the current sections 24(4) and (5) and 26(3) and (4) should not then be retained, and of the current Schedule 6 amended accordingly.

Similarly, at a lower threshold of risk (though still one at a higher level than would be appropriate for only after-the-event (ATE) conditions), the determination of activities for which during-the-event (DTE) conditions were considered appropriate, and the setting of those conditions, would also require a suitable and credible decision-making process to be developed by the LSRA.

It would seem both unwieldy and unnecessary for these more frequent and market-related decisions to lie with either Parliament or the government: changing circumstances and risk profiles suggest that flexibility and timeliness would be required if the framework were to remain attuned to regulatory need and risk.

Again, therefore, decisions should be made by the LSRA, after appropriate gathering of evidence and consultation. This would allow the regulator to recognise the need for greater protection and consumer welfare, supported by DTE regulation, in relation to services that carry a higher (but not the highest) risk.

ATE regulation could then be applied proportionately in relation to lower-risk services. As suggested in paragraph 4.5.3.3, legal services subject only to ATE conditions should be explicitly identified and defined, by the LSRA.

In relation to all decisions about regulatory scope and conditions, the LSRA should develop and publish its process, as appropriate, for investigating, consulting on, deciding, publishing and implementing its decisions on:

- recommendations for changes to or exemptions from BTE authorisations;
- proposals for imposing, changing or removing DTE conditions;
- proposals for adding, changing or removing legal services subject only to ATE conditions, or to the conditions that are applied to those services;
- providers' conduct, and the consequences to providers, clients and other affected parties.

Therefore:

### **Recommendation 36**

Legal services subject to before-the-event authorisation for the public good should be confirmed by Parliament and set out in statute. Changes to them should be proposed by the Legal Services Regulation Authority, following consultation, and subject to approval by senior judges in accordance with Recommendation 24 and to confirmation by affirmative procedure in Parliament.

Legal services subject to before-the-event authorisation for consumer protection, and any changes to them, should be determined by the Authority, following consultation, and subject to confirmation by negative procedure in Parliament.

Other legal services subject to regulation (including those for which the identification and definition of low-risk legal services attracting only ATE regulation is required), and the regulatory consequences attaching to them, should be determined by the Authority, following consultation.

The LSB has been striving for greater transparency in its Board papers and minutes, and in making these available in a timely fashion. This is a practice that I would greatly encourage, and would wish to see continue.



A further point here is in relation to transparency generally. Currently, front-line regulators and professional bodies are not subject to the Freedom of Information Act 2000. However, for example, both the Solicitors Regulation Authority (SRA) and the Law Society have their own transparency codes – though they differ from each other and neither, in the view of one lawyer respondent to the interim report, “properly reflects the FOIA”.

In addition, a previous adjudication process has been discontinued, and there is now no right to challenge a refusal to disclose under the code.

This is an area that should be looked at again, with a view to increasing public confidence in the responses of regulators (see Viewpoint 2, page 62).

### **6.2.5 Consumer representation and complaints**

The traditional asymmetry of information and power as between consumers and lawyers leads to a strong case for the independent representation of consumers’ interests within the regulatory framework.

This is further reinforced by the typically well-organised representation of lawyers’ interests through their professional bodies, as compared to the often fragmented and disparate ability of consumers collectively to collate and present their views.

The Legal Services Act 2007 therefore built into its structure the explicit representation of the interests of consumers through the creation of the Legal Services Consumer Panel (see paragraph 3.1(3)). Since its formation, the Panel has carried out its assigned role diligently and effectively.

Under the 2007 Act, ‘consumers’ are defined in section 207(1) as:

persons –

- (a) who use, have used or are or may be contemplating using, [legal services],
- (b) who have rights or interests which are derived from, or are otherwise attributable to, the use of such services by other persons, or
- (c) who have rights or interests which may be adversely affected by the use of such services by persons acting on their behalf or in a fiduciary capacity in relation to them.

In its Vision paper, the LSB helpfully identified the principles that are appropriate to the representation of an independent sector-specific consumer voice. These are that it should (2016a: paragraph 96):

- be independent of thought and evidence-based;
- combine an expert perspective on the consumer interest with an understanding of regulation;
- provide dedicated attention to legal services regulation issues;
- maintain a relationship of constructive challenge with the regulator(s);
- have access to sufficient dedicated resources but also provide good value for money;

- take into account developments and make connections across the economy; and
- have legitimacy amongst stakeholders and the public.

I endorse these principles, and believe that the Legal Services Consumer Panel should be retained in any revised structure for legal service regulation on the same basis as its current composition and role.

Accordingly:

**Recommendation 37**

There should continue to be an independent Legal Services Consumer Panel to represent the interests of consumers.

*“The traditional asymmetry of information and power as between consumers and lawyers leads to a strong case for the independent representation of consumers’ interests within the regulatory framework.”*

Just as the independent representation of consumer interests is important, so is the independent investigation and resolution of unresolved complaints and concerns about providers. The continuing role of a legal services ombudsman was explored in paragraph 5.3.2.

The new Legal Services Regulation Authority will be carrying out a direct and active role in the regulation of legal services providers, and in their compliance and conduct. It is therefore important that there should be no formal appointment, reporting or accountability link between the Authority and the legal services ombudsman.

Accordingly:

**Recommendation 38**

The Office for Legal Complaints (possibly renamed as the Office of the Legal Services Ombudsman) should be established on an equivalent basis to the Legal Services Regulation Authority in respect of the appointment of chair, board members and staff, and reporting to Parliament.

## 6.2.6 The future of front-line regulators

### 6.2.6.1 Background

The current distribution of regulatory responsibilities has resulted in ten regulatory bodies (as listed in footnote 13), often described as ‘front-line regulators’. This is because some of these regulatory bodies are attached to professional bodies that are, confusingly now, named in the 2007 Act as ‘approved regulators’.

The regulatory bodies are in the main derived from their historical origins as regulators of members of a profession. The institutional structure of the current regulatory framework is therefore very closely attached to the holders of professional titles.

This results in members of different professions being regulated for the same legal service, but by the regulator most closely associated with their professional title. However, it has become possible, since the implementation of the 2007 Act, for an individual to move from one regulator to another – or, indeed, to be regulated simultaneously by two different regulators.

For example, a solicitor who was regulated by the Solicitors Regulation Authority, and who predominantly works in conveyancing, is able to move from the SRA to the Council for Licensed Conveyancers without changing their professional title.

A barrister who is regulated as an individual practitioner by the Bar Standards Board might now choose to work within a law firm regulated by, say, the SRA. This will often be done within an alternative business structure. Both regulators will have some jurisdiction over the same individual.

It is quite possible that regulators will take a different approach to the same activity. So, the SRA and the Council for Licensed Conveyancers might have different approaches to qualification, practice obligations and professional discipline in respect the reserved activity elements of conveyancing or probate practice.

Similarly, the Bar Standards Board and the SRA might have different approaches in relation to rights of audience exercised in the higher courts.

The consumers of these same legal services might be completely unaware of these differences in approach and requirements. If aware, they might be confused – or, more likely, astonished that such differences are allowed under the regulatory regime.

#### **6.2.6.2 An integrated approach**

Any restructuring of regulation in the future should therefore take the opportunity to address this complexity, duplication and inconsistency, with its potential for regulatory arbitrage and consumer confusion.

As well as the benefits of consistency of approach across the sector, Department of Health analysis also suggests that “significant economies of scale exist in regulation” (2017: paragraph 4.4):

As a regulator’s size increases, unit operating costs (defined as operating costs per registrant) fall and plateau above 300,000 registrants. No significant diseconomies of scale in large regulators were identified.

These considerations all suggest that:

#### **Recommendation 39**

The existing ‘front-line’ regulatory bodies should be replaced by a new integrated structure within the Legal Services Regulation Authority.

Combined with no continuing need for 'approved regulator' status (see Recommendation 34), this would secure the independence of regulation from representation. It would also allow the professional bodies to address regulatory matters of importance to their members on an equally free and robust basis.

I would, however, be in favour of retaining as much flexibility as possible in the new structure, and this could point to different meanings or approaches in relation to the way in which the LSRA chooses to structure the discharge of its responsibilities.

For this reason:

**Recommendation 40**

The Legal Services Regulation Authority should have power to delegate or assign distinct aspects of its regulatory powers to other 'designated bodies'.

This could offer the LSRA two different (and not mutually incompatible) routes to managing the resources available to discharge its regulatory responsibilities: internalisation and delegation.

**6.2.6.3 Internalisation**

It would not be cost-efficient to create a new regulatory infrastructure completely from a blank sheet of paper. Expertise, data and other resources will already exist within the current front-line regulators. It is therefore quite possible that the LSRA might wish to assimilate elements of these within its new structure.

This would allow the LSRA to make its own appropriate decisions about the best way to organise the newly combined resources. There should be some economies of scale, as intimated by the Department of Health analysis. For example, replicated establishment, technology, policy and research, and governance costs might be saved or rationalised.

Interestingly, the report of the Australian Health Ministers' Advisory Council (2013: page 45) observed increasing attention to cross-sector regulatory approaches, and thought that this might be attributable to an emergent understanding that:

- (a) operating comprehensive and robust professional regulation can be beyond the resources of some bodies (particularly those with responsibility for relatively smaller regulated communities);
- (b) cross-sector regulatory structures do not inevitably mean losing professional integrity or control over standards for participating professions; and
- (c) the advantages of economies of scale associated with joint arrangements may outweigh the disadvantages.

The basis of the LSRA's internal organisation would no longer be by profession. It need not inevitably therefore be based on the backgrounds of those who provide the services. A move to a more explicit focus on service and activity is possible.

I understand the wish for a specialist approach to regulation. For the future, however, the 'specialisation' should be aligned more closely to the nature and extent of the regulatory conditions attached to particular legal services or composite approval of them (cf. paragraphs 5.6.5 and 6.2.6.4).

*"I understand the wish for a specialist approach to regulation. For the future, however, the 'specialisation' should be aligned more closely to the nature and extent of the regulatory conditions attached to particular legal services"*

In many respects, the foundations of activity-based regulation are already in place. There are dominant providers or specialist regulators (or both) for many legal services.

These include advocacy and the Bar Standards Board, conveyancing and the Council for Licensed Conveyancers, notarial activities and the Master of the Faculties, immigration and the Office of the Immigration Services Commissioner, intellectual property and Intellectual Property Regulation Board, and costs and the Costs Lawyer Standards Board.

Many of these activities are not reserved legal activities under the 2007 Act (conveyancing, immigration, intellectual property, costs), even though elements of these broader services might well be.

By and large, these specialist regulated activities currently secure regulation through the recognition of a title, but I do not believe that such a connection is necessary. If the LSRA focuses less on titles, there is scope for combining the currently dispersed expertise and experience of regulating specific activities, requirements and processes.

In the short term, it is likely that the individuals with this expertise and experience will still be mindful of important insights and best practice that can be applied from different professional backgrounds, for the benefit of all.

For the longer term, I would expect the LSRA to adopt policies and practices that ensured that the continuing experience of those with different professional backgrounds could be consulted and taken into account. It is likely that this might be achieved through operational departments within the LSRA that focused on particular or specialist legal services.

This would be in line with the CMA's view (2020a: paragraph 5.74):

We recognise that practical knowledge and operational insights can help design and target regulation efficiently. However, we are not persuaded that these are excluded by an independent regulatory model.... [A]n independent regulator could still draw on the



expertise of the representative bodies and would also be expected to recruit appropriate professional expertise to its Board.

Taking a more integrated and collaborative approach (which, as suggested by the CMA) could also more easily in future include the professional bodies, too) should enable much more productive and focused regulatory responses.

For instance, a joint approach on behalf of all practitioners – whether legally qualified or not – to identifying the most likely instances of defendants in the criminal justice system being let down (such as delays, duplication, police practice, perverse financial incentives created by legal aid) could lead to regulation where it is most needed and can have the greatest positive impact.

Rather than the somewhat fragmented and resented process burdens and bureaucracy experienced by criminal legal aid practitioners, a more targeted alliance of experience, ideas and solutions could lead to better outcomes for all.

These issues are also considered in paragraph 6.4 in relation to the future role of the professional bodies.

#### **6.2.6.4 Delegation**

After due consideration of particular services or providers, there might be some merit in maintaining or encouraging the creation of separate regulatory bodies, perhaps because of their technical focus, or for cost-efficiency or other reasons. Rather than closing off that prospect in a new statutory framework, I would be in favour of allowing the possibility (as envisaged in Recommendation 40).

There are two circumstances in which I think that this form of delegation could be particularly valuable. The first would be mandatory, and the second discretionary.

##### *(1) Mandatory delegation*

The first situation I wish to consider here is vital to the rule of law and the effective administration of justice – so much so that designation might even be mandated in the enabling legislation.

I have referred throughout this report to the importance of the public good basis of prior authorisation as the replacement for the reserved legal activities (see paragraphs 4.2.1, 4.5.2.2, 5.2.2 and 6.2.4). I envisage that these public good legal services will in future be restricted probably to the exercise of most rights of audience and the conduct of most litigation (see paragraph 5.2.2.1).

These services are key to the rule of law and the administration of justice. Their effectiveness is underpinned by appropriate and robust regulation. This is the principal reason for suggesting that the senior judiciary should play a defined role (see paragraphs 5.2.2.1 and 6.2.4). It is for the same reason that I now suggest a different approach to regulation.

In this case:

**Recommendation 41**

The Legal Services Regulation Authority should be under a statutory duty to set up a designated body in relation to the legal services for which public good authorisation is required.

For ease of reference, I shall identify this body as the 'advocacy and litigation regulator'. I wish to make it clear that this is not intended to be a separate, independent regulator. It would remain part of the LSRA structure, and would be exercising only delegated powers on behalf of the Authority.

*"The Legal Services Regulation Authority should be under a statutory duty set up a designated body in relation to the legal services for which public good authorisation is required."*

The advocacy and litigation regulator would play a key role in enabling the LSRA to discharge its duties in relation to regulating these critical legal services in a consistent way. It would also have material experience and insight to allow the LSRA to consult with the judiciary and more widely in any review, amendment and application of exemptions to the exact scope and nature of the regulation of advocacy and litigation.

The designated regulator would be responsible, in conjunction with the LSRA and the group of senior judges established for this purpose (see paragraph 5.2.2.1) for identifying those proceedings or circumstances for which the exercise of rights of audience and the conduct of litigation requires specific specialist approval (see paragraph 5.6.3). It would also be responsible for exemptions (see paragraph 4.5.3.4).

It would be for the LSRA to decide how best to establish and staff the advocacy and litigation regulator. It would not be a re-creation of the Bar Standards Board, though no doubt the BSB will presently embody experience and resources that will be relevant.

It is likely that most barristers would be subject only to the requirements of this specialist designated regulatory body. Given the personal skill and integrity required of advocates, and that few consumers come into direct contact with members of the Bar unless they go to court, this would not be inappropriate.

Unless specific specialist approval is required, as above, I expect that all barristers would be capable of being registered and authorised for the exercise of rights of audience.

However, if some barristers have an exclusively advisory practice and do not wish to exercise any rights of audience (especially if there is a marginal regulatory cost attached to doing so), I can see no reason why they should not be able to be registered in the usual way, but elect not to be authorised for rights of audience.

Solicitors would not be automatically authorised for the exercise of rights of audience or the conduct of litigation. They would seek authorisation and any specific specialist approvals as their preference and practice warranted (see paragraph 5.6.3).

Both barristers and solicitors could, I imagine, receive their initial authorisation (and possibly any relevant specific specialist approvals) from the advocacy and litigation regulator at the time they are awarded their professional title. This would be on the basis of their qualification, training and experience.

Maintaining authorisation and accreditation would in all cases be a matter for the regulator and its requirements for continuing competence.

In addition, the role of solicitors as officers of the court – and of other practitioners in the conduct of litigation – again reinforces the important position of this legal service. The need for standards and consistency, as well as the proposed role of the senior judiciary, justify a distinct approach.

*“Maintaining authorisation and accreditation would in all cases be a matter for the regulator and its requirements for continuing competence.”*

A second situation in which mandatory designation might be used would be as an alternative to the proposed exemption that would remove notarial activities and notaries from the legal services regulatory framework (paragraph 5.7.5).

By adopting the delegation alternative, the Master of the Faculties could become a designated body in respect of that defined legal service and its providers. As a consequence, alternative regulatory arrangements and costs might then be applied.

In a small profession (of around 750), this delegation could be important for the reasons given in paragraph 5.7.5 as well as because about half of its practitioners have a professional income from notarial activities of less than £15,000 a year.

It would help to maintain both the distinctiveness of notarial activities and their position in international perception (as an independent profession regulated by the Master), as well as the need for minimum, appropriate and cost-effective regulation.

## *(2) Discretionary delegation*

In other circumstances, by allowing a 'designated body' to undertake some regulatory functions on its behalf, the LSRA could – where it considers it appropriate – allow specific regulatory activity to be targeted in a more proportionate and cost-effective way. This might be appropriate in the case of, say, law centres (cf. paragraph 4.11) and mediators (cf. paragraph 4.6.2).

This approach is similar to that recommended by Lord Best in relation to the proposed regulation of property agents (2019: paragraphs 114-116).

I should emphasise that I would expect any designation only to be made where the LSRA is satisfied that the body concerned is capable of exercising the delegated functions in accordance with the regulatory objectives, with an assurance of appropriate resourcing and independence from professional interests, and with proper accountability to the LSRA.

I also wish to emphasise that designated bodies would not be exercising powers relating to legal services in their own right, but only on behalf of the LSRA and in accordance with the delegated powers conferred by it.

Just as the LSRA would have the power to grant designated body status, so it would have the power to withdraw that status if it was satisfied that its qualifying conditions were no longer met or maintained or delegated powers were being exercised inappropriately.

Finally, there may be some similar consequences where there are elements of overlapping regulation: this issue is dealt with in paragraph 6.5. This would allow the LSRA to approve a regulator in a different market sector as a designated body for the purposes of exercising regulatory functions in relation to defined legal services carried on by a recognisable group of providers.

Consequently, while I would always expect the LSRA to remain the approving regulator for all legal services that require registration, authorisation and accreditation, there might be circumstances in which the LSRA would be prepared to delegate to, say, the ICAEW as the designated body for chartered accountants providing tax advice.

In all circumstances where a designated body assumes regulatory functions on behalf of the LSRA, the providers subject to that delegated jurisdiction should still appear on the single public register of providers of legal services. If any individuals provide services for which personal authorisation or accreditation is required, they should also appear on the register.

In both cases, the register should record the designated body responsible for those providers and individuals.

## 6.2.7 Conduct and discipline

The full separation of regulatory and representative functions, and of many regulatory bodies from their professional body origins, should rightly prompt a different approach to the regulation of title (considered in paragraphs 6.3.3 and 6.4), and to the instigation and management of professional conduct and disciplinary issues.

The Legislative Options Review raised the possibility that “a common disciplinary institutional framework could be shared across legal regulators” (2015: Annex 4, paragraph 9). This would allow the current differences in systems, forums and decision-making to be addressed.

Even under the current structure, as well as differences in approach and practice across professions, Boon & Whyte identify the SRA and the Solicitors Disciplinary Tribunal as “potential competitors for jurisdiction”, and the incremental extension of the SRA’s powers as “an existential threat to the SDT” (2019: page 5).

This multiplicity of jurisdictions as between disciplinary tribunals dealing with professional conduct issues is further complicated by the Legal Ombudsman’s separate jurisdiction for dealing with service complaints.

The landscape for after-the-event consequences in respect of the same provider and the same relationship with the client is understandably illogical to the client and the wider public (see Viewpoint 2, page 62).

There is some evidence that the current approach is sub-optimal. Boon & Whyte conclude (2019: page 14):

Our assessment of the SRA’s broad regulatory strategy suggests that it is ill-suited to the most salient problems of regulation. It is geared to organisations with significant infrastructure, not to the sole and small practices comprising the majority of organisations in which solicitors work<sup>82</sup>.... Because of the difficulty of making private practice conform to its regulatory model, the SRA must also rely on the disciplinary apparatus inherited from the Law Society. This system, based on monitoring and investigation, was geared to the use of specific professional rules of conduct. The abandonment of a conventional rule book causes difficulty both in prosecuting cases and in adjudicating on cases brought to the SDT.

*“This multiplicity of jurisdictions as between disciplinary tribunals dealing with professional conduct issues is further complicated by the Legal Ombudsman’s separate jurisdiction for dealing with service complaints”*

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82. This points to an important paradox in the current structure: that regulation is seemingly designed in such a way that it is easier for larger, better-resourced firms to comply, yet most regulatory enforcement is targeted at smaller firms and sole practitioners who find it most difficult to comply: cf. Middleton & Levi (2015: page 656).

There have been suggestions that, where a regulator is established on a basis that is independent of government and of those it regulates, that regulator might in future deal with all professional conduct and disciplinary matters without the need for independent tribunals. This might be subject to the 'backstop' of an appeals process, ultimately to the courts.

I do not favour such an approach for two principal reasons. First, a sector-specific disciplinary tribunal can bring greater insight and independence to adjudication on matters of practitioners' conduct. While it is right that a regulator should have a process for investigating and prosecuting disciplinary matters, it should not simultaneously be prosecutor and adjudicator.

Second, I accept the point made by Boon & Whyte (2019: page 24) that "the tribunal process publicly exposes possible failings in practice regulation. These may not come to light where the regulator is the sole judge of misconduct" (see also Viewpoint 2, page 62).

Middleton & Levi (2015) identify a number of instances where providers of legal services might be facilitating wrongdoing: mortgage fraud, investment fraud, legal aid fraud, immigration law practice, fraudulent claims for financial loss, theft of client money, tax fraud, financial schemes, financial instability of their firm, abusive litigation, and direct facilitation of crime.

Where title is no longer the only route into regulation, the existing title-based disciplinary arrangements will not be suitable for dealing with all future instances of misconduct. In any event, therefore, an alternative or parallel tribunal structure would be needed.

Consequently:

#### **Recommendation 42**

The enabling legislation, or the Legal Services Regulation Authority acting under the conduct and discipline elements of the regulatory arrangements it puts in place under that legislation, should establish a single tribunal to adjudicate on the conduct and discipline of regulated providers of legal services.

As Boon & Whyte suggest (2019: page 24):

Such a body could be established independently but given a remit clarifying the regulatory standards and methods to be promoted. This would be an opportunity to explore a different procedural basis for hearings, including replacing the current adversarial format with an inquisitorial approach.

Many of the underlying conduct issues that a disciplinary tribunal deals with are common across many areas of the professional and service sectors. The composition of a particular tribunal panel can ensure that expertise or experience of certain professions or legal activities is engaged where that is of particular bearing in a case.

It is also worth noting that, in the health sector, the Professional Standards Authority is in favour of a consolidated and consistent approach to the investigation, prosecution and adjudication of professional conduct matters (2016b: page 11):

There would be particular benefits from shared adjudication across all professions, by a separate tribunal service.... This would reduce variability and would potentially generate cost savings from economies of scale. There would be other benefits such as more straightforward monitoring of performance and statistics, and the opportunity to develop greater expertise of hearing panellists.

A clearer distinction between service regulation and title regulation, leads to the possibility of a different approach to the investigation and discipline of misconduct.

For example, title-holders who are found to have engaged in inappropriate (but not criminal) behaviour, say, with a junior member of staff or in a social setting, might not be thought to pose a significant regulatory risk in relation to their provision of legal advice and representation to clients (such provision might, in fact, be exemplary).

Taking too narrow a regulatory, service-based, approach could result in no action being taken, on the basis that clients or consumers were not likely to be at risk. However, a view might also be advanced that this particular form of private conduct might otherwise be indicative of professional misconduct.

For example, the nature or consequences of a practitioner's actions might be such as to bring into doubt the "unquestionable integrity, probity and trustworthiness" required of a provider of legal services. These are the words of Sir Thomas Bingham, Master of the Rolls, in *Bolton v. The Law Society* [1993] EWCA Civ 32 in relation to a member of a profession, but seem to me to be of wider relevance in the delivery of legal services.

The broader point here, therefore, is that in assessing conduct in the future, the regulatory framework will need to monitor and discipline a range of providers. Some of these providers will be members of a profession, and some will not. I would expect the same standards and expectations to be applied by the regulator to both, and the Bingham view is a good test.

Within that framework, misconduct could lead to suspension from the right to provide legal services, conditions on that right, or even removal of registration and the right to practise (either entirely, or only in relation to certain legal services for which authorisation or other regulatory conditions were required).

Of itself, though, I do not suggest that removal of registration in relation to the provision of services would also *automatically* lead to the removal of a professional title (on this, see further paragraph 6.4.3).

*"Where title is no longer the only route into regulation, the existing title-based disciplinary arrangements will not be suitable."*

In terms of sanctions, there can be significant value in 'remedial action by consent'. Where a practitioner has recognised their shortcomings or breach of a code of conduct, then, say, a reprimand (noted on the public register), or undertakings not to repeat the behaviour, or to undergo identified training, might be effective responses.

Perhaps greater use might also be made in future of attaching conditions on the right to practice. Depending on the nature of the wrongdoing, these could include, for example: restrictions on workload, types of legal service offered, types of client served, or practice location; client gender restrictions or the use of a chaperone; or health monitoring.

Being allowed to continue in practice with conditions attached would be a privilege. It would be important, therefore, that other practice staff and clients should be aware of the conditions. This could be managed through appropriate entries on the public register and requirements for disclosure.

Any breach of such conditions on practice rights should result in the loss of any authorisation or other permissions to practise, removal from the register and, potentially, entry on the prohibited list (see paragraph 4.8.3.3).

## **6.3 Regulatory independence**

### **6.3.1 Balancing regulation and professional titles**

A consequence of the future approach recommended in Chapter 4 is that the primary focus of the regulator should be on the necessary and minimum requirements for regulated legal services.

This focus would be built on a risk-based assessment of the need for regulatory intervention, and would apply a range and mix of BTE, DTE and ATE obligations appropriate to the assessed risk.

This would therefore go some way towards the shift away from titles towards more activity-based regulation as recommended by both the CMA (2016) and the LSB (2016a).

But it would not mean – as some might fear in such a shift – the replacement or disappearance of professional titles from the marketplace or the dilution of professional standards.

Regulation (as properly understood) would focus on the minimum necessary requirements that need to be attached to various activities, services or circumstances, based on the assessed risk, and applying the same regulatory requirements whoever is subject to that regulation.

The award of titles, and the maintenance of any standards above or beyond the regulatory minimum, must now be considered.



### 6.3.2 Is any element of self-regulation still legitimate?

The 'guardianship' of professional titles might be considered a separate matter from the specific regulation of the provision of legal services. In principle, as explored in the interim report, the logical place for this might be with the relevant professional body.

In other words, for reasons explored in paragraphs 3.6 and 3.7.2, the issue is whether the reduced role of self-regulation since the Legal Services Act 2007 might benefit from reassessment.

There is a sense in which both a regulator and professional bodies could have something of a 'regulatory' function: the regulator for the minimum necessary standards, and professional bodies for the requirements sufficient to warrant and maintain membership of their profession.

The challenge is whether an approach to future regulation could effectively and satisfactorily combine the two. The interim report accordingly explored three options.

In all options, a distinction was drawn, on the one hand, between the BTE, DTE and ATE regulation of services or activities and, on the other, the regulation of title.

In all options, the regulation of legal *services* would have remained a matter for the regulator, and all envisaged that particular *titles* would have been conferred (and removed) by the relevant professional body.

Responses to the interim report did not indicate any significant support for professional bodies fully 'taking back control' of their titles. Accordingly, with the ending of 'approved regulator' status, legal professional bodies would be removed from any formal aspects of the regulation of legal *services*. However, despite this, I do not propose that professional bodies should be stripped of all oversight of *titles*.

### 6.3.3 Regulator responsibility for title

I questioned in Mayson (2020d: paragraph 4.5) whether the Legal Services Act 2007 technically required the professional bodies to transfer the regulation of title to their regulatory bodies. Nevertheless, the practical point for now is that they have done so.

Given that full self-regulation of titles by professional bodies is no longer acceptable, this report recognises and accepts the current position. The LSRA should therefore determine the regulatory conditions and consequences for all providers (whether holding a professional title or not) to be registered and regulated to deliver legal services.

As a result:

#### **Recommendation 43**

The Legal Services Regulation Authority should have power to determine the general requirements for the award and removal of professional titles, and approve the particular arrangements of professional bodies for the qualification, conduct and discipline of title-holders.

In my view, this will require the definitions of ‘regulatory arrangements’ currently found in section 21 of the 2007 Act to be clarified. In their present form, they refer only to the arrangements necessary for the authorisation of title-holders to carry on a reserved activity, not for the award of title.

At the moment, the LSB approves the regulatory arrangements of the approved regulators. This gives the Board oversight of the arrangements of those regulatory bodies of approved regulators that also have representative functions.

However, the current approach of title-by-title approval does have the potential to result in different regulatory requirements for one professional title when compared to others.

For example, the attainment of higher rights of audience by solicitors is not directly comparable to the attainment of equivalent rights by barristers.<sup>83</sup> Solicitors and licensed conveyancers also have different requirements for carrying on conveyancing practice.

In other words, the existence of multiple regulators leads to multiple, varying regulatory requirements in respect of the same legal services. The Legal Services Regulation Authority should in future address this with uniform rules and standard requirements for authorisation or accreditation in respect of the same legal services.

Some of the current front-line regulatory bodies have been created by approved regulators that have representative functions. Their current legal structures sometimes have them as still institutionally connected, and various arrangements have to be made to secure their independence, funding and resourcing.

Others, such as the Council for Licensed Conveyancers, have no such structural connections and are simply overseen by the LSB.

In the future, the question of regulatory independence will be settled by having the LSRA as the sector regulator, and the professional bodies no longer being established as ‘approved regulators’. There would be no institutional connection with any of the current professional or representative bodies.

*“the existence of multiple regulators leads to multiple, varying regulatory requirements in respect of the same legal services”*

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83. I note that the Solicitors Regulation Authority is, at the time of writing, considering revising its regulatory arrangements for higher courts advocacy: see <https://www.sra.org.uk/sra/consultations/consultation-listing/advocacy>.

The LSRA will therefore need to (a) establish a single, sector-wide set of regulatory requirements relating to the award and removal title by professional bodies, and then (b) approve specific arrangements for different titles that are consistent with those sector-wide requirements.

The sector-wide requirements would address the arrangements to be put in place by the professional bodies for qualification and conditions for the award of title (meaning their existence and appropriateness rather than prescription of, say, specific content of education and training courses or providers). These should be set as the minimum necessary arrangements that should be required across the sector for the award of any professional title.

In approving the specific arrangements of particular professional bodies, the LSRA would need to be satisfied that all of the general requirements were met, that the arrangements were consistent with the regulatory objectives (cf. paragraph 4.2), and that the arrangements also justified the statutory protection of the relevant title (cf. Recommendation 44).

These specific arrangements could, however, go beyond the minimum necessary requirements of the LSRA, provided that these also did not compromise the regulatory objectives or statutory protection of title. In this way, a professional body could establish aspects of membership that went beyond (or were higher than) the regulator's minimum.

I envisage that these additional aspects might relate, for example, to the expectation of a higher degree of competence than that required by the regulator for authorisation or accreditation, or obligations in relation to professional standards or membership of the professional body that are additional to (but not inconsistent with) the regulator's requirements.

For example – where not otherwise required or inconsistent, and within the overall approval of title arrangements by the LSRA – this might extend for barristers to membership of an Inn of Court, following the cab-rank rule, not paying or receiving referral fees, and not handling client money.

For all professions – again, subject to the extent that there is no sector-wide requirement or inconsistency with regulatory objectives or statutory protection of title – it might also extend to the arrangements for on-the-job training, accreditation, employed lawyers, additional professional indemnity insurance, practice or chambers administration, and expectations of personal conduct and ethical behaviour as a member of the profession.

The LSRA would also need to set out, for those specific legal services for which BTE authorisation or DTE accreditation was required, which authorisations and accreditations could be obtained by title-holders solely on the basis of the approved arrangements for the award of title. Depending on the actual training of practitioners, this could allow different routes to qualification and authorisation for, say, civil and criminal practice.

As a result of this approach, there would be mandatory regulatory requirements set by the LSRA for the award of title, registration and carrying on specific legal services, determined and supervised by the regulator.

There could also be additional mandatory requirements for individuals being able to hold and retain a particular professional title. These additional requirements would be approved by the LSRA, but enforced by the professional body. However, these additional requirements could not be or become a condition of a member of that body being able to carry on any legal service for which an individual title-holder is registered.

Therefore, as an example, if the LSRA did not require specific accreditation for those practitioners who were exercising rights of audience in youth courts, a professional body could not make such accreditation a condition of practice for its members.

However, it might regard any lack of competence or experience as a reason for taking disciplinary action against a member, irrespective of the regulator's assessment of competence (see further paragraph 6.4.3).

This approach presents a simple, consistent approach to title regulation that would apply across the legal services sector. It is similar to the approach of membership of the Royal Medical Colleges and their control of professional titles and the regulatory authority of the General Medical Council over the regulation and performance of medical practitioners.

In the circumstances proposed here, there would be clear separation of regulatory and representative functions. The common regulatory requirements, consistently applied, should also be sufficient to justify the continuing statutory protection of professional titles.

Consequently:

**Recommendation 44**

All legal professional titles should have the benefit of statutory protection. It should therefore be an offence for a person who is not a title-holder wilfully to pretend to be a title-holder or, with the intention of implying falsely that a person is a title-holder, to take or use any name, title or description.

The separation of the award and holding of a professional title from registration and regulatory conditions for carrying on specific legal services would still allow 'non-practising' lawyers to retain the use of their title (and to practise as a member of a foreign legal profession), but unless registered or exempt they would not be able to provide any legal services for reward in England & Wales.

The regulatory framework would still, however, need to take account of alternative arrangements for non-legal professional titles (such as chartered accountants): see further paragraph 6.5.

The continuing role of professional bodies under this structure is considered in paragraph 6.4.

## 6.4 The continuing role of professional bodies

### 6.4.1 Introduction

If there is a single, sector-wide, regulator and no continuing formal role for professional bodies in the regulation of legal services, there are a number of potential issues for those bodies that arise as a consequence.

Under the alternative framework recommended in this report, there would be a clear separation of regulatory functions relating to legal services and the protection of the public interest. The LSRA would be approving the arrangements of the professional bodies for the award and removal of titles.

It would also be determining the conditions and requirements that title-holders (in common with all other providers) must comply with in order to be able to offer regulated legal services to the public.

The representation of the interests of title-holders (including their interest in gaining and maintaining their title) would fall separately to the professional body.

### 6.4.2 Award and removal of title

The regulatory conditions for the award and removal of title would therefore be determined by the LSRA (see paragraph 6.3.3). However, I envisage that the process for actually conferring (or removing) that award would still rest with the professional bodies (such as the Law Society for solicitors and the Inns of Court for barristers). In this sense, professional titles would continue to be 'owned' by the professions.

Further, I would expect that the setting of the content and practical arrangements for training and certification – consistent with the LSRA's sector-wide requirements – would fall to the professional body (including approval of training providers).



The LSRA should have power to withhold approval of a professional body's arrangements if it believed that these arrangements were disproportionate, inappropriate to the regulatory objectives, or inconsistent with statutory protection of the relevant title.

The professional bodies would have an incentive not to make their requirements too onerous or expensive. To do otherwise might deter practitioners from wanting to join their professions, and gaining the benefits of any authorisations and accreditations that would flow from title, or any additional accreditations available (cf. paragraph 5.6.3).

The Inns of Court offer a good example of professional bodies that already carry out title-related and training functions under the broader regulatory requirements of the 2007 Act. They are subject to the practice rules and expectations of current regulators (the LSB and Bar Standards Board) and work alongside a formal representative body (the Bar Council).

However, they are not representative bodies. In fact, they occupy a role that is closer to that of the medical Royal Colleges, as specialist and influential institutions whose interest is in advancing professional education and high standards, and preserving the value of their associated professional titles. This is an important role that could be developed further, and for other professions.

Practical aspects relating to title could therefore remain with the relevant professional body. This could include the provision of training and continuing professional development, or being a recognised organisation for accreditation purposes (as envisaged in paragraphs 4.5.2.3 and 5.6.3) and specialisation, albeit subject to specific requirements relating to these activities that might be imposed by the LSRA.

### **6.4.3 High professional standards**

I quite understand that a professional body might wish to adopt higher standards of competence or service delivery than those required by the regulator. The professional ideal of high standards is not to be dismissed or diminished. After all, that might be said to be the principal mission of a professional body.

Also, in competitive terms, as suggested in paragraphs 3.7.2, and 6.5, seeking and maintaining high standards of technical or specialist competence might be a profession's route to securing a sustainable competitive advantage against other providers in the sector.

In principle, I see no objection to professions being able to encourage standards higher than the required regulatory minimum. As I observed in paragraph 4.5.2.3, though, for the most important or highest-risk services there might be little or no difference between the high standards that practitioners and their professional bodies would expect of themselves and the minimum necessary standards required by a regulator.

The pursuit of higher or more onerous professional standards for title-holders than are required by the regulator for legal services would therefore be a matter for the relevant profession. This could encourage the raising of professional standing and standards as were thought appropriate by that body and its members.

However, it would be important that a professional body could not impose mandatory additional requirements on title-holders (see paragraph 6.3.3). The attainment and manifestation of those higher qualifications or standards (where not required to meet BTE or DTE conditions imposed by the LSRA in respect of particular legal services) would be an aspect of membership of a profession rather than of regulation of one or more legal services.

In the same way that, say, the medical profession offers routes to further specialisation or Fellowship of a Royal College, so legal professional bodies could establish equivalent schemes for its members.

The decision to raise professional specialisation or standards in this way, with any associated costs, where not required as a condition of regulation, would therefore be undertaken as a feature of membership of a particular profession. Some of the professional bodies already have such schemes (which could be said, for example, to underpin the difference between scrivener notaries and notaries public).



These decisions would be moderated primarily by the extent to which members of a profession were prepared to bear the additional effort and cost associated with higher standards. They would also need, on a commercial basis, to take account of the willingness of clients to recognise and pay any price premium attached to their choice of provider.

It might be seen as professional self-interest to promote higher standards as part of a bid, perhaps, to 'crowd out' those providers who are not professionally qualified. However, it is just as likely that new entrants and alternative providers who are not so qualified might be quite happy to see those who are choose to raise their standards and prices.

In this way, the professionals would be creating further space and difference in the market, and this scope for price competition could be attractive to alternative providers and consumers.

Under this approach, there is no risk that a professional body could impose barriers or burdens on membership that were contrary to regulatory objectives or other mandatory requirements. Only the LSRA could impose requirements for, or conditions on, rights to offer regulated legal services.

Professional bodies would be offering opportunities to comply with regulatory conditions (such as accreditation, training or ongoing competence), or for further enhancements (such as certification for specialisations for which there were no mandatory regulatory requirements).

I therefore envisage that there will be a difference between requirements for the practice of regulated legal services (as set and overseen by the LSRA) and the requirements for the award and retention of a professional title (as set and overseen by a professional body, under arrangements approved by the LSRA).

This inevitably leads to questions of the enforcement of standards and conduct. This was addressed in relation to regulated legal services in paragraph 6.2.7. The issue in this paragraph relates to conduct and discipline in relation to a professional title.

I begin here with the words of Sir Thomas Bingham, Master of the Rolls, in *Bolton v. The Law Society* [1993] EWCA Civ 32. He referred to a profession's need for "unquestionable integrity, probity and trustworthiness", and said:

The reputation of the profession is more important than the fortunes of any individual member. Membership of a profession brings many benefits, but that is a part of the price.

I have already referred to this in paragraph 6.2.7 as an indicator of the nature and level of expectation that should be applied to all providers of legal services, whether members of a profession or not.

However, that paragraph also raised the matter of conduct that might be directly relevant to technical competence, and therefore of concern to a regulator. It then referred to other conduct that may or may not be relevant to technical competence (such as inappropriate behaviour with colleagues or misuse of social media). This second type of conduct can, and does, cause disquiet among those who are concerned about the broader reputation of their profession.

This suggests that the professional bodies – as guardians of their professional titles – have a legitimate interest in setting and enforcing standards of behaviour for their members. Where these go beyond the minimum regulatory requirements and expectations of the regulator, a professional body will want to feel able to take disciplinary action in order for membership to have meaning and value.

There is no doubt that these issues can be problematic. They might have happened in public (say, on social media) or in private (behind closed doors); and the alleged wrongdoer may or may not be identifiable either personally, or as a member of a particular profession. These factors may well have a bearing on the extent to which the profession is 'brought into disrepute'. But the expectation of consequences, and the need for them, may be clear.

*"The reputation of the profession is more important than the fortunes of any individual member. Membership of a profession brings many benefits, but that is a part of the price."*



There has been much concern recently that the SRA might not be taking sufficient account of, or action in relation to, the private conduct of solicitors in assessing professional misconduct or bringing the profession into disrepute. It is certainly not being so to the degree suggested by the Bingham quotation above.

Similar concerns have been expressed in relation to the Bar Standards Board and the conduct and discipline of barristers.

Too often, lawyers are allowed by regulatory bodies or disciplinary tribunals to continue in practice following instances of proven misconduct. It is not surprising that aggrieved clients or the public generally should raise their eyebrows and wonder about the impartiality of disciplinary processes where this happens. As they see it, in their world, wrongdoers would more likely have been dismissed from their employment or prosecuted.

I am content that professional bodies should retain the privilege of being able to set and enforce for their members standards and expectations of professional performance, conduct and behaviour that go beyond those required by the LSRA as conditions of registration and regulation.

A consequence of this, though, is that professional bodies will also need to establish their own disciplinary processes for the investigation and determination of conduct cases that relate only to the performance and behaviour of a title-holder in their capacity as a member of their profession. (These processes would also fall to be approved by the LSRA as part of its approval of the professional body's title arrangements: cf. paragraph 6.3.3.)

If as a consequence of these disciplinary processes, a member of a profession has the title removed, any regulatory authorisations and accreditations that flowed from title should also be withdrawn automatically.

However, this would not necessarily prevent that individual from seeking authorisation through other routes, subject to the regulator applying, as appropriate, the 'fit and proper person' and fitness to practise requirements (see paragraphs 4.7.4 and 4.5.3.3).

Similarly, if a practitioner has authorisations or accreditations removed for misconduct as a result of regulatory misconduct, or is otherwise found to be in breach of regulatory conditions, a professional body could consider that to be a relevant factor in relation to the retention of title and impose whatever sanctions it then felt appropriate.

#### **6.4.4 A new freedom**

Although the recommendations in this report would remove professional bodies from a formal role in the regulatory framework, they should not be read as 'anti-profession'.

There is undoubtedly a major and important role in legal services for professions to play. Part of the task in this report is to address two issues. The first is to allow providers other than members of the legal and related professions to offer an extended range of regulated legal services to the public.



The second is to free those professions from the perception of bias and 'looking after their own' in pursuing an uncomfortable and ultimately unsustainable purpose of both representing and regulating their members.

My intention is not to remove from them the mission of excellence in practice or, where they can, from offering something to consumers that is demonstrably better than the services available from other providers. However, we cannot have such aspirational excellence as the only regulated option available to those with legal needs.

The regulator should ensure that necessary regulatory protections exist for the legal services that citizens need or from those who provide them. Beyond this, though, I would hope that this report and its recommendations can also encourage any profession to follow its highest ideals.

As the CMA puts it (2020a: paragraph 5.79):

The role of a regulator to ensure entry standards are limited to what is necessary, in the interests of greater entry and wider choice, thus intuitively runs somewhat counter to the role of the profession. Ultimately, however, both roles are complementary in seeking positive outcomes for consumers, albeit via different means. Keeping the roles distinct can therefore help to ensure an appropriate balance is found.

With their new freedom to represent robustly, the professions could in fact campaign more vigorously for what they believe is right.

Indeed, freed from the constraints of a formal regulatory role, perhaps the legal professions can rededicate themselves to what Blond et al (2015: pages 4 and 19) would advocate as their core purpose:

what is needed is a fundamental shift in approach, returning ... professions ... to their core purpose, which is serving others and helping them to flourish. This relational universal which binds the professional and those they serve speaks to the shared perception of the public good that we as a society are most lacking. Virtue speaks to the shared goods that we all want to realise but need help in securing, be it health, education or justice....

The problem is that the conditions for virtuous professions and professionals are under threat.... Britain has a model that is both state-dominated and market-driven.... The result is a set of regulated transactions between producers and consumers, which have reduced relationships of professionals and citizen to contractual exchange and eroded the true purpose of professions – to strive for both excellence and ethos.

This could, of course, be seen as happening in a future environment where professional bodies will have lost their 'approved regulator' status and therefore have less influence over regulation. In fact, though, the current requirements of the 2007 Act and the internal governance rules in my view significantly inhibit the ability of professional bodies to influence regulation.

As the CMA recently noted (2020a: paragraph 5.76):

a healthy tension between regulator and the regulated is to be expected and need not be counterproductive. Key to this may be how effectively the representative bodies can encourage constructive engagement by its members in the common interest of ensuring compliance that would safeguard public confidence in the legal profession as well as maintain open dialogue with the regulator to allow for the professional perspective to be taken into account.

Indeed, the CMA considers that a degree of scepticism and challenge on both sides would be beneficial in promoting healthy discourse. As noted by stakeholders, the relinquishment of its regulatory duties could potentially allow representative bodies greater freedom to champion more vigorously its members' perspectives, enabling more effective and open debate than may currently exist for fear of perceived conflict, on critical matters of regulation.

#### **6.4.5 A sound future**

Although professional title would not be the only route into regulation in the future, the continuing advantages of title would derive from three principal benefits.

The first would be the continuing route to regulatory approval for those regulated legal services where the regulator considers that title is sufficient to satisfy its requirements to demonstrate the necessary competence and experience.

Accordingly, authorisation in respect of legal services that require BTE authorisation (as envisaged in paragraph 5.2) could still flow from the award of title. The LSRA would have to establish the regulatory requirements necessary to assure competence in respect of the relevant service.

It would then be a matter for the regulator to decide whether, and to what extent, holding a particular professional title was a sufficient basis for authorisation (and accreditation, where relevant) for the service in question.

On this basis, it might be that, as now, the award of a professional title would give certain general rights of practice. Consequently, for example, barristers could still have general rights of audience, licensed conveyancers the right to carry on conveyancing services, and so on.

The second is the enduring familiarity and value that a profession can build and maintain in the recognition and market worth of the 'brand meaning' attached to its title. This is likely to remain very important in the continuing confidence and value that clients, the courts, judiciary, public at large, and other jurisdictions attach to professional titles.

The third benefit should be that professional titles should continue to confer significant benefits internationally in terms of mutual rights of establishment and practice in other jurisdictions. By not changing the fundamental nature, rights or values of title-holders, those benefits would not be lost.

It would be for those other jurisdictions to decide whether or not to confer similar benefits on registered providers of legal services who did not hold a title.

For these reasons, I believe that those who see their career and future as 'lawyers' will continue to acquire and practise under one of the existing professional titles. However, there are other providers who tend to narrow their focus of attention, either professionally or as a business. For them, at the moment, the routes to regulated provision are either non-existent, restrictive or expensive.

These providers tend to be experienced and focused practitioners (such as will-writers, estate administrators, advocates in particular proceedings or for particular clients, CPS associate prosecutors, and so on). The proposals in this report would allow such specialists to be brought within the scope of regulatory requirements and redress for dissatisfied clients.

If established lawyers and law firms find the prospect of competition from such newly regulated practitioners either daunting or unwelcome, there must be good reason for their concern. However, with the right (robust) approach to regulating all providers in the sector, I do not accept that the good reason would reflect risks to competence, ethics or consumer protection.



I would not therefore wish the recommendations in this report to be seen as an assault on the status of professional titles. One can accept that titles represent a form of elitism, but they are for the most part rightly earned on the basis of merit.

The standing of the UK legal professions in the rest of the world, and the respect accorded to them and to the justice system generally, attests to a legitimate meaning of 'elite'. However, it does require that the basis of that competence, quality and integrity must be maintained at both the systemic and personal levels.

Concerns have been expressed to me that the alternative approach that is recommended in this report could lead over time to the effort and cost associated with acquiring a professional title becoming a discretionary decision. However, I do not think that there is any substantial reason to assume that titles will become a 'voluntary' and increasingly unnecessary add-on to authorisation.

With alternative routes available to regulated status and consumer protection, the numbers entering the regulated legal sector should certainly increase. As stated above, these are most likely to be providers targeted on particular specialisation or market and consumer segments.

While traditional legal professions might decline as a percentage of total providers, it does not follow that the value attached to a full professional title will reduce. The absolute number of fully qualified lawyers could remain at the same level, or increase.

Whether that proves to be the case or not will result from decisions to qualify based on the perceived competitive advantage and economic value as between having a professional title and status, or not.

That is a challenge to which the professions would have to rise (and I am confident that they could do so). If they continued to demonstrate value and public benefit, there is no reason to assume that they would not continue to survive and thrive.

#### **6.4.6 A continuing contribution**

A related, and important, issue is to recognise the vast amounts of time, support and goodwill offered through the voluntary contributions of members of the profession. This is particularly the case in relation to the training of students and practitioners, as well as to regulatory matters.

I would certainly not wish to see these contributions diminished or being marginalised in the new approach to regulation recommended in this report. I strongly believe that there remains a sound future for resilient and independent legal professions.

On balance, therefore, and certainly in relation to contributions to regulation, I am inclined to agree with the CMA's assessment (2020a: paragraph 5.84):

while there may be incentives for voluntary contributions to drop off, the profession would retain incentives to continue volunteering some of this input, both to mitigate any cost implications and to ensure the perspective of the profession was recognised.

In this context, 'permitted purposes' funding could remain a significant incentive.

#### **6.4.7 The 'permitted purposes'**

The Legal Services Act continues the pre-2007 approach of requiring practitioners to maintain an annual practising certificate and to pay a fee for that privilege. The practising certificate fee (PCF) must be approved by the LSB, and covers a range of regulatory costs.

The Act requires that an approved regulator may only apply amounts raised by the PCF for one or more of the 'permitted purposes' (section 51(2)). Some of those permitted purposes are carried out by the regulatory bodies and, in circumstances where there is a representative arm of an approved regulator, some of the permitted purposes are carried out as a representative function.

As a result, some elements of the PCF raised by a regulatory body are paid over to a representative body. For example, the following activities, which are permitted purposes under section 51, might well be carried out in representative capacities:

- (a) accreditation, education and training of practitioners and students;
- (b) maintaining and raising professional standards;
- (c) participation in law reform and the legislative process;
- (d) the provision to the public of *pro bono* reserved legal services;
- (e) promotion of the protection by law of human rights and fundamental freedoms;
- (f) promotion of relations with national and international bodies, governments or the legal professions of other jurisdictions.

Many of these functions can rightly be regarded as public interest activities. Some could even be thought to be more challenging for regulators (and possibly even inappropriate: cf. Mayson 2020a: paragraph 4.2 and 2020f: paragraph 5.2.5). This could apply to participation in law reform, the provision of *pro bono* advice and representation, and the promotion of human rights protection.

Understandably, professional bodies might be concerned at the loss of income through the PCF if the effect of full separation of regulatory and representative functions resulted in the removal of permitted purposes funding. However, I firmly believe that a case could – and should – be made for preserving compulsory funding for such important public interest activities.

While the correlation between the PCF communities (such as solicitors) and the funding recipient (currently the Law Society) might be disrupted by the full separation of regulation and representation envisaged in this report, that should not inevitably prevent a future framework empowering the LSRA from raising funding through a PCF (or future equivalent, such as a registration fee) for these important public interest purposes.

The distribution of those funds by the LSRA might in future be based on a transparent process for securing that they are expended by those organisations (including current professional bodies) that are assessed to be able to apply them most effectively and cost-efficiently towards their intended purpose and outcomes.

Some of the activities carried out (as will be apparent from the list in section 51 above) are not in-year or one-off activities. They will require planning and sustainability over time, such that assured continuity of funding will be critical, and this would also need to be addressed.

As a transitional measure, I would support preserving whatever is the aggregate amount of permitted purposes funding approved by the LSB in its final year being maintained under any new framework for a period of five years. This would provide a degree of assurance for a period of time while new arrangements are worked out and implemented.

In summary, therefore, I do not see it as a necessary or immediate consequence of any further separation of regulatory and representative functions that professional bodies would lose all of their permitted purposes PCF funding.

It is important to acknowledge, though, that such funding is in effect a 'tax' on practitioners above and beyond the strict costs of registration and regulation. As such, I would expect the funding to be kept at a reasonable level.

I also think that there should be no necessary assumption that it could not, at some future point and with an appropriate transitional period, be phased out. Professional bodies would therefore need to think carefully about their other routes to income, particularly from membership dues, training and accreditation.

Professional bodies could therefore be free to compete for membership on the basis of the value of their qualification and title, the quality of their training, and their ability to offer career development advice and support. If they wish, they would also be free to compete with other professional bodies (and providers of accreditation) for those seeking specialist accreditation.

*"allow the professions to pursue higher levels of competence, quality and service where they believe that doing so would be beneficial to all parties"*

## **6.5 Areas of regulatory overlap**

### **6.5.1 The issue**

An approach to legal services regulation that seeks to address the regulatory gap by better aligning consumer expectation and regulatory coverage might nevertheless give rise to some challenges of regulatory overlap.

For example, at the moment, chartered accountants are regulated under the Legal Services Act 2007 in respect of the reserved probate activities. The Institute of Chartered Accountants in England & Wales (ICAEW) has separate arrangements in place to discharge its regulatory functions under the 2007 Act.

However, the same body under different arrangements also regulates chartered accountants in relation to audit and, for instance, the provision of tax advice.

It is likely that any definition of legal activity or services will be broad enough to apply to advice on tax law given by chartered accountants (and also, for instance, by a chartered tax adviser: see paragraphs 5.2.2.2, 5.3.1, 5.6.3 and Case Study 3, page 166). Similarly, chartered surveyors and town planners might also fall within that definition if they offer advice on property or planning law (subject to any exemption).

The definition would also cover immigration and insolvency practitioners, as well as some of the activities of claims management companies. All of these are already covered by other statutory frameworks (see further paragraph 5.7).

If a new entry point for regulation is any 'provider of legal services', then there would inevitably be an overlap with certain providers who offer advice and assistance that will fall within the definition of 'legal services'.

The implications for this potential dual coverage therefore have to be addressed, on the basis that the provider in question does not qualify under the exemption for a 'subsidiary but necessary' service (see paragraph 4.7.2).

### **6.5.2 A sector-wide approach?**

This potential for regulatory overlap is not unique to legal services. However, it is perhaps more problematic for legal services regulation because so many aspects of public, commercial, social or personal activity are subject to or touched on by legal concepts and consequences.

This exacerbates the challenge for consumers' understanding of whether or not they face a legal issue and, if they do, what sources of advice and representation might be available to them (cf. YouGov 2020 and paragraph 2.4 above). The more diverse those sources, the greater the potential for confusion and inconsistency.

Applying the same regulatory treatment across the sector, irrespective of the providers' background, would be consistent, for instance, with the recommendations of the working group on the regulation of property agents that "all those carrying out property agency work be regulated, even if it is not their largest or traditional core function".<sup>84</sup>

A common approach could, however, be subject to the exception suggested in paragraph 4.7.2 for legal services that are 'subsidiary but necessary' to the provider's principal activity.

This approach would ensure that clients of all providers could be satisfied that the validation of competence in relation to legal services, and their expectations of service quality and redress, would be assessed relative to the same sector-wide standards.

They would also be assured that they would have access to the minimum regulatory requirements that applied to the particular legal service provided. This might include ATE access to consumer complaint investigation and redress, and would extend to any other regulatory requirements that applied to that service.

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84. See Best (2019: paragraph 37).



### 6.5.3 Alternative regulatory arrangements

If there were no alternative arrangements in place, those non-legal professionals who were not exempt but were offering legal services when not registered would be committing an offence, and possibly further claiming or implying that they were registered when they were not.

However, where a non-legal profession has its own regulatory arrangements in place, it might be possible for the LSRA to accept those arrangements as a satisfactory assurance that the provider would meet the minimum requirements for the provision of legal services.<sup>85</sup>

It is conceivable that the standards set by those providers' own professional or other oversight bodies might be higher than those set for legal services. This would place those who are not mainstream providers of legal services in much the same position as legally qualified title-holders relative to non-title-holders (as discussed in paragraph 6.4).

Consequently, the LSRA should be able to accept the regulatory arrangements applying to a provider who is not legally qualified as a satisfactory assurance that the provider was meeting the necessary regulatory requirements.

However, where BTE authorisation is required, or where the LSRA imposes specific requirements for accreditation, the individual carrying on the relevant services would still need to be registered for them.

*“It is conceivable that the standards set by those providers' own professional or other oversight bodies might be higher than those set for legal services.”*

The minimum ATE requirements of the legal services regulatory framework that follow from registration (such as indemnity insurance and access to consumer complaint investigation and redress: see paragraph 5.3 for details) might sensibly be applied to all providers in order to simplify the consumers' route to making complaints and initial claims for redress.

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85. For example, the SRA currently refers to this as the 'suitable external regulation exception', which it extends to the Association of Chartered Certified Accountants, the Association of Taxation Technicians, the Chartered Institute of Taxation, the Financial Conduct Authority, the Insolvency Practitioners Association, the ICAEW, and the Royal Institution of Chartered Surveyors.

This could allow, say, the legal services ombudsman to carry out sector-wide, consistent, initial assessments of the nature and extent of a consumer's issue in the manner of a 'triage' function (in much the same way as the Complaints Gateway of the Insolvency Service).

The ombudsman could then direct the handling of that issue to other appropriate parts of the regulatory infrastructure (including, where appropriate, a non-legal regulator). In this way, the regulatory 'floor' in respect of legal services could be the same for all providers.

Consequently, those who also hold a legal or non-legal title would be free to compete in an open market on the basis of the standards or verifiable quality that they felt their membership of a professional or other body could give them, at whatever price premium their clients were willing to pay.

This approach could place the members of the accountancy bodies who are currently authorised for probate activities and within the framework of the Legal Services Act 2007 on the same footing as all other providers.

It would also address the existing disparity in the regulatory arrangements that apply as between, say, the ICAEW and the Association of Chartered Certified Accountants, and the other approved regulators of reserved legal activities.

Accordingly:

**Recommendation 45**

The minimum requirements of after-the-event regulation should in principle apply to all registered providers of legal services. However, the Legal Services Regulation Authority should have the power to direct that alternative but at least equivalent arrangements established by a non-legal regulator of registered persons would meet its requirements for that regulator to become a 'designated body'. The legal services ombudsman should then have the ability to triage consumer complaints and refer them as appropriate to the designated regulator.

*“reduce the possibility of differences and inconsistency in regulatory standards”*

#### 6.5.4 Legal professional privilege

A further factor that might be brought into play here is the question of legal professional privilege. The public policy rationale for privilege is that clients should be encouraged to make full and frank disclosures to their legal advisers in order to seek complete and effective advice on their actual or potential legal situation.

The current position, in short, is that privilege is restricted to certain legal professions (namely, barristers, solicitors, and chartered legal executives) rather than to all those who actually give legal advice in a regulated professional capacity (which might then have included, say, chartered accountants).

This was confirmed in the Supreme Court judgement in the *Prudential* case<sup>86</sup>. The Supreme Court also said in this case that any change to the application of privilege to other providers of legal services should be a matter for Parliament.

It seems to me that the present distinction is unfortunate, in that it unfairly disadvantages the clients of some regulated professionals. It also fails to reflect the broader intentions of the Legal Services Act 2007 that authorisation to carry on reserved legal activities should be extended beyond the traditional legal professions.

The distinction also leads to some degree of 'contortion' in multidisciplinary practices (see paragraph 4.13). The client's interests might suggest, for example, that tax advice should attract legal professional privilege. In that case, internal arrangements need to secure that the work is carried out by or under the direction and supervision of a regulated lawyer rather than a regulated accountant. Such arrangements are often not otherwise necessary or desirable.

Extending privilege in the future to advice given by registered providers of legal services could give clients and the courts assurance that those on the register were subject to regulation and, therefore, to at least some minimum requirements and confidence for attaching privilege to their advice.

However, I accept that this might extend the policy too far. On balance, therefore, I would propose that privilege should attach to those providers subject to BTE authorisation and specific DTE accreditation.

I also acknowledge that, as with other aspects of title recognition, the issue of professional privilege has implications in other jurisdictions.

In any event, reform could offer the opportunity to review legal professional privilege and perhaps provide for an alternative that offered assurance other than membership of only certain legal professions.

Those providers who are not presently within the scope of legal professional privilege might regard this as a desirable benefit arising from being subject to registration and regulation for legal services.

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86. *R. (on the application of Prudential plc and another) v. Special Commissioner of Income Tax and another* [2013] UKSC 1.

Accordingly:

***Recommendation 46***

Given the public policy objectives for legal professional privilege, and parity for clients, legal professional privilege should be extended to those providers who are registered within the legal services framework and subject to before-the-event authorisation or during-the-event accreditation.

## 6.6 Summary

The objectives of a revised regulatory structure would be to:

- secure the independence of a single sector regulator from political influence and from representative interests;
- ensure the proper accountability of the single regulator for its performance, decisions and use of resources;
- recognise a common regulatory minimum that applies to all providers of the same legal services, whether title-holders or not, set and overseen by the regulator;
- as such, allow providers both with and without titles to compete on equal terms *within* the framework of regulation;
- separate clearly (a) the requirements that should be imposed on all providers as matters of regulation from (b) those additional qualifications, certifications or obligations that members of a profession are willing to assume;
- leave the formal award and removal of title with the relevant professional body, conferred or removed in accordance with arrangements approved by the LSRA;
- allow the professions to pursue higher levels of competence, quality and service where they believe that doing so would be beneficial to all parties;
- prevent those levels being barriers to regulated entry for other providers, from creating market cost barriers to consumers, or being conditions of registration or regulation for one or more legal services;
- accept that the professions might legitimately wish to regain and reinforce a sense of professional responsibility and aspiration;
- preserve the basis of mutual recognition of qualifications and rights of establishment in other jurisdictions;
- allow the regulator to recognise multiple routes to meeting required regulatory standards;
- allow professions and their members to compete on quality among themselves and with alternative providers, but without excluding legitimate and regulated alternatives (who might not wish to compete on that basis) from emerging in the sector;
- encourage competition amongst professional bodies and others who wish to provide the means to qualification, authorisation, accreditation, supervision, and regulatory compliance; and
- reduce the possibility of differences and inconsistency in *regulatory* standards applicable to providers or services operating in the same market segment, while allowing regulated providers to differentiate and compete on higher levels of standards and quality where they wish to do so.



## PART 3

### FOR THE SHORT TERM







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## CHAPTER 7

### PROPOSALS FOR SHORTER-TERM REFORM

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#### 7.1 Introduction

I recorded earlier my belief that regulatory reform needs to be both incremental and radical, and that some change is needed sooner rather than later. I came to those conclusions even before the effects of Covid-19 became apparent.

As the pandemic crisis has extended and deepened, those views have only strengthened. The personal, social and economic disruption created by this crisis has unsurprisingly accelerated different ways of working, and of buying and experiencing legal services.

This chapter therefore sets out some thoughts and proposals for incremental changes to the legislative framework for legal services regulation. It goes beyond reform within the scope of the Legal Services Act 2007, but does build on the foundations of the Act.

The problems with the current regulatory framework identified in this report have been magnified as consumers have changed their previous patterns of behaviour. In particular, they have moved in significant numbers and at speed to prepare wills<sup>87</sup> and seek legal advice remotely.

For example, on 24 March 2020, Citizens Advice reported its busiest week in history with 2.2 million views (up 50% on the same time a year earlier)<sup>88</sup>. A more sinister indicator is that the National Domestic Abuse Helpline has also seen a significant increase in traffic to its website<sup>89</sup>.

As they have done so, the issues and risks to consumers arising from the regulatory gap described in paragraph 4.3.1 have increased. Consequently, the implications for future public confidence in legal services and their regulation could be profound.

The inability of the current regulatory framework to provide adequate protection to consumers who instruct unregulated providers or use lawtech products and services is increasingly troubling. As noted in paragraph 4.9.1, it might be the case that in a post-pandemic world lawtech providers will be better funded, financially more resilient, and more entrepreneurial than many law firms.

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87. See: <https://www.ft.com/content/7025f425-87c2-4738-b305-6392d13ce0c0>.

88. See: <https://www.citizensadvice.org.uk/about-us/how-citizens-advice-works/media/press-releases/busiest-week-in-history-for-the-citizens-advice-website-with-over-22-million-views/>.

89. See: <https://www.refuge.org.uk/refuge-sees-700-increase-in-website-visits/> (9 April 2020) and <https://www.refuge.org.uk/refuge-reports-further-increase-in-demand-for-its-national-domestic-abuse-helpline-services-during-lockdown/> (27 May 2020).

In those circumstances, they could well be better placed to drive more consolidation, and put greater competitive and cost pressure on traditional law firms and client relationships. For them to be able to do so beyond regulatory reach potentially compounds the risks to consumers and society.

In fact, the President of the Law Society has recently emphasised the economic vulnerability of high street solicitors' firms. In evidence to the Justice Select Committee<sup>90</sup>, he referred to the sharp fall-off in legal work caused by the pandemic and the perilous financial position of many law firms:

We are talking about firms that are in very serious financial straits and already have heavy borrowing. These are loans that will have to be repaid by people who have no idea whether they are going to be there to repay them or whether the work is going to be there to finance it....

For conveyancing there are falls in work of up to 60%. For immigration, it is up to 65%, sometimes higher. With housing, no possession cases of any kind are taking place so there is a very serious impact. Crime is at 75%. Family is more mixed. I highlight those because it is those particular areas on which the high street firms regularly depend, and it shows why we have such a major concern in that area....

[W]e must not overlook the areas of housing and community care [where in] swathes of the country there are no solicitors available to provide the kind of advice people need in relation to housing and community care. That is going to be exacerbated by the present position.

Irrespective of the question of the levels of public funding for legal aid, these comments cause particular concern (and there have been similar views expressed about the effects on self-employed barristers).

First, in times of financial crisis and instability, there is an increased likelihood that lawyers will be tempted into financial irregularities in order to sustain their businesses or personal circumstances. Middleton & Levi have previously noted the possibility that (2015: page 662):

Problems associated with solicitors sailing very close to the wind will increase as financial instability and competition become more widespread.

Second, when work in an established practice area falls away (such as residential conveyancing), there is an increased tendency for lawyers to be redeployed into other practice areas where they are less experienced or up to date. This leads to a greater risk of 'dabbling', with potential detriment to clients.

Third, the clear implication is that law firms are now highly likely to go out of business, and the number of qualified lawyers within them will decline because of redundancies. The pressures are at least as acute for self-employed barristers and law centres.

If this happens, consumers will be drawn even more to currently unregulated providers and unregulated technology-based legal services. If there is a serious danger that the pandemic 'drives high street firms to brink of collapse' (*The Times*, 7 May 2020, page 58) and forces them out of business, or tempts them to move to new areas of practice

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90. See <https://committees.parliament.uk/oralevidence/337/pdf/> (4 May 2020).

where they have little or no experience as old ones decline, then it is even more important that alternative providers are brought within the scope of regulation.

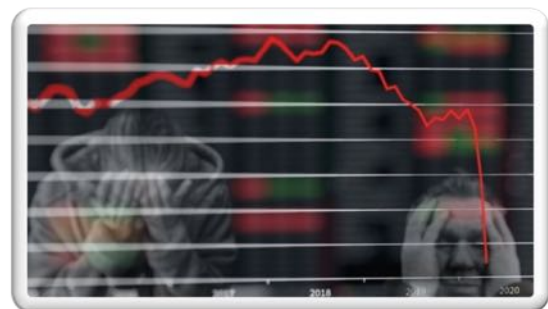
As the Pathfinders report points out, we are now in “a time when the justice system most needs to maintain the public’s confidence”, but when “marginalized communities – already poorly served by justice systems – face the highest risks”, and at a moment when the pandemic “is widening the justice gap, with a sharp increase in the problems that many people face and the ability of justice actors to respond declining” (2020: page 2).

More particularly (Pathfinders 2020: page 4):

The economic impacts of the pandemic will increase the burden on justice systems. Job losses and company closures translate into declines in physical and psychological wellbeing, increases in evictions and debt, and loss of healthcare or other services.

As a society, we cannot allow the personal tragedies and hardships of a biological assault on our way of life to be overshadowed by a consequential failure to support the increasing number of people now most in need of legal help and certainty in their lives.

We are not the only jurisdiction that needs to “suspend regulations that limit ... non-lawyer legal assistance”, and to “challenge monopolies that block the entry of paralegals, low-cost mediators, and digital legal services” (Pathfinders 2020: page 25). But we might yet be (one of) the first to respond swiftly and positively.



## 7.2 What are the short-term regulatory issues?

The critical issues that have been highlighted by this Review and current circumstances are both general and specific, structural and operational. I would describe the general challenges with the most short-term impact as follows:

- (1) increasing evidence of the legal needs of citizens going unmet or under-served, giving rise to no action at all, more ‘self-lawyering’ and litigants-in-person, or the use of unregulated providers, online services and lawtech (paragraphs 2.3.2, 2.4.2, 3.2 and 7.1);
- (2) the absence in the regulatory arrangements under the Legal Services Act 2007 of any prospect of redress to consumers who suffer any harm or detriment at the hands of unregulated providers of non-reserved services (sections 125 and 128);

- (3) a similar absence in relation to providers of online, lawtech services where no other regulated person is involved (paragraph 4.9.2);
- (4) the consequential inability of consumers who use the providers referred to in (2) and (3) to complain to the Legal Ombudsman (LeO);
- (5) the deliberate exploitation by some unethical providers of the existence of the structural gaps in regulation referred to in (2) to (4);
- (6) the lack of any modern, risk-based foundations for the reserved legal activities, and the cumbersome procedure under the 2007 Act for adding or changing them (Findings 2 and 4 and paragraphs 3.4 and 4.3.3);
- (7) restrictions on the jurisdiction and remedies available to LeO (paragraph 5.3.2);
- (8) expressions of dissatisfaction by some complainants about the decisions and independence of the Legal Ombudsman, and some wider concerns about performance (paragraph 3.8 and Viewpoint 2, page 62);
- (9) increasing numbers of litigants-in-person and the associated challenges for judges in relation to McKenzie Friends (paragraph 5.6.4); and
- (10) variability (Finding 9) in will-writing standards (paragraphs 5.4 and 5.5.1), in the quality of criminal and youth court representation and advocacy (paragraphs 3.8 and 5.5.3), and in the quality of immigration advice and services (paragraph 5.7.4).

These challenges can be characterised as either structural flaws in the Legal Services Act 2007 (points (2) to (7)), or as consequences of those flaws (points (1) and (8) to (10)).

All of these issues would be addressed by the recommendations in Part 2 of this report for an alternative longer-term framework for regulation. The proposals in the next paragraph offer some thoughts and short-term recommendations for addressing them in advance of longer-term reform.

### **7.3 Addressing structural flaws**

A series of interrelated amendments to the 2007 Act would allow the regulatory structure to be adapted to address the short-term challenges identified in paragraph 7.2. These would require primary legislation, and therefore support from the Ministry of Justice.

#### **7.3.1 Bringing the unregulated within scope**

There are two principal ways in which aggrieved clients should be able to pursue their unresolved dissatisfaction with providers. The first, where the standard of service has been inadequate, is the ability to complain to an independent and neutral arbiter to seek an apology, adjustment of the fee, rectification, and the like.

The second is the ability to claim some form of redress, such as compensation or restitution for the consequences of negligent or fraudulent acts or omissions by

providers. This is usually assured through professional indemnity insurance and a compensation fund (though see Viewpoint 2 (page 62) and paragraph 5.3.1).

The complaints and redress mechanisms under the 2007 Act can only apply if the provider is an authorised person. As a consequence, a complaint can only currently be made to LeO, and redress ordered, against someone who is authorised to provide one or more of the reserved activities. There is no jurisdiction over unregulated providers.

Further, only authorised persons can be required to have professional indemnity insurance or contribute to a compensation fund. Although many unregulated providers do in fact carry indemnity insurance, for them this is a voluntary decision.

Consumers are therefore faced with the possibility of two different providers advising or representing them on exactly the same issue (such as drawing up a will or a power of attorney).

By pure chance for some of them, their provider could be regulated and the consumer will have a route to making a complaint and seeking redress (such as compensation or rectification). A different, unregulated, provider offers no such protection.

In a complex and fast-changing world, with multi-dimensional regulation and vulnerable consumers, 'buyer beware' places an onerous and unfair burden of enquiry and understanding on those consumers.

In terms of extending LeO's jurisdiction to unregulated providers, therefore, those providers would first need to be brought within the scope of the legislation. To protect consumers, this should be done.



The most likely sources of unregulated provision at the moment are:

- (a) *those of potential benefit to consumers*, such as will-writers, estate administrators, costs drafters, paralegals, and McKenzie Friends; many of these providers choose to join voluntary accreditation and registration schemes and carry professional indemnity insurance; and

- (b) *those posing a potential risk to consumers, such as similar providers as within (a) but without accreditation, registration or insurance, as well as formerly authorised persons (particularly those who have been removed from their profession because of serious misconduct) and opportunists deliberately seeking to exploit consumer vulnerability or ignorance created by the 'regulatory gap' (paragraph 3.3).*

In my view, it is time to bring those within (a) into the formal regulatory framework and offer clarity and comparable redress to consumers. It is also time to protect consumers and the interests of fair competition by tackling those within (b) and either requiring them to submit to regulation or removing them from the market.

It might be claimed that there is insufficient evidence of harm to consumers arising from unregulated providers. By definition, we cannot know the extent of any such harm. There is presently no way of knowing who is engaging in such provision, or the nature and extent of their activities (see further paragraph 3.9).

There is also significant evidence of 'silent sufferers' in relation to *regulated providers* (see paragraphs 2.4.4 and 2.6) who do not use the mechanisms open to them in the regulatory framework. Nor are these sufferers likely to engage another lawyer to pursue their dissatisfaction in a formal action for negligence.

As Gillers suggests (2013: page 407):

It may be that the truth or falsity of the prediction of harm cannot easily be verified (or verified at all), but that the level of harm if the prediction is correct but ignored is greater than the level of harm if the prediction is adopted but wrong. Therefore, the burden of disproving the prediction should lie with its opponents.

To my mind, it is a reasonable supposition that similar levels of client dissatisfaction exist in the unregulated sector as in the regulated. It can no longer be right that we allow reluctance arising from the lack of (necessarily incomplete) evidence to justify knowingly leaving vulnerable or under-served consumers to the whims of the market.

### **7.3.1.1 Change the reserved legal activities?**

The first possibility to bring the unregulated within the scope of regulation would be to change the reserved legal activities so that the main activities of unregulated providers became reserved. This might involve, for example:

- (a) including the preparation and execution of a will or other testamentary instrument, and of a letter or power of attorney, as 'reserved instrument activities', by removing paragraphs 5(3)(a) and (c) from Schedule 2 to the 2007 Act;
- (b) extending or replacing the definition of 'probate activities' in paragraph 6 of Schedule 2 to include the administration of the real and personal estate of a deceased person and the performance of any other functions in relation to such administration (such as preparing probate papers and applying for a grant of probate or of letters of administration);

- (c) including 'conveyancing services' (as defined for licensed conveyancers in section 11(3)(a) of the Administration of Justice Act 1985) as a new reserved activity, combined with those elements of paragraph 5(1)(a), (b) and (c) of Schedule 2 that relate to real estate.

However, in my view there are three principal difficulties in using extended reservation as the route to widening the scope of regulation (see also paragraph 4.3.3) to enable the Legal Ombudsman to deal with consumer complaints against those who are currently unregulated.

The first is that changes to the reserved legal activities would address only some of the issues identified in paragraph 7.2. This could not, therefore, offer a complete solution.

The second difficulty is that amendments to the reserved activities would affect everyone in the market. Existing regulators would have to be identified as approved regulators in respect of the proposed reserved activities. They would then have to introduce new rules that applied to their existing regulated community in respect of those activities.

In most cases, providers who are already regulated will be subject in some way to existing regulatory requirements that cover the new reserved activities. For example, conveyancing generally and will-writing activities, although not reserved activities, are in fact regulated at the moment by virtue of the existing regulators of, say, solicitors and chartered legal executives applying their rules to everything done by those lawyers.

The newly regulated community – such as currently unregulated will-writers – would have to apply to an approved regulator for authorisation in respect of the new reserved activities. This would add an additional burden to the current regulatory framework.

Existing approved regulators would need to amend their rules to accommodate the new entrants. These practitioners are unlikely to conform readily to the regulators' usual requirements for qualification and supervision.

Alternatively, the Legal Services Board (LSB) would either have to establish itself as an approved regulator for the newly reserved activities in accordance with sections 62 and 63(2)(a) of the 2007 Act, or use the powers under Part 2 of Schedule 4 to designate one or more new approved regulators.

The third difficulty is that the processes for adding or amending the reserved activities in sections 24 to 26 of the 2007 Act, and for creating new approved regulators, are time-consuming, in circumstances where the need for change is more pressing.

Alternatively, primary legislation could amend the reserved activities directly and, if Parliamentary time were available, would almost certainly be quicker.



Achieving the short-term outcomes that are necessary to deal with the issues arising now will in any event require primary legislation to amend the 2007 Act in some way. I would therefore prefer to see the introduction of an alternative approach that I believe would be more comprehensive in addressing the issues identified, and less onerous for both the regulators and providers.

### **7.3.1.2 A parallel approach**

In the circumstances, therefore, it seems to me that a second possible approach could be quicker and less disruptive. This short-term solution lies in establishing a new regulatory gateway for the presently unregulated. Significantly, it would also leave those who are already authorised and regulated untouched.

The enabling legislation for a parallel approach to bring unregulated providers within scope would raise many of the same issues that I have considered in Part 2 of this report. These include:

- whether the extended scope should apply to all legal activities, or identify only those legal activities for which regulatory attention is most needed;
- whether any form of qualification or certification should be required of a provider before entry into regulation is allowed; and
- whether the application of regulation to providers should be mandatory or voluntary.

For my part, the answers to these questions for the short term are the same as they would be for the longer term.

It is, however, possible to use the existing framework of the Legal Services Act 2007, and adopt some of the recommendations from Part 2 of this report. A key element of those recommendations is a single, public register of providers.

Accordingly:

#### **Recommendation S1**

The Legal Services Board should be empowered to create a public register of providers (who are not otherwise authorised persons under the Legal Services Act 2007) of a non-reserved legal activity to consumers whether for reward or as part of a commercial activity. It should also decide if any compensation and indemnification arrangements (within the meaning of section 21 of the Act) should attach to those who are registered.



This change could bring within the scope of regulation currently unregulated providers of non-reserved legal activities, as described above.



A short-term, parallel regulatory structure could therefore be created such that:

- (1) Any provider of a non-reserved 'legal activity' to a consumer (who would qualify as a complainant under the current Legal Ombudsman Scheme Rules<sup>91</sup>), and who is not otherwise regulated under the 2007 Act, would fall within the scope of the amended framework.
- (2) A 'provider' would need to be defined for these purposes (I would suggest along the lines proposed in paragraph 4.7.2, so including providers of lawtech services). The important factors would be that: (a) the provider was, in some way, holding out the prospect of knowledge or experience relevant to the consumer's legal issue, either for reward or otherwise on a commercial basis (or both); and (b) that the consumer could reasonably infer that a relationship of client and legal adviser was being created.
- (3) The LSB maintains the public register of all providers, and those registrants would be allowed to describe themselves as, say, 'registered with the Legal Services Board under the Legal Services Act 2007'.
- (4) Registration should be in the name of the business or organisational entity providing the relevant legal activity, or with which the consumer has terms of engagement.
- (5) Registration should be mandatory, with offences of carrying on a legal activity for payment when not registered and for persons describing themselves as registered when not.
- (6) LeO's jurisdiction should then be extended to allow the submission of complaints by consumers against registrants.
- (7) A registration fee would be payable by registrants, to cover the costs of maintaining the public register, as well as an element of LeO's establishment costs (on the same pro rata basis as the allocation of those costs to authorised persons).
- (8) The LSB should have powers to:
  - (a) require the disclosure in a particular form by a registrant to a consumer of the registrant's regulatory status, the terms of engagement, pricing (as appropriate), and complaints process;
  - (b) introduce, in consultation with LeO and the Legal Services Consumer Panel, one or more codes of conduct applicable to all providers or to those providers of a certain legal activity; and
  - (c) decide in relation to all providers (or those of certain legal activities) that it is a condition of initial and continuing registration that a registrant should have a minimum level of professional indemnity insurance: this should not simply be on the basis of the SRA's current minimum terms and conditions, which impose

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91. See Rule 2.1, applying to: individuals; micro-enterprises (businesses with fewer than 10 employees or turnover or assets of €2 million); charities, clubs, trusts, etc (with an annual income net of tax of less than £1 million); and personal representatives or beneficiaries of the estate of a deceased person. Available at: <https://www.legalombudsman.org.uk/wp-content/uploads/2019/03/Scheme-Rules-1-April-2019.pdf>.

a 'one-size-fits-all' approach that would be inappropriate and probably disproportionately expensive for the purposes of the intended registration.

I do not believe that all of the legal activities that would fall within the scope of the obligation to register are low risk. I would therefore expect the LSB to give due consideration to the nature of any regulatory conditions that ought to be imposed in relation to those providers who are, say, administering an estate and collecting in and distributing a deceased's assets or operating online services.



The proposed register could also apply to CPS associate prosecutors<sup>92</sup> and police station accredited representatives<sup>93</sup>. A decision would therefore be needed on whether to bring them within the scope of regulation (see also paragraphs 5.6.3 and 7.4.2) or exempt them from it.

The requirement to register might extend to some businesses that are currently forced to separate out the reserved activity elements of an otherwise seamless consumer service (such as estate administration from probate activities, and employment advice or representation at tribunals from appeals to the Employment Appeal Tribunal): see the discussion of multidisciplinary businesses at paragraph 4.13.

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92. These are designated non-legal employees of the Crown Prosecution Service on whom the powers and rights of audience of a Crown Prosecutor are conferred (including bail applications, and the conduct of criminal proceedings in the magistrates' courts – including the youth court (cf. paragraphs 5.6.5 and 7.4.2) – other than trials of either way offences tried summarily or offences punishable with a term of imprisonment): <https://www.cps.gov.uk/publication/directors-instructions-cps-associate-prosecutors>.

93. These representatives are non-solicitor employees who go to police stations to advise and assist people who would otherwise have no legal representation, and are usually called to a police station after the duty solicitor has spoken to the client by telephone: for details, see: <https://www.sra.org.uk/solicitors/accreditation/police-station-representatives-accreditation>.

Importantly, this recommendation would leave the current regulatory provisions and practice in place for those title-holders and alternative business structures already within the regulated sector. This would meet the concerns expressed by some professional bodies in response to the prospect of reform that change now would be unwelcome and disruptive to their members.

The changes would, however, extend the possibility of complaint and redress to consumers beyond the present parameters. They would enable limited entry into regulation for those providers who are presently excluded. This would also lead to experience and evidence for the future about the levels of demand from such providers.

Registration need not be an expensive proposition. As indicated in paragraph 4.8.3.2, examples of registration already exist. There is a Professional Paralegal Register<sup>94</sup> for practitioners who do not hold a legal professional title but who practise in non-reserved legal services.

There is demand for such paralegal registration (approaching 2,000), and the costs are manageable at less than £300 for full registration (a proportion of which is paid into a compensation fund), plus the cost of professional indemnity insurance for £2 million.

The Civil Mediation and Family Mediation Councils also maintain voluntary registers that provide examples of current registration schemes.

Registration is common for other professions in the UK, including those in healthcare, architects, science and engineering, and for surveyor-valuers. It is also used in Scotland for paramedics, and in North America for licensed paralegals and legal technicians (for example, in Arizona, California, New York City, Utah, Washington State, and Ontario).

### **7.3.2 Extending the Legal Ombudsman's jurisdiction and powers**

The key to providing meaningful redress for consumer harm and complaints most easily lies with the Legal Ombudsman. At the moment, the jurisdiction is restricted to authorised persons under the Legal Services Act 2007. These are, in essence, qualified lawyers who are already regulated for one or more of the reserved legal activities (see sections 125 and 128).

This restriction is one of the significant manifestations of what I described in paragraph 3.3 as the 'narrow gateway' into regulation. I have suggested in paragraph 7.3.1.2 a short-term approach to altering the gateway.

For the purposes of this paragraph, therefore, the proposition is that LeO's jurisdiction should be extended to include the wider group of regulated providers who would fall within the scope of legal services regulation as a consequence of the registration process.

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94. See <https://ppr.org.uk>.

Accordingly:

**Recommendation S2**

The jurisdiction of the Legal Ombudsman under the ombudsman scheme rules should be extended to complaints by consumers against registrants on the same basis as if registrants were authorised persons.

As a consequence, LeO would then have powers to require a registrant (in the same way as for authorised providers) to do one or more of the following:

- apologise;
- pay compensation of up to £50,000 (and interest on it) for loss suffered;
- pay compensation for the inconvenience or distress caused to the complainant;
- put right (at the provider's cost) any error, omission or other deficiency;
- take (and pay for) any action specified by LeO to be in the complainant's interests;
- pay an amount directed by LeO for the complainant's costs in bringing the complaint; or
- limit the provider's fees to a specified amount.

If amendments are being made to the scope of LeO's jurisdiction, the opportunity might also be taken to confirm some additional elements of the ombudsman scheme. These could include a statutory basis for LeO to:

- (a) establish a process for receiving from anyone expressions of concern, short of a formal complaint, about an authorised person or registrant;
- (b) exercise 'own-initiative' powers to investigate providers in respect of whom the ombudsman is aware of expressions of concern (whether or not these are manifested in one or more formal complaints); and
- (c) exercise a power, if it wishes, to make a group determination of several complaints in relation to the same provider and to connected circumstances.

I am aware of recent concerns that LeO has been struggling to cope with even its current remit. I do not regard this as a reason in itself not to make the necessary recommendations. Such operational, funding and resourcing matters would be for the Office for Legal Complaints, the LSB and the Ministry of Justice to address.

Like other organisations during the Covid-19 pandemic, the Legal Ombudsman has had to deal with staffing capacity and remote working, as it receives and processes complaints. It has also had to deal with the similarly limited capacity of providers to respond in a timely manner.

## 7.4 Persistent concerns about quality and standards

I referred earlier in paragraph 7.2(10) to persistent concerns about variability in the standards of will-writing, in the quality of criminal representation and advocacy, youth court representation and advocacy, and in immigration advice and services, as well as to the increasing numbers of litigants-in-person and the associated challenges for judges in relation to McKenzie Friends.

These are concerns that have been brought to my attention and emphasised from various representations and submissions during the course of this Review.

Addressing these concerns, does not require any short-term legislative amendment. The proposals in Part 2 of the report would inevitably lead to them being addressed in the longer term, largely through specific authorisation or accreditation relating to the narrow or specialist service being carried on.

Nevertheless, in relation to the immediate risks to public confidence in the justice system and legal services flowing from the Covid-19 pandemic, the concerns would bear close attention from regulators in the short term.

The following paragraphs therefore record some further thoughts about these issues. Unlike the recommendations in paragraph 7.3, they would not require changes to primary legislation and can be achieved under existing regulatory powers. They might, though, affect some of those who are already regulated as authorised persons, as well as new registrants.

### 7.4.1 Will-writing

There has been longstanding evidence of shortcomings in the preparation of wills. When the reservation of will-writing was last formally considered in 2013, it became apparent that legally qualified will-writers were just as likely to produce wills of questionable validity and quality as unregulated will-writers.

This was interpreted by some to show that regulation would not in itself improve protection for consumers, on the basis that regulated providers were not in fact less of a risk than unregulated ones.



However, I take the view that it showed that the *regulation in place* had been ineffective in securing that protection. Poor quality among the regulated community is, to my mind, more a reflection of the inadequacy of regulation and of its supervision and enforcement, particularly in allowing regulated practitioners to 'dabble' or practise infrequently in will-writing.

To repeat a point made in Part 2 of this report, modern circumstances are changing the risk profile of will-writing (see also Case Study 5, page 181). The increasing complexity of family relationships and arrangements, and increased longevity giving rise to questions about mental capacity to make a valid will, increase risk and add complexity.

The current regulatory system therefore continues to expose consumers to the risks of fraud, incompetence or inexperience in will-writing, including partial intestacies arising from poor drafting, unintended trusts, and issues relating to foreign wills. In practice, these risks are as likely to arise from regulated and unregulated providers.

As a respondent to the interim report recorded in relation to complainants about unregulated will-writers: "Too often they are astounded that someone has sat in their house for a couple of hours, talked legal things with them, taken a few thousand pounds from them and hasn't been seen since".

In all of these circumstances, bringing unregulated will-writers into the scope of regulation would create the opportunity for redress to consumers who have suffered harm or detriment. However, it would not on its own necessarily improve quality and reduce risk for them.

A key proposition of Part 2 of this report for will-writing is that for the future the regulator should require that every will-writer should have appropriate accreditation for this service: see paragraph 5.4.3. This should apply even to those who are already otherwise fully qualified lawyers.

I would not suggest that this proposal should be incorporated into the short-term recommendation for the registration of unregulated providers. But I would encourage the existing suppliers of voluntary accreditation schemes to make those available to those newly registered providers who wished to take advantage of the additional assurance that this might bring.

These include, for example, the Law Society, which has a wills and inheritance quality scheme (though current membership is restricted to SRA-regulated practices), and CILEx Regulation has specific accreditation requirements for probate practice (which includes will-writing and estate administration, and is open to individuals who are not CILEx members). The Council for Licensed Conveyancers also has approved qualification for its licensed probate practitioners.

In addition, accreditation could perhaps come through the full or affiliate membership of the Society of Trust and Estate Practitioners, the Institute of Professional Willwriters, or the Society of Will Writers.

Consistent with the longer-term proposals in Part 2, I would not restrict the encouragement here to new registrants. I would also encourage specialist accreditation for authorised persons who practise in the preparation of wills, and letters or powers of attorney, and estate administration (consistent with the longer-term proposal for accreditation).

#### **7.4.2 Criminal and youth court representation and advocacy**

Lack of knowledge and competence, practitioners straying beyond the limits of their competence and experience, and variability in quality and performance, are aspects of criminal litigation and advocacy that have been increasingly apparent in recent years (see paragraphs 3.8, 5.5.3 and 5.6.5).

Not only do these challenges undermine the criminal justice system and judicial confidence, they also jeopardise public and consumer confidence in legal services and representation.

They are also likely to become more acute during the course of 2020 and into 2021 as the legal system processes the backlog in jury trials and other criminal proceedings resulting from the coronavirus lockdown and related restrictions.

While there might be some connection between these persistent concerns and levels of public funding, greater funding (even if it were available) would not solve the issues. We still need to ensure competence and quality underpinned by the appropriate and effective regulation of those who provide the services.

In the same way that competence and quality in relation to will-writing might be assured through appropriate accreditation, so that approach might be adopted in the longer term for criminal and youth court representation and advocacy.

In relation to youth courts, magistrates may not sit as a member of a youth court unless specifically authorised to do so. It would not seem unreasonable to expect that the representatives and advocates who appear before them should be similarly validated.



Appropriate accreditation, either in respect of criminal proceedings generally, or specifically for proceedings in youth courts constituted under section 45 of the Children and Young Persons Act 1933, should give assurance to judges, clients and the general public that those who exercise these important rights have sufficient competence and experience to do so.

This position is reinforced by the recent observation of Adams & Day (2020: page 37):

Although there are optional courses available, there is no mandatory requirement for barristers to undertake additional training in order to represent people in the youth court. A barrister is deemed competent to practise in the youth courts simply by means of a self-declaratory tick box on their practising certificate renewal. Dealing with children and young people is a skill in itself; they need to be advised in a way they understand. Mandatory training would go some way to helping young people navigate the system with the assistance of their counsel.

I would therefore similarly encourage practitioners to seek appropriate accreditation in the short term as a way of signalling to others within the criminal justice system that they are making a systematic and determined effort to demonstrate and maintain their professional competence within their chosen field of practice.

As with will-writing, there already exist a number of accreditation schemes that all relevant practitioners might be further encouraged to join. These include the CPS Advocate Panel (also a route to accessing CPS instructions) and the Law Society's criminal litigation accreditation scheme (presently available to solicitors, barristers and chartered legal executives to enable them to apply for inclusion on a local duty solicitor rota).

CILEx Regulation also has specific certification and authorisation for chartered legal executives in respect of criminal litigation and advocacy.

In this context, I would repeat and emphasise the points made in paragraph 4.5.2.3 that schemes such as Lexcel and the Legal Aid Agency's quality mark do not, in my view, offer adequate assurance of *individual* competence for accreditation purposes.

I shall understand if established criminal practitioners regard the suggestion of accreditation (as in paragraph 5.6.3) as an unwelcome burden at a time when they are also struggling with the economic, social and professional aftermath of the pandemic.

However, as inconvenient as specific accreditation might seem to criminal practitioners, those who will be involved in the criminal justice system will also be feeling the effects of the same aftermath, whether they are accused, victims, witnesses or judges. They also deserve the benefit of as much assurance of specific competence that voluntary accreditation might bring to the functioning and integrity of the system.



### 7.4.3 Immigration advice and services

Part 2 of the report set out in paragraph 5.7.4 the concerns about the quality of immigration and asylum advice and services. It also pointed to the existence of inconsistencies as between regulation and enforcement by regulators established under the 2007 Act and the Immigration Services Commissioner.



Immigration law is technically complex, and can be changed quite frequently in response to political imperatives. The UK's exit from the European Union is likely to add to the complexity. It could also potentially increase the number of people from outside the UK who will need advice and representation from immigration practitioners.

Immigration rules apply on a UK-wide basis. It is therefore important that there is consistency both within and across the jurisdictions of England & Wales, Scotland and Northern Ireland.

The main difficulty seems to lie currently with the SRA's regulation of solicitors who practise in immigration advice and services. No specialist qualification or authorisation is required of them, and there appears to be insufficient monitoring of their initial or ongoing competence.

Under current legislation, it is the Office of the Immigration Services Commissioner (OISC) that has the power to investigate and prosecute those unregulated providers of immigration advice and services who choose to ignore the requirement for registration under section 84 of the Immigration and Asylum Act 1999.

It would seem unnecessary, therefore, to allow those providers the choice of submitting to registration either with the Immigration Services Commissioner, or with the Legal Services Board under a new registration process for previously unregulated advisers as recommended in paragraph 7.3.1.2.

Legal services regulators tend not to have the same degree of technical insight, capability and frequency of dealing with immigration practitioners that OISC has. Accordingly, in the interests of consistency and public confidence:

#### **Recommendation S3**

The proposed registration scheme should exclude immigration advice and services, as defined in section 82 of the Immigration and Asylum Act 1999. As now, all immigration practitioners not regulated as authorised persons under the 2007 Act must continue to be regulated by the Immigration Services Commissioner.

#### 7.4.4 McKenzie Friends and others

There is currently perceived to be a crisis in access to legal advice and representation. This is fuelled by the increasing costs of professional services, and a corresponding reduction in the availability of public funding through legal aid.

The effect is to drive more litigants to represent themselves, or to turn to other sources of help, such as McKenzie Friends. In many instances, judges will allow McKenzie Friend representation on the basis that this will allow them to maintain their perceived impartiality (by not having to 'compensate' in some way for a litigant's lack of knowledge or experience).

Many judges also believe that some experienced representation is better for a litigant than none at all. The requirement of the Legal Services Act 2007 that a right of audience or to conduct litigation may only be exercised by someone who has been formally authorised under the Act is too often stretched beyond breaking point.

McKenzie Friends can vary greatly in their expertise and experience, and some are paid for the support that they offer. There has so far been no settled view from the judiciary, the regulators or practitioners about the best way to deal with the challenges presented by McKenzie Friends.

The constraint of reserved or non-reserved activities might not always be observed, for example, when paid McKenzie Friends are given permission by a judge to address the court, or prepare documents in connection with litigation. This strikes me as especially problematic when formerly regulated practitioners set themselves up as McKenzie Friends following retirement or striking off.

However, in those circumstances, there would at least still be some judicial oversight of the work undertaken. It is also clear that the practitioner would owe a duty of care to the litigant (*Wright v. Troy Lucas & Rusz* [2019] EWHC 1098). Even so, there remains a legitimate question about whether this circumvention of authorisation should be possible.

The future position of McKenzie Friends was addressed in paragraph 5.6.4. It seems to me that it would become a requirement of the proposal for registration in Recommendation S1 that *paid* McKenzie Friends would have to register. They are carrying on a 'legal activity' for reward.

However, this could still not give them any authorisation to carry on the reserved activities of exercising rights of audience and conducting litigation. It would, however, apply to any other non-reserved legal advice and assistance offered.

It would follow from this that the future position of registered McKenzie Friends would still rely on judicial discretion and permission to address the court as a McKenzie Friend.

I foresee some remaining challenges with this. Given the particular nature of a McKenzie Friend's work, from a client's perspective, it might be difficult to explain that their representative is registered to provide legal services but is not entitled to address a court.

However, there are other authorised practitioners already in that position. For instance, chartered legal executives are not entitled to exercise reserved rights in criminal, civil, or family proceedings unless specifically authorised to do so.

Also, a condition of registration will be a requirement for a level of professional indemnity insurance for non-reserved legal activities. If a McKenzie Friend were to be allowed to address the court in particular proceedings, the terms of that cover might not extend to protect the client in respect of the exercise of what is otherwise a reserved activity.

I recognise the value that some previous clients might have gained from unregulated McKenzie Friends. However, I believe that the future for paid-for services (especially those that otherwise remain reserved legal activities for which prior authorisation is necessary) should reasonably require a different approach. We should expect better protection for clients, and greater comparability with regulated provision of services.

At least with registration, there would be a process through which a dissatisfied client of a paid McKenzie Friend could complain to LeO, coupled with a requirement that all registrants should subscribe to a common code of conduct and have indemnity insurance.

*“It is not unreasonable to require those who offer legal services to consumers for reward to be registered and subject to certain minimum regulatory conditions.”*

It remains to be seen whether judges might wish to be more discerning in the permissions given to registered McKenzie Friends. They might, perhaps, be inclined to see registration as inferring less of a risk for a litigant – even in relation to a reserved activity for which the McKenzie Friend will still not hold authorisation (or possibly insurance).

As now, there is a danger that such judicial permissions will give an opportunity to some that is not available to all. For example, many paid McKenzie Friends currently work in family courts. In order to preserve a level playing-field, fair competition, and equivalent protection for clients, it seems to me that in principle paid McKenzie Friends should be in no more favourable a position than, for example, chartered legal executives who do not hold CILEx Regulation practice rights for family litigation and advocacy.

On the other hand, professional McKenzie Friends might find the cost or burden of registration too great, even without considering CILEx authorisation. They might then withdraw from the sector and deprive disadvantaged litigants of an attractive option for assistance.

It could be that the option of registration in respect only of paid-for legal advice and any other non-reserved services would not be sufficiently appealing. If there is no real prospect of judges granting permission to address the court, the basis for a professional McKenzie Friend's practice might be undermined.

The longer-term implementation of a regulatory approach (as recommended in Part 2 of the report) could introduce limited accreditation for particular legal services. This could address these remaining challenges without the need for unduly expensive qualification and authorisation.

In the meantime, I do not consider that it is unreasonable to require those who offer legal services to consumers for reward to be registered and subject to certain minimum necessary regulatory conditions.

On balance, therefore:

***Recommendation S4***

*Paid McKenzie Friends should be subject to the registration scheme. The question of whether they should be given permission to address a court on behalf of a litigant should remain subject to judicial discretion and oversight.*

This paragraph has so far focused particularly on paid McKenzie Friends. However, it could be applied on the same basis to any other unregulated practitioners with appropriate experience in certain proceedings, such as social workers.

It would also apply to formerly authorised practitioners – including those who have retired or been struck off – and so require registration in a way that can at present be circumvented.

For those McKenzie Friends who are not paid, my assumption is that judicial discretion should remain as it does now, to allow someone to help a litigant. In these circumstances, those providing unpaid support and assistance would remain as 'true' McKenzie Friends.

**PART 4**  
**CONCLUSION**



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## CHAPTER 8

### FINAL THOUGHTS

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#### 8.1 Introduction

This Review makes a case for longer-term reform of legal services regulation. It does so in the context that, at some point (and I now think in the not-too-distant future), the timing and need for more fundamental reform will be compelling.

This report therefore proposes in Part 2 an alternative approach that would extend regulatory reach to all legal services, at least at an after-the-event level for the lowest-risk activities. It would do this in preference to a current framework that limits access to regulation to those holders of a professional title who are authorised for one or more of the narrow and dated range of reserved legal activities.

However, it also recognises the mounting shorter-term pressures arising from a combination of health, social, economic and technological stresses. These are combining to intensify the shortcomings in the current regulatory framework, particularly in relation to who is regulated, for what, and how. These stresses suggest a need to consider more immediate reform, for which proposals are included in Part 3.

This chapter draws a number of final thoughts together.

#### 8.2 How the proposals are intended to address the issues identified

I set out in paragraph 3.10 those shortcomings and challenges arising from the present structure for the regulation of legal services and those who provide them that I believe any regulatory reform should seek to address. This paragraph therefore explains how the alternative recommended in this report could deal with them.

##### **(1) *Inflexibility arising from statutory prescription***

Significant concerns arise under the current arrangements because of the inflexibility of the statutory framework and the prescription that it contains. This makes both day-to-day operation and substantive change to reflect evolving circumstances challenging.

This in turn runs the risk of undermining the confidence of the regulators, the regulated, and others for whose benefit regulation is intended.

The recommendation of this report is that a more flexible, risk-adjusted approach to legal services regulation should be achieved. It should be constructed on a less rigid statutory framework. This should extend the reach of regulation and consumer protection, as well as preserve (and even enhance) the standing of those providers who hold a professional title.

With less statutory prescription, the ability of regulation to reflect more quickly and appropriately developments in the domestic and international markets for legal services can be secured. Changes in the risks attached to those developments, and to other social and technological changes, could then also be addressed.

Further, the power to use the full range of before- (BTE), during- (DTE), and after-the-event (ATE) regulatory tools, as appropriate and either independently of each other or in combination, should reduce the current pressure on the legislative and institutional infrastructure of regulation.

Finally, a more flexible structure offers greater scope for a 'breathing space' between the regulatory baseline, and professional values and aspiration, to allow professional and organisational cultures to work on raising and maintaining high standards.

This in turn can lead to greater emphasis on an 'ethical infrastructure' and to more buy-in among the regulated community, with less box-ticking regulatory compliance.

### ***(2) Competing and inappropriate regulatory objectives***

The adoption of a primary objective to promote and protect the public interest (as explained in paragraph 4.2) would remove competition amongst objectives and focus regulatory attention on its principal mission. This would not, however, exclude promoting other important secondary objectives and desirable outcomes.

### ***(3) A pivotal set of reserved legal activities that are anachronistic and distort the approach to activities that ought to be regulated***

Universal access to a form of ATE regulation, such as consumer complaint investigation and redress, for all legal services would ensure that regulation of some kind would attach to all legal services, irrespective of how or by whom they are provided.

A review of the current reserved activities would also ensure for the future that a different, and more modern, targeted and risk-focused, set of legal services would be subject to BTE and DTE regulation.

### ***(4) Title-based authorisation that results in additional burden and cost in relation to some activities being regulated that do not need to be (resulting in higher prices to consumers)***

A differentiated approach to regulation, that is capable of applying BTE, DTE and ATE regulation as appropriate to risk, would result in regulation being applied to a broader group of providers than only those who hold a professional title. This would also mean that regulation could be applied in a proportionate way to the risks actually arising from a provider's practice.

In these ways, the cost of regulation could be distributed more appropriately and, for the lowest-risk legal activities, should not be disproportionate to the risks and consumer protections arising.



**(5) *The unsatisfactory nature of the separation of regulation and representation***

The tension of regulatory independence has been a continuing theme throughout the genesis and implementation of the Legal Services Act 2007. Revisiting this important component of regulation has been necessary.

With the establishment of a single regulator (the Legal Services Regulation Authority), as proposed in this report, the question of the separation of regulatory and representative functions is addressed.

Those activities that require BTE, DTE and ATE regulation should be matters for the independent regulator. The professional bodies would be interested parties in the same way that consumer and other representative interests are. There would therefore be separation of regulatory and representative interests

In relation to the award and guardianship of professional titles, the purpose should be to maintain the protection and 'brand value' of those titles and their standing in the domestic and international marketplaces.

In the future, the requirements for the award and retention of title would be set by the regulator on a sector-wide basis. So too would be the regulatory conditions and authorisations that flow from the award of title.

The present arrangement under which appointments to the Legal Services Board, as well as certain designated decisions, are made or approved by the Ministry of Justice, gives rise to understandable perceptions from international observers and consumers that the regulatory structure in England & Wales is a creature of government and therefore that lawyers are not truly independent from the state.

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

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

For the future, having a new regulator report directly to Parliament should alleviate these concerns. This is the position, for example, in health regulation, with the Professional Standards Authority for Health and Social Care, laying an annual report before Parliament.

Even so, with a move to a single, independent regulator, it will be crucial that the chair and board members of the LSRA, and its staff, should be fully committed to the regulatory objectives (in particular to the rule of law and the administration of justice) and to targeted and cost-effective regulation: see also paragraph 8.4(6).

They will need to demonstrate this consistently in their appointments, policy formulation, balanced and objective decision-making, and implementation if they are to maintain the confidence of the regulated community as well as of the public and consumers.

**(6) *The existence of unregulated providers who cannot be brought within the current regulatory framework (with an expectation that their numbers and activities will increase)***

All providers would in future fall within the regulatory structure, whether holding a professional title or not. Depending on the relative risk of the portfolio of legal services they wish to offer, a differentiated approach to regulation would apply BTE, DTE and ATE regulation appropriate to that risk.

**(7) *The emergence and rapid development of lawtech that is capable of offering legal advice and services independently of any human or legally qualified interface or interaction, at scale, that is beyond the reach of the current framework***

The ability to treat lawtech as offered by a 'provider of legal services' would bring all forms of legal technology into the regulatory framework, whether or not it is provided by an individual or entity already subject to regulation.

**(8) *A regulatory gap that exposes consumers to potential harm when some activities are not regulated when they ought to be, and puts qualified practitioners at a competitive disadvantage***

Opening up the regulatory framework to all providers of legal services would close the regulatory gap. Applying regulation on identical or equivalent terms to all providers would also ensure no continuing advantage to the providers of non-reserved activities who are not legally qualified, and no continuing disadvantage to title-holders who are currently regulated for all legal services they provide.

**(9) *Increasing costs of legal advice and representation, reducing further the availability and affordability of legal services for many; this encourages either greater self-lawyering and, or nudges increasing numbers of citizens into the world of unregulated providers or lawtech***

Paradoxically, it would seem that, "by driving up prices and forcing many consumers to seek self-help", the regulation of lawyers "may actually reduce the overall quality of service received by the public" (Turfler 2004: page 1927). In other words, regulation is doing the very thing that it is supposed to redress.

While regulation can add to the costs of legal services for consumers, a more targeted and proportionate approach to the regulation of legal services rather than of lawyers should ensure that those costs fall where they are most appropriate to the risks involved and the consumer protections offered. Beyond that, pricing will be for the market and competition.

One respondent to the interim report noted that "activity-based regulation may provide a useful challenge to 'ever-increasing prices' within the legal sector, by ensuring a better risk-to-cost ratio and helping diversify the market so that consumers are offered greater choice".

Requiring the regulation of all providers would also reduce the risk (or increase the transparency) of consumers straying into less competent, unregulated or unprotected provision of legal services.

**(10) Consumer confusion, caused by the existence of both regulated and unregulated providers, and a profusion of differently regulated professional titles**

Part 2 of this report suggests a future where there would be no distinction between regulated and unregulated provision. The underlying requirements for regulation according to risk would ensure that there was no regulatory distinction in relation to the provider of the legal services provided.

Regulatory requirements would apply on a consistent, sector-wide basis, irrespective of who provided legal services. Protection and redress in respect of the same legal service would also be available without distinguishing between providers.

**(11) Concerns about variability in the competence and quality of legal services, particularly in relation to will-writing, immigration advice and services, and criminal and youth court advocacy and representation**

These services represent areas of practice where the technical complexity or the risks to the consumer are such that specialist during-the-event accreditation should in future be required. In this way, a more consistent and risk-based approach to the assurance of competence can be taken. This will contribute to avoiding the inherent risks of the incompetent or inexperienced being able to 'dabble'.

Immigration advice and services should ideally be treated differently, and regulated by the Immigration Services Commissioner.

**(12) Inadequate or incomplete consumer protection, that is not consistent with a widespread consumer expectation that all legal services and those who provide them are subject to some form of regulation and protection**

With the closing of the regulatory gap, and access to some minimum form of after-the-event protection, all consumers of all legal services would be protected, supported by a single public register showing whether or not their chosen or prospective provider is subject to at least the minimum ATE jurisdiction.

I completely share the sentiment expressed by Caroline Normand, Director of Policy at Which?, in her foreword to a recent policy report (2019: page 2):

we need a consumer rights system ... that makes sure that consumers are protected from harm.... And if things go wrong for consumers, we want companies to take responsibility and be held to account, rather than passing customers from pillar to post, or hiding behind the small print.

**(13) Concerns about the competence and quality of responses made by front-line regulators and the Legal Ombudsman in relation to complaints by dissatisfied and aggrieved clients and consumers**

The existence of a single regulator should reduce the incidence of inconsistencies in responses, and allow greater focus on issues of competence and quality of regulatory staff. Nevertheless, it will need to be an area of particular concern and activity by the Legal Services Regulation Authority.

An enhanced legal services ombudsman will need to focus on the same aspects of its services, too. However, the ability to triage the whole range of consumer concerns and

complaints, and take appropriate action or make referrals, combined with a broader range of powers, should put the ombudsman in a better position to respond.

**(14) *The risk of falling public confidence in legal services and their regulation***

The combination of factors above should drive higher public confidence than is capable under the current framework. Without such confidence, the longer-term sustainability of the rule of law and the effective administration of justice is at risk.

So, too, is the necessary confidence that citizens and businesses can have in the predictability, security and enforceability of their personal and commercial arrangements.

I also believe that the proposals in this report can go some way towards helping consumers deal with 'the three asymmetries' (see paragraph 3.11.1) of information, power and representation.

The need for users of the legal system to have an insider's understanding of the regulatory requirements relating to the legal services they wish to access should not remain as a necessary condition or component of legal capability.

### **8.3 Benefits**

I identified in paragraph 3.10 what I regard as the principal shortcomings of the current regulatory framework. Paragraph 8.2 set out the ways in which the proposals in Part 2 could address them. As a summary, it is now worth recording in one place the intended benefits of the alternative long-term approach recommended in this report:

- (a) It would be easier for consumers to check whether their provider or prospective provider is registered or not (including for higher-risk activities that attract further BTE and DTE regulatory requirements and protection). This is a simpler starting point for consumers than the current complex mix of factors.
- (b) A differentiated, or layered, approach to regulation would allow BTE, DTE and ATE interventions to be applied to providers based on the risks of the services that they actually offer.
- (c) Adopting such a risk-based approach would mean that more of the cost and burden of regulation could be self-selected and cumulative, depending on the commercial or operational choices that providers elect to make. As such, it would offer a more targeted and proportionate response to the public and consumer risks within the legal sector.
- (d) This approach would enable those who are currently unable to enter the regulatory structure to choose to do so, for the benefit of their consumers. This would lead to an increase in regulated access, competition and innovation in legal services.
- (e) It would not, however, prevent the established professions and professional bodies from maintaining and promoting higher professional standards than those required by the regulatory minimum where they believe that it is in their best interests to do so.

- (f) This approach could also apply to those providers who are moved (or move themselves) outside the current regulatory framework, for instance by having been struck off, disbarred, or even simply retired.

While the risks are arguably greater when medical practitioners do this, the following observation remains equally relevant to the legal sector (Australian Health Ministers' Advisory Council 2013: page 34):

The fact that these practitioners have been willing to restructure and re-badge their practice arrangements to continue practising free from regulatory oversight suggests there is a heightened risk for consumers.

The recommendations in this report would constrain their current option to set themselves up as an unregulated paid adviser in respect of non-reserved activities.

- (g) A framework that is constructed around 'providers' of 'legal services' would apply to the providers of lawtech in ways that the current framework cannot.
- (h) It would clearly separate regulatory from representative functions, and the existence of a single sector regulator would encourage greater consistency, coordination and scale economies in regulation across the legal services sector.

In my view, such an approach could deliver the best public benefits because it would:

- apply to all providers of legal services whether or not they held a professional title or were otherwise members of any occupational associations;
- set common minimum necessary standards regardless of profession, occupation or nature of practice;
- target monitoring and enforcement at those providers who display incompetence or inappropriate behaviour towards clients, irrespective of their professional background; and
- be a relatively cost-effective approach to dealing with the most harmful or detrimental conduct or behaviour.

Finally, for reasons elaborated in Chapter 7, there are also short-term challenges arising from pressures on both consumers and providers. The benefits of the short-term reform recommended in that chapter would lie in bringing forward the possibility of registration for the currently unregulated, and the extension of access to the Legal Ombudsman and redress to consumers who use them.

The short-term benefits would therefore be in line with and bring forward those mentioned in (a), (d), (f) and (g) above.

#### **8.4 The CMA's practical questions**

Finally, the CMA identified a number of practical questions that it suggested any fundamental review of legal services regulation should need to consider (see page 303). This is my assessment of the extent to which the recommendations and proposals in this report would address those questions.

**(1) Assessing risk: the review needs to identify how to assess and identify risk across many legal services areas, and how to define the scope of regulation on the basis of this risk assessment.**

A key element of the approach and recommendations in Part 2 of this report is to adopt a more overtly risk-based structure for legal services regulation. I have sought to do so in a way that will not inevitably lead to over-specification of risk and response.

I believe that it is possible to approach risk in legal services in such a way that risks can be considered reasonably broadly, grouped, and (where helpful) related to life-events. The regulator should also recognise the realities of the way in which many providers of legal services and their organisations typically respond to market and client demand by arranging linked services within an overall offering.

However, it will be most important for the regulator to recognise particular needs of consumers for specialist help, where technical competence is paramount and the risk and consequences of dabbling by the incompetent or inexperienced are too high.

**(2) Implementing flexibility: the review needs to identify what legislative changes should be implemented to achieve flexibility of the regulatory framework.**

The proposals in this report remove many of the fixed (and therefore limiting) elements of the current framework. The recommendations would give the Legal Services Regulation Authority powers to maintain flexibility by making timely changes to regulatory requirements in line with emerging circumstances.

The regulator would therefore be able to implement changes that reflected its assessment of the increasing or reducing risk to the public interest and the broader regulatory objectives and outcomes. Its processes for doing so would need to be fully independent, objective, consultative, balanced, robust and transparent. With such powers would come great responsibility (see further (6) below).

**(3) Effective prioritisation: the review should ensure that the new framework allows regulators to prioritise effectively regulatory changes.**

I believe that it is implicit in the responses to (1) and (2) above that effective, timely and appropriate regulatory responses can be made as societal, sector and technological changes emerge. The effect that these changes have on the risk profile relating to various (or all) legal services, providers or consumers of those services should lead to targeted and prioritised action by the regulator.

**(4) Evidentiary standards: the review should set an appropriate evidentiary threshold for making changes to regulation, by ensuring that it strikes the right balance between the need to ensure that changes are made only when there is evidence of a change in the risk factor and the need for flexibility in the framework.**

The need for flexibility, and the possibility for it, is reflected in the responses above. The proposals in this report set a number of thresholds for which evidence-based decision-making will be required (albeit without specifying the nature of the evidence required, which I regard as a matter for the regulator).

The first threshold is that the need for change and the nature of any regulatory response must be justified by reference to the regulatory objectives, with the proposed hierarchy of primary objectives, subordinate objectives, and outcomes.

The second is the proposed statutory duty in Recommendation 28 that the regulator should impose only the 'minimum necessary' regulatory requirements. In order to determine and justify such a level of regulatory intervention it will be essential for the regulator to have the appropriate nature and degree of available evidence, combined with a transparent risk assessment.

The third will apply to those circumstances in which the regulator's recommendations must be approved, by senior judges (Recommendation 24) or by affirmative or negative procedure in Parliament (Recommendation 36). In order to gain those approvals, the Legal Services Regulation Authority will need to have collected, analysed and presented sufficient compelling evidence to secure the approval it seeks.

**(5) Impact on the wider market: the review needs to consider how changes to the framework are likely to impact the legal services sector outside of the scope of this market study (i.e. criminal legal services and legal services other than to small businesses and consumers).**

The changes to the regulatory framework proposed in this report will be of general application, adopting a common, sector-wide approach. It is intended to be of particular benefit to individual consumers and small businesses, both in extending the range of regulated providers and the regulatory protections available.

It is likely that those who are currently qualified as solicitors, barristers and chartered legal executives – and therefore most likely to benefit from broad regulatory authorisation at the moment – will continue to be regulated, in principle, for all of their legal services.

In future, though, regulation would apply to those legal services that they actually offer, rather than, as now, to all those that they might conceivably offer. However, it would also offer the benefit of 'composite approvals' (see paragraph 5.6.5) of their activities to avoid the need for complicated and multiple registration.

The principal future difference for them is likely to be that, where the Legal Services Regulation Authority decides that the risks for consumers of certain specialist legal services are high, specific authority for practice would be required (either by way of before-the-event authorisation or during-the-event accreditation: see paragraph 5.6.3).

Given expressed concerns about criminal and youth court advocacy and representation (cf. paragraphs 3.8 and 5.5.3), I believe that such an approach should be seriously considered in both the long and short term: see paragraphs 5.6.5 and 7.4.2.

For current and future providers who do not hold a professional title and are currently excluded from sector-specific regulation ('new entrants'), it is likely that their practice focus is either on low-risk legal services or on targeted or focused services. For these providers, the proposals and recommendations in Part 2 would allow general entry into regulation for low-risk services and specific and limited entry for higher-risk services.

In all cases, the requirements and consequences applying to these new entrants would be the same as for any other provider of those low-risk or specialist services. In this sense, the regulatory playing field would be level.

For legal services other than those aimed principally at individual consumers and small businesses, it is likely that these will be provided by larger law firms and other specialist practitioners (such as barristers, intellectual property practitioners and notaries). All entity providers of legal services and individuals who hold a protected legal professional title would be registered (see paragraph 4.8.3).

Individuals who hold any BTE authorisation or DTE accreditation for specific legal services would also be identified as such on the public register. Otherwise, I regard it as unlikely that the regulator would require specific, detailed or multiple registrations by large law firms (cf. paragraph 5.6.6).

In those circumstances, for individuals who are not registered title-holders or not registered personally for authorisation or accreditation purposes, the legal services they provide to clients will be covered by the firm's registration. The same would be true, for instance, for individuals working in law centres and in-house corporate legal departments.

***(6) Regulatory structure: the review needs to identify whether the current structure is appropriate under the new framework, particularly in relation to its ability to deliver risk-based regulation.***

This Review proposes a broader, sector-wide approach to the regulation of legal services that is no longer reliant on the existence of reserved legal activities and those who hold a professional title. In this sense, the current regulatory framework would not be fit for this future purpose.

To achieve more inclusive entry of legal services providers into regulatory scope, the report therefore recommends a single, independent, sector regulator (the Legal Services Regulation Authority), the redistribution of current regulatory resources, and the removal of professional bodies from the formal regulation of legal services.

However, it supports the continuing right of professional bodies to award and remove professional titles, and to seek high professional standards from their members that may go beyond the minimum requirements of the regulator.

The new structure would also introduce new powers to deliver more overtly risk-based regulation to reflect changing societal, economic, market and technological circumstances. It would require the application of before-, during-, and after-the-event regulatory conditions to reflect the assessed risk, and the mandatory registration of all providers and the services for which they are registered.

There is a significant responsibility for regulation and the regulator in this proposed structure. It is inevitable that, in seeking the flexibility referred to in response (2) above, a good deal of discretion is left to the Legal Services Regulation Authority. Much of the reality and efficacy of risk-based regulation will depend on how that discretion is exercised in practice.



I would therefore understand a degree of apprehension among the regulated community about how the new structure might work in practice. I have therefore sought to frame the responsibility and the ability to deliver effective risk-based regulation within the recommendations themselves.

This includes the primary regulatory objective of the public interest, combined with secondary objectives and other desirable outcomes. It will require balance – I hope without dancing on lawyers’ pinheads. The consequent ability to apply risk-based analysis to framing regulatory responses on a differentiated basis should encourage the Legal Services Regulation Authority to use it as a nuanced, rather than blunt, instrument.

Such nuance should also take account of the circumstances and vulnerability experienced by consumers, as well as the realities of practice of those who provide legal services in response. It is vital that the Authority does not over-engineer or over-specify its analysis of risk or reaction to it – indeed, that its default position should be ‘no action’, unless the risks to society or consumers are too great.

It must therefore resist the temptation to see risk everywhere and always seek a regulatory intervention (hence the statutory duty to apply only the minimum necessary regulation). It must seek out and respect the views of all those affected by regulation. The mechanisms for accountability are also intended to secure independence, objectivity and balance in decision-making and implementation.

While the design of a new regulatory infrastructure is important, the critical factor in the success of the new framework will lie not only in the structure but in the choice, ability and performance of those who occupy positions within it. The selection and appointments processes must ensure that those appointed are committed to the regulatory objectives.

Board members and staff must also have (or be able to develop) the necessary understanding of the nature and implications of the legal ‘ecosystem’. In their commitment to the regulatory objectives, they must be able to demonstrate their open-mindedness and ability to take into account and balance the sometimes competing interests of different constituents.

They must also be able to demonstrate independence of thought, and the absence of any bias (cognitive or otherwise), dependency, distrust or suspicion of either professional or consumer representation (cf. paragraph 3.8), and personal motivation.

***(7) Transition costs: the review should determine the most effective way to transition between the current and the new framework models without introducing excessive regulation, creating uncertainty for businesses or chilling current liberalising initiatives.***

I readily accept that this is the one question set by the CMA where the Review is likely to fall short. I did not have the budget or resource for an economic analysis of the report’s proposals or the preparation of any cost-benefit analysis. That detail must regrettably be left to others as part of any follow-up work that would need to precede the adoption and implementation of any recommendations.

Subject to the implications of adopting any of the short-term recommendations in Chapter 7, there should be time to prepare and secure a smooth and cost-effective transition (indeed, the short-term proposals could provide an effective step in making such a transition, as well as testing some of the implications).

However, in making the proposals and recommendations of this report, I do not believe that the cost of the new approach would compare unfavourably with that of the current framework. In particular:

- A single regulator, absorbing the presently fragmented resources of front-line regulators, should be implemented so as to realise economies of scale. Depending on the precise transitional period and arrangements, there should therefore be ongoing cost-savings.
- The costs of registration should in principle be modest and manageable for reputable providers (based on existing examples: see paragraph 4.8.3.2), and should be set to cover the cost of maintaining the public register and the establishment costs of an ombudsman service. These costs might arise as part of the implementation of short-term reform (see Chapter 7).
- The identification and confirmation of high-risk services subject to before-the-event authorisation and of low-risk services subject only to after-the-event regulation would largely be one-off costs. Even without reform, there is a strong argument for a review of the reserved legal activities under the Legal Services Act 2007 such that this might not be an additional or direct cost of reform.
- The regulator's risk-assessment processes should not be over-engineered and thus disproportionately expensive to providers. If these processes are misjudged, the regulator will be regarded as having built unnecessary and excessive cost into the new system.
- Compared with the current 'all or nothing' approach to regulation and its cost, this report offers a more differentiated scheme for both. Providers who choose to offer legal services for which BTE authorisation or DTE conditions apply should expect to pay more for their regulation. The inherently higher risk of those services requires more and different regulation, for which they must pay. However, the business decision to offer those services will be theirs. The marginal and cumulative regulatory costs of their decisions will be transparent to them.
- The proposals in this report would not immediately see any difference to the cost of the 'permitted purposes' funding. However, this additional 'tax' on practitioners should be treated differently in future – on a sector-wide basis, rather than by profession. It may therefore be that, over time, the cost to the regulated community can be rationalised and reduce their financial burden.

On balance, therefore, I believe that the CMA's practical questions have been satisfactorily addressed by this report.

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## Appendix 1: The Review and its terms of reference

### Introduction

The Centre for Ethics & Law in the Faculty of Laws at University College London has supported this fundamental review of the current regulatory framework for legal services in England & Wales.

The Review has explored the longer-term and related issues raised by the Competition and Markets Authority (CMA) market study in 2016<sup>95</sup> and its recommendations. Its intention is to assist government in its reflection and assessment of the current regulatory framework.

The Review's scope reflects the objectives and context included in the terms of reference (below), 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.

The work of the Review is supported by input from the members of an Advisory Panel (see Appendix 2). Some of the published work and comments of Panel members are referred to and referenced in the working papers.<sup>96</sup> However, the content of this report 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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95. See Competition and Markets Authority (2016) 'Legal services market study'.

96. For details and copies of the working papers, see: <https://www.ucl.ac.uk/ethics-law/publications/2018/sep/independent-review-legal-services-regulation>.

## **Terms of Reference**

### **A. Purpose and timing**

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

In the context of the outcome of the EU Referendum and the UK's impending exit from the European Union, it is even more important that the regulatory framework for legal services is fit for the future. The democratic intention that is central to 'taking back control' presumes full confidence in our domestic rule of law and legal institutions, as well as maintaining our performance and competitive position in the global economy. This in turn requires that the supporting regulatory structure for legal services is as robust as it can be – which is in question given the CMA's conclusion that the current regulatory framework is unlikely to be sustainable in the future.

The review will aim to present its conclusions to the Ministry of Justice by the end of 2019, and the final report will be published.

### **B. Review objectives**

The provision of effective and properly regulated legal services is critical to maintaining the rule of law, and the effective and efficient administration of justice. It is also necessary to sustaining the UK's position and reputation as a world-leading jurisdiction for the governing law of international transactions and for the resolution of disputes. The review's objectives will therefore be to consider how the regulatory framework can best:

- promote and preserve the public interest in the rule of law and the administration of justice;
- maintain the attractiveness of the law of England & Wales for the governance of relationships and transactions and of our courts in the resolution of disputes;
- enhance the global competitiveness of our lawyers and other providers of legal services;
- reflect and respond flexibly to fast-changing market conditions being driven by innovation and advances in technology;
- protect and promote consumers' interests, particularly in access to effective, ethical, innovative and affordable legal services and to justice; and
- lead the world in proportionate, risk-based and cost-effective regulation of legal services, consistent with the better regulation principles.

### **C. Context**

A review of legal services regulation was carried out in 2003-4 by Sir David Clementi. It led to the Legal Services Act 2007 and a new framework for the regulation of legal services (including the introduction of the Legal Services Board (LSB) as an oversight regulator, of the Office for Legal Complaints, of the separation of regulatory and representative activities of professional bodies, and of alternative business structures). In the years since

the Clementi Review, the impact of the global financial crisis has been felt, the use of technology has become more extensive and pervasive, and the experience of regulators and of regulation has developed considerably. The world that existed in 2004 does not exist in the same way now, and the inherent tensions in the 2007 Act have become increasingly apparent.

In July 2014, the then Secretary of State for Justice called a Ministerial Summit of legal services regulators, as a result of which the regulators were invited to consolidate their collective strategic view of the difficulties they were experiencing under the Legal Services Act 2007 and related legislation and to identify possible legislative options for creating a regulatory framework that would better support an effective, diverse and healthy legal services sector. Cross-regulator discussions ('the Legislative Options Review') were then chaired by Professor Stephen Mayson of UCL, and the regulators' views were published and submitted to Ministers in July 2015.<sup>97</sup> The LSB subsequently developed and published its own more detailed views on the options.<sup>98</sup>

Shortly before the Legislative Options Review report was published, the (new) Secretary of State said in an appearance before the Justice Select Committee that there would be a review of the Legal Services Act within the lifetime of that Parliament. Later that year, in November 2015, HM Treasury announced in its competition plan that the government would consult in spring 2016 on making legal service regulators independent from their representative bodies.

Then in January 2016, the Competition and Markets Authority launched a market study into the supply of legal services in England and Wales. Its work took a year, and its final report was published in December 2016.<sup>1</sup> The principal conclusion from the review was that the legal services sector is not working well for individual consumers and small businesses, largely because those consumers lack the experience and information they need to understand their needs, to make informed choices, and to engage confidently with providers of legal services.

The CMA also concluded that these issues are likely to increase over time and *make the current regulatory framework unsustainable in the long run* (especially since some aspects of that framework do not meet the better regulation principles). The CMA also concluded that "the majority of issues cannot be addressed by tweaking the current framework but would be better addressed through legislative and/or structural changes by the government" (page 213), and therefore recommended that government undertook a review of the current regulatory framework.<sup>99</sup>

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97. See:

[https://lsbstaticwebsites.z33.web.core.windows.net/what\\_we\\_do/pdf/20150727\\_Annex\\_To\\_Submission\\_on\\_Legislative\\_Options\\_Beyond\\_LSA.pdf](https://lsbstaticwebsites.z33.web.core.windows.net/what_we_do/pdf/20150727_Annex_To_Submission_on_Legislative_Options_Beyond_LSA.pdf).

98. See:

[http://www.legalservicesboard.org.uk/news\\_publications/LSB\\_News/PDF/2016/20160909LSB\\_Vision\\_For\\_Legislative\\_Reform.pdf](http://www.legalservicesboard.org.uk/news_publications/LSB_News/PDF/2016/20160909LSB_Vision_For_Legislative_Reform.pdf).

99. It is important to emphasise that this conclusion was reached in the context of alternatives to a fundamental review of the regulatory framework having been taken into account. The regulators, as part of their work following the Ministerial Summit in 2014, developed a number of proposals for short-term implementation: see <https://www.legalservicesboard.org.uk/our-work/work-related-to-previous-years/work-arising-following-the-july-2014-ministerial-summit-of-legal-services-regulators>).

During the period of the CMA market study, and before the government was able to respond to the CMA's recommendations, both the EU Referendum and a General Election took place. As a consequence, the political backdrop changed considerably and, not surprisingly, when the government responded to the CMA in December 2017, it did not feel able to commit to the formal review recommended by the CMA. It did, however, agree that it would "continue to reflect on the potential need for such a review".

#### **D. The Review and its scope**

The review will take as its starting point the issues and options identified in the Legislative Options Review, along with the findings of the CMA market study (which also set out the principles that it thought should guide a review, along with its assessment of the current framework against those principles). The review's scope will therefore reflect the objectives and context included in these terms of reference, and will include: regulatory objectives; the scope of regulation and reserved legal activities; regulatory structure, governance and the independence of legal services providers 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. (Further detail is included in the Annex.)

The review will be led by Professor Stephen Mayson, an honorary professor in the Faculty of Laws, and the chairman of the Legislative Options Review. This project is being undertaken independently and with no external funding, and Professor Mayson has agreed to participate without payment.

Professor Mayson will be supported by an Advisory Panel whose members will advise on the direction of the review and on specific issues, and will help to scrutinise and challenge emerging conclusions and recommendations. The Advisory Panel will include one or more members in each of the following categories: academic specialist in regulation and professional ethics; specialist in legal services regulation; economist; retired judge; individual with experience of representing consumers' interests and of the business world; individual with experience of acting as a regulator; and Parliamentarian or expert in constitutional governance and accountability.

#### **E. Stakeholder engagement**

The review will seek to engage with a wide range of stakeholders, including the Competition & Markets Authority, the Legal Services Board, approved regulators, front-line regulators, representative bodies, consumers, the judiciary, practitioners, and providers of legal education and training.

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CMA market study also put forward some short-term recommendations, most of which are also being taken forward. Nevertheless, the CMA's conclusion was that these various measures would not be sufficient in the longer term to address all of the identified shortcomings in the current framework.

## **ANNEX: DETAILED SCOPE**

The Review will consider and, where appropriate, make recommendations on the following issues identified by the Legislative Options Review 2015:

### **1. Regulatory objectives**

The review will consider the number, nature and presentation of any regulatory objectives. It will examine the case for a different set of objectives, and whether or not there should be an overarching objective or an explicit hierarchy of objectives.

### **2. Scope of regulation**

The review will consider what should fall within the scope of sector-specific regulation, and how that could best be addressed. The rationale for (and of the current) reserved legal activities will be considered as part of a broader consideration of scope, including whether there should be:

- regulation of all 'legal services' and providers
- limited (or no) sector-specific regulation
- regulation targeted by reference to the regulatory objectives
- regulation targeted by reference to the assessed risks of certain activities or providers, or to certain consumers (based, perhaps, on vulnerability, asymmetry of relationship, or the potential consequences of incompetent or inadequate advice or representation).

From the conclusions that emerge, consideration will then be given to the continuing need for, and approach to, reserved legal activities, as well as to how regulation might appropriately be applied before the event (such as authorisation), during the event (such as codes of conduct or indemnity insurance), and after the event (such as complaints and disciplinary processes, and the role of an ombudsman).

The review will also consider how a future framework might best incorporate flexibility to adapt to market changes and emerging perceptions or assessments of risk, including the processes for adding or removing regulation to reflect those changes in circumstances or assessed risk (bearing in mind the importance of an assessment of relative costs and benefits as part of any proposal to add or remove regulation).

### **3. Focus of regulation**

The review will consider whether regulation should primarily be focused on one or other (or both) of the legal activities or the providers (individuals, professions, organisations) who carry them out. As recommended by the CMA, the future role of professions and professional title in regulation will be explored, along with the implications for consumer protection and professional bodies.

### **4. Regulatory governance and independence**

Being mindful of international perceptions and professional concerns, the review will consider how the independence of legal services regulation from both government and representative interests might best be assured. It will explore appropriate forms of governance and independence that should flow as appropriate from the regulatory objectives, and the scope and focus of regulation.

## 5. Structure

By reference to the conclusions on regulatory objectives, scope, focus and governance, the review will consider the ways in which the regulatory framework for legal services might then best be structured. This will address issues relating to:

- the number of regulatory bodies
- regulatory bodies focused on regulated activities or regulated persons
- the desirability of a single regulator (with or without specialist sub-units to focus on either activities or providers, or a combination)
- the need for or desirability of an oversight regulator.

## 6. Representation of interests

The review will consider the extent to which the interests of, for example, government, judges, consumers, professions, and providers might appropriately and legitimately be incorporated into a future regulatory framework, either through structural requirements or representation, or through obligations to consult or seek approval.

The review will also bear in mind the key features of any alternative regulatory framework suggested by the CMA in its market study recommendations (at pages 215-217):

- Clear objective: legal services regulation should focus on outcomes for consumers and society as a whole, taking account of the balance between wider public interests and consumer protection and competition.
- Independence: [we believe strongly in the principle and importance of independence of regulators. This is because insufficient independence may compromise their effectiveness in meeting their objectives].
- Flexibility: this could be achieved by replacing (or supplementing) the current reserved legal activities (which are defined in primary legislation and thus require substantial time and resource to be varied) by a provision that allows the regulator to direct regulation at areas which it considers pose the highest risk to consumers.
- Targeted and proportionate regulation: this may have the following implications:
  - (i) Providers that are currently unauthorised would come into the regulatory net, if they undertake activities considered as risky. By contrast, the regulatory burden on solicitors and others might be lower than currently for lower risk activities. This would allow providers to compete on a level playing field and allow lower cost unauthorised providers to compete where the authorisation of titles is not necessary.
  - (ii) Some of the activities that are currently reserved may cease to be reserved. Furthermore, reservation may be replaced with other type of regulation, if this would better match regulation with risk.
  - (iii) Access to redress mechanisms, such as the [Legal Ombudsman], could be extended more widely for the services that fall within the scope of regulation. In other words, access to redress would depend on the risk of detriment faced by the consumer (or the public interest), and not on the professional title of the provider. More targeted access to redress is likely to reduce the 'regulatory gaps' that consumers currently face in certain area of law.
  - (iv) Low-risk activities would not be subject to sector-specific regulation and would not give access to specific forms of redress. However, consumers would be able to rely



on private and public enforcement of general consumer law, and alternatives to regulation such as voluntary schemes, where available.

- Fewer regulators: over time, there is a case for consolidation of regulators. A framework with fewer regulators may allow for better prioritisation over risk factors as these risk factors relate more to the relevant types of consumer, activity and legal services rather than types of provider. However, we also consider that the appropriate structure should ultimately depend on the preferred regulatory approach, rather than structure being something that should be considered in isolation.
- Role of title: 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 ... professional titles play an important role in the current market: the majority of legal services are provided by authorised legal providers, mainly solicitors.

The CMA also identified a number of practical questions that any review would need to consider (page 217), including:

- (a) Assessing risk: the review needs to identify how to assess and identify risk across many legal services areas, and how to define the scope of regulation on the basis of this risk assessment.
- (b) Implementing flexibility: the review needs to identify what legislative changes should be implemented to achieve flexibility of the regulatory framework.
- (c) Effective prioritisation: the review should ensure that the new framework allows regulators to prioritise effectively regulatory changes.
- (d) Evidentiary standards: the review should set an appropriate evidentiary threshold for making changes to regulation, by ensuring that it strikes the right balance between the need to ensure that changes are made only when there is evidence of a change in the risk factor and the need for flexibility in the framework.
- (e) Impact on the wider market: the review needs to consider how changes to the framework are likely to impact the legal services sector outside of the scope of this market study (i.e. criminal legal services and legal services other than to small businesses and consumers).
- (f) Regulatory structure: the review needs to identify whether the current structure is appropriate under the new framework, particularly in relation to its ability to deliver risk-based regulation.
- (g) Transition costs: the review should determine the most effective way to transition between the current and the new framework models without introducing excessive regulation, creating uncertainty for businesses or chilling current liberalising initiatives.

This review will accordingly also seek to address these questions.



## Appendix 2: Advisory Panel

To reflect the purpose, context and scope of the Review, as set out in the terms of reference (see Appendix 1), the following were members of the Advisory Panel:

**Dr Alan Brener**, former Council Member of the Chartered Institute of Bankers in Scotland

**Carol Brennan**, Chair of the Scottish Legal Complaints Commission Consumer Panel

**George Bull**, Senior Tax Partner and former head of the Professional Practices Group, RSM

**Alison Carr**, Lay Member of the Royal College of Veterinary Surgeons (RCVS) Veterinary Nurses Council, and former Registrar and Chief Executive of the Architects Registration Board

**Elisabeth Davies**, Chair of the Appointments Committee of the General Pharmaceutical Council, and former chair of the Legal Services Consumer Panel\*

**Dr Edward Donelan**, former senior advisor on regulatory governance, OECD, and former Parliamentary Counsel in the Republic of Ireland

**Dame Janet Gaymer QC**, former Commissioner for Public Appointments

**Tahlia Gordon**, Secretary-General of the Australian Section of the International Commission of Jurists, and former Executive Director of the Legal Profession Advisory Council, Sydney

**John Gould**, solicitor and senior partner, Russell-Cooke LLP; editor of *The Law of Legal Services and Practice* (2<sup>nd</sup> ed.) (2019, LexisNexis)

**Rt Hon Dominic Grieve QC**, former Member of Parliament and Chair of the All-Party Parliamentary Group on the Rule of Law, and former Attorney-General for England & Wales

**Professor Gillian Hadfield**, Professor of Law and of Strategic Management, University of Toronto; author of *Rules for a Flat World: Why Humans Invented Law and How to Reinvent It for a Complex Global Economy* (2017, Oxford University Press)

**Alison Hook**, co-founder of Hook Tangaza, and former Head of International, The Law Society of England & Wales

**Steve Mark AM**, former Legal Services Commissioner for New South Wales

**Paul McFadden**, Deputy Ombudsman for Northern Ireland, Deputy Commissioner for Local Government Standards, and Judicial Appointments Ombudsman for Northern Ireland

**Iain Miller**, solicitor and partner, Kingsley Napley; general editor of *Cordery on Legal Services* (Lexis Nexis)

**Professor Richard Moorhead**, Head of the Law School, University of Exeter

**Michael Napier CBE QC**, former President of the Law Society, former Board member of the Legal Services Board, and Attorney-General's pro bono envoy (2001-15)

**Rt Hon Lord Neuberger of Abbotsbury**, former President of the Supreme Court

**Professor Neil Rickman**, Professor of Economics, University of Surrey

**Patricia Robertson QC**, former Vice Chair of the Bar Standards Board

**Professor Colin Scott**, Professor of EU Regulation & Governance, Vice President for Equality, Diversity and Inclusion and Principal, UCD College of Social Sciences and Law at University College Dublin

**Professor Noel Semple**, Associate Professor, University of Windsor, Ontario; author of *Legal Services Regulation at the Crossroads* (2015, Edward Elgar)

**Professor Frank Stephen**, Emeritus Professor of Regulation, University of Manchester; author of *Lawyers, Markets and Regulation* (2013, Edward Elgar)

**Jenifer Swallow**, Lawtech Director at Tech Nation, and former general counsel & company secretary, including former leadership roles at TransferWise and Yahoo

**Andrew Walker QC**, former Chairman of the Bar Council\*

*\*Members of the Panel were appointed on the basis that they did not also have a current membership of or employment with any governing or regulatory body within the scope of the Review. For this reason, Andrew Walker QC was appointed on 29 July 2019 after his term as Chairman of the Bar had ended; and Elisabeth Davies stood down from the Panel on 1 April 2020 when she was appointed as Chair of the Office for Legal Complaints.*

## Index

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### A

- access to justice ..... 2, 30, 41, 45, 71, 72, 74, 84, 93, 136, 143
- accountants..... 33, 36, 66, 92, 122, 152, 200  
    *and see* chartered accountants
- accreditation 15, 18, 96, 97, 98, 100, 101-103, 107, 117, 119, 123, 125, 145, 151, 152, 155, 162-164, 168, 176-178, 180, 185, 187-198, 207, 225, 226, 232-237, 241, 244, 245, 247, 251, 260, 267-270, 274, 281, 285, 286  
    *see also* specialisation
- administration of justice ..... ix, x, 10, 15, 82, 83, 104, 123, 161, 188, 212, 223, 242, 257, 267, 269, 279, 282  
    forced participation ..... 112, 171, 189
- administration of oaths..... 41, 115, 122, 159, 163, 187,  
    *see also* reserved legal activities
- advocacy..... 64, 120, 162, 184-186, 188, 222, 224, 232, 269, 273  
    *see also* barristers, rights of audience, *and* solicitors: solicitor-advocates
- advocacy and litigation regulator: *see* Legal Services Regulation Authority: advocacy and litigation regulator
- civil advocacy ..... 52, 162, 201, 273  
    *see also* civil justice
- criminal advocacy ..... 52, 60, 64, 70, 162, 185, 188, 189, 258, 267, 269, 270, 273, 281, 285  
    *see also* criminal justice
- family advocacy ..... 52, 162, 187, 192, 195, 273  
    *see also* family proceedings
- youth court advocacy..... 64, 70, 234, 258, 267, 269, 281, 285
- after-the-event regulation: *see* regulation: after-the-event regulation
- alternative business structures ..... 27, 42, 46, 50, 65, 92, 121, 133, 152, 154, 157, 209, 220, 265  
    *see also* entity regulation *and* multidisciplinary businesses
- architects ..... 265
- Arizona ..... 102, 265
- Association of Chartered Certified Accountants..... 41, 123, 247, 248
- Association of Costs Lawyers..... 55  
    *see also* regulation: approved regulators
- Association of Taxation Technicians..... 104, 123, 145, 166, 247
- asymmetry of information..... 43, 72, 110, 171, 218, 282
- asymmetry of power..... 72, 110, 171, 172, 218, 281, 282
- asymmetry of representation..... 8, 72, 82, 83, 110, 282
- Australia..... 132, 162, 168, 204, 221, 283  
    New South Wales ..... 168  
    Queensland..... 204  
    South Australia ..... 168
- authorisation ..... 51-53, 70, 85, 87, 99, 102, 121, 123, 126, 133, 145, 156, 162-165, 176, 178, 184-188, 191-193, 195, 198, 199, 201, 207, 216, 226, 230, 232, 242, 249, 251, 271, 278  
    authorised persons ..... 41, 65, 89, 178, 204, 259, 260, 262, 263, 265-267, 269, 271, 274  
    before-the-event authorisation ..... 15, 18, 96, 99-103, 105, 107, 109, 120, 121, 124, 125, 128, 129, 131-133, 138, 145, 150-152, 155, 156, 159-164, 167, 176, 177, 180, 186-189, 194-197, 204, 207, 215-217, 223-226, 233, 241, 247, 249, 267, 279, 285, 286  
    *see also* conduct of litigation *and* rights of audience
- composite approval..... 108, 189, 194-197, 222, 285
- reserved activity authorisation..... 46, 50-53, 85, 91, 100, 121, 133, 141, 261, 264, 270, 272-274

---

## B

Bar Council .....	42, 55, 203, 236
see also regulation: approved regulators	
Bar Standards Board .....	41, 42, 55, 61, 201, 220, 222, 224, 236
barristers .....	27, 34, 68, 88, 122, 124, 152, 159, 160, 182-186, 188, 193, 194, 196, 201, 220, 224, 225, 232, 233, 235, 239, 241, 249, 256, 270, 285, 286
see also advocacy, Bar Council, Inns of Court, qualified lawyers and rights of audience	
CPS Advocate Panel.....	188, 270
public access.....	188, 198
before-the-event regulation: see regulation: before-the-event regulation	
Better Regulation Commission .....	104, 112, 114, 169
and see regulation: better regulation principles	
Brexit.....	4, 74, 271

---

## C

California .....	102, 265
Canada .....	102, 265
Channel Islands.....	204
Charity Commission .....	146
chartered accountants.....	27, 182, 183, 200, 226, 234, 245, 249
and see Institute of Chartered Accountants	
Chartered Institute of Legal Executives .....	41, 55, 102, 203
see also regulation: approved regulators, and CILEx Regulation	
Chartered Institute of Patent Attorneys.....	55
see also regulation: approved regulators	
Chartered Institute of Taxation.....	104, 123, 145, 166, 247
Chartered Institute of Trade Mark Attorneys .....	55
see also regulation: approved regulators	
chartered legal executives 27, 52, 88, 122, 162, 182, 183, 186, 187, 194, 196, 201, 249, 261, 270, 273, 285	
see also Chartered Institute of Legal Executives, CILEx Regulation and qualified lawyers	
CILEx Regulation.....	41, 188, 189, 201, 268, 270, 273
see also Chartered Institute of Legal Executives	
Citizens Advice .....	33, 143, 146, 255
civil justice .....	72, 75, 93, 117, 162, 177, 201, 233, 273
see also advocacy: civil advocacy	
claims management .....	123, 199, 246
Clementi Review .....	41, 42, 43, 45, 55, 71, 78
codes of conduct.....	66, 69, 84, 95, 96, 97, 98, 112, 117, 119, 138, 168, 169, 194, 195, 230, 263, 273
Commissioner for Public Appointments.....	215
commissioners for oaths.....	159
see also administration of oaths	
company formation.....	106
comparison websites: see technology: comparison websites	
compensation fund .....	63, 88, 97, 131, 141, 171, 259, 262, 265
competence....	2, 52, 56, 58, 59, 61, 64, 70, 71, 85, 96, 98-102, 121, 125, 143, 145, 147, 160, 164, 167, 174, 182-186, 188, 191-194, 196, 197, 225, 233, 234, 236-238, 241, 242, 246, 251, 269, 270, 271, 281, 284
see also professional standards and qualified lawyers: 'dabbling'	
competition ...	2, 24, 27, 33-35, 41-43, 57, 67, 68, 77, 84, 86, 89, 90, 103, 110, 127, 141, 156, 176, 192, 207, 215, 236, 237, 242, 243, 248, 251, 256, 260, 273, 280, 282
Competition & Markets Authority.....	27, 34, 35, 43, 54, 60, 67, 77, 86, 90, 94, 103, 110, 116, 141, 156, 172, 210-212, 222, 223, 230, 240, 241, 243, 283

conduct of litigation .....	124, 159, 161-163, 178, 192-194, 225, 272
see also dispute resolution and reserved legal activities	
before-the-event authorisation .....	15, 105, 186, 188, 223, 224
consumer credit .....	106, 144
consumer rights law .....	36, 38, 68, 106, 281
consumers	
choice .....	35, 68, 102, 127, 130, 165, 167, 185, 255, 259, 280, 282
complaints.. xi, 37, 38, 41, 47, 59, 60, 64, 66, 67, 69, 88, 95, 131, 138, 168, 171, 173, 174, 219, 246, 247, 248, 258, 259, 263, 265, 266, 268, 278, 282	
see also legal services ombudsman: complaints and redress	
confidence .....	36, 60, 67, 85, 99, 269, 277, 279
see also public confidence	
consumer representation .....	279
definition.....	218
disclosure and transparency.....	35, 96, 110, 132, 168, 169, 282
dissatisfaction.....	36, 37, 38, 60, 64, 67, 258, 260, 273, 280
expectations.....x, 11, 36, 46, 50, 59, 60, 64, 70, 86-89, 99, 111, 117, 169, 174, 245, 246, 281, 282	
experience .....	32, 40, 60
harm or detriment .. 15, 43, 59, 65, 70-73, 82, 108, 110-114, 116, 135, 137-139, 149, 157, 167, 170, 172, 178, 180, 185, 192, 200, 204, 256, 257, 260, 265, 268, 280, 281, 283	
life events.....	x, 97, 108, 110, 195, 284
price transparency .....	35
protection: see public interest: consumer protection	
redress ..... xi, 10, 15, 38, 41, 47, 52, 59, 67, 69, 73, 84, 86, 87, 89, 95, 96, 107, 110, 112, 116, 118, 123, 130, 131, 138, 156, 168, 170-172, 178, 182, 183, 194, 242, 246, 247, 257-260, 265, 266, 268, 278, 281, 283	
see also legal services ombudsman: complaints and redress	
representation .....	218
shopping around .....	35, 85
silent sufferers .....	37, 39, 67, 118, 260
small businesses .....	xi, 15, 171, 173, 198, 263, 285
see also small businesses	
the consumer interest.....	47, 90, 218
vulnerability....x, 8, 15, 43, 51, 69, 89, 96, 97, 103, 104, 107, 108, 110-114, 120, 121, 135, 136, 139, 145, 161, 171, 187, 188, 191, 200-202, 207, 260, 268, 287	
continuing professional development.....	46, 96, 99, 100, 119, 236, 243
see also legal education and training	
conveyancing.....	32, 34, 35, 37, 44, 97, 98, 100, 108, 109, 160, 164, 190, 194, 195, 220, 222, 232, 241, 256, 261
costs law .....	109, 164, 177-179, 222, 259
Costs Lawyer Standards Board .....	41, 177, 222
costs lawyers.....	27, 92, 122, 162, 177-179, 183, 186
see also Association of Costs Lawyers, Costs Lawyer Standards Board and qualified lawyers	
costs proceedings.....	162, 178, 188
Council for Licensed Conveyancers.....	41, 55, 101, 220, 222, 232, 268
courts ..... 10, 45, 52, 82, 93, 161-163, 172, 178, 185, 187, 188, 192, 220, 228, 232, 241, 249, 269, 270, 273	
county courts.....	187
Crown Court.....	188
magistrates' courts .....	161, 187, 189, 264
Supreme Court.....	162, 178, 249
youth courts .....	64, 70, 187, 194, 258, 264, 267, 269, 270, 281
Covid-19.....	xi, 3, 4, 68, 73, 74, 77, 103, 134, 136, 255, 266, 267, 269

criminal justice .....	100, 110, 162, 185, 188, 189, 223, 233, 269, 270, 273, 285
<i>see also</i> advocacy: criminal advocacy <i>and</i> advocacy: youth court advocacy	
CPS associate prosecutors.....	187, 190, 242, 264
duty solicitors.....	190, 264, 270
police station accredited representatives.....	189, 190, 264
criminal law.....	32, 43, 189, 228, 256, 264
<i>see also</i> criminal advocacy <i>and</i> criminal justice	

---

## D

debt advice.....	68, 106, 144
designated body: <i>see</i> Legal Services Regulation Authority: designated body	
digital comparison tools: <i>see</i> technology: comparison websites	
discrimination law .....	164
dispute resolution .....	3, 134, 203
<i>see also</i> conduct of litigation	
abusive litigation .....	82, 83, 228
alternative dispute resolution.....	3, 83, 116-119, 122, 171
arbitration .....	118, 119
mediation: <i>see</i> mediation	
online dispute resolution .....	46, 92, 116, 118, 119, 134
diversity .....	84, 111, 191
doctors.....	32, 33, 36, 66
document preparation .....	92, 106, 115, 122, 134, 170
<i>see also</i> reserved legal activities: reserved instrument activities	
leases.....	106, 140
non-disclosure agreements.....	106, 140
partnership agreements.....	106
pre-nuptial agreements .....	106
shareholder agreements.....	106
stock transfers.....	106
during-the-event regulation: <i>see</i> regulation: during-the-event regulation	

---

## E

employed lawyers .....	147, 149, 233
<i>see also</i> in-house lawyers	
employment law .....	10, 27, 29, 31, 33-35, 68, 102, 104, 106, 195, 239, 264
estate administration.....	86, 98, 108, 154, 164, 177, 180, 195, 259, 260, 264, 268, 269
<i>see also</i> probate	
estate agents.....	36, 44, 152
<i>see also</i> property agents	
exports .....	28, 76
external investment.....	42, 124, 126, 133, 152, 228

---

## F

family.....	9, 15, 29, 30, 32, 33, 36, 44, 66, 106, 122, 123, 165, 180, 268
family proceedings 31, 32, 35, 37, 44, 52, 67, 68, 93, 100, 106, 117, 119, 162, 187-189, 192, 195, 256, 273	
<i>see also</i> advocacy: family advocacy	
financial advisers.....	33, 66
fraud.....	98, 106, 188, 203, 228, 268
friends .....	9, 15, 30, 32, 33, 44, 66, 123, 165



---

## G

Gibraltar ..... 204  
government ..... 4, 9, 27, 50, 55, 74, 76, 77, 110, 123, 165, 200, 210, 212-214, 216, 228, 279

---

## H

healthcare professionals...33, 77, 112, 132, 157, 168, 169, 191, 210, 220, 221, 228, 234, 240, 265, 279, 283  
    see also doctors  
    General Medical Council.....99, 234  
    Nursing & Midwifery Council ..... 99  
high street law firms: see law firms: general practice law firms  
HM Revenue & Customs..... 165, 166  
housing law..... 68, 164, 187, 256

---

## I

immigration .....32, 43, 64, 70, 97, 100, 106, 123, 144, 163, 199-203, 222, 228, 246, 256, 258, 267, 271, 281  
immigration practitioners .....123, 201, 203, 271  
    see also Office of the Immigration Services Commissioner  
indemnity insurance .... 15, 33, 46, 69, 88, 95-99, 117, 119, 131, 133, 138, 141, 165, 168-171, 190, 194, 195,  
    233, 247, 259, 262, 263, 265, 273  
    indemnity insurers ..... 97, 98, 105, 170  
in-house lawyers.....27, 28, 110, 122, 129, 144, 147-151, 155, 286  
    independent legal advice..... 148-151  
    inverse vulnerability ..... 104, 148  
    pro bono services ..... 152  
    public register ..... 150  
innovation.....4, 24, 57, 76, 84, 89-91, 135, 136, 138, 139, 141-143, 156, 282  
Inns of Court..... 233, 235, 236  
insolvency law .....76, 123, 125, 199, 200  
insolvency practitioners ..... 76, 123, 200, 246  
Insolvency Practitioners Association..... 123, 200, 247  
Institute of Chartered Accountants in England & Wales ..... 41, 123, 166, 205, 226, 245, 247, 248  
    see also chartered accountants  
Institute of Chartered Accountants in Scotland..... 41  
Institute of Professional Willwriters..... 169, 268  
intellectual property law..... 27, 67, 68, 92, 104, 164, 186, 188, 194, 203, 222  
intellectual property practitioners..... 27, 122, 152, 162, 182, 286,  
    see also Chartered Institute of Patent Attorneys, Chartered Institute of Trade Mark Attorneys,  
    Intellectual Property Regulation Board and qualified lawyers  
Intellectual Property Regulation Board .....41, 222  
internal governance rules .....56, 57, 59, 210, 240  
international practice..... 76, 143, 184, 278  
    mutual recognition .....52, 251  
    rights of establishment ..... 52, 241, 251

---

## J

judiciary .. 1, 7, 10, 60, 61, 64, 75, 115, 116, 118, 119, 135, 162, 164, 167, 185, 192, 193, 212, 216, 223-225,  
    241, 258, 267, 269, 270, 272-274, 285

---

## L

- law centres .....66, 122, 129, 143-145, 190, 202, 226, 286  
see also pro bono'
- law clinics: see law centres
- law firms ..... 1, 2, 27, 28, 38, 39, 42, 44, 133, 136, 147, 149, 242, 255, 256  
City, commercial and international law firms ..... 39, 44, 45, 197, 227, 286  
financial instability ..... 228, 256  
general practice law firms..... 184, 191, 192, 256  
small law firms..... 27, 39, 44, 109, 141, 191, 227, 256  
sole practitioners..... 27, 44, 132, 196, 227
- Law Society.... 27, 28, 42, 55, 82, 100, 134, 166, 180, 188, 189, 191, 203, 218, 227, 229, 235, 238, 244, 256, 268, 270  
see also regulation: approved regulators
- Law Society of Scotland ..... 130
- lawtech ..... 14, 15, 24, 46, 68, 70, 71, 76, 89, 90, 122, 134-140, 255, 257, 258, 263, 280, 283, 286  
see also technology  
public register ..... 137-138, 220, 263, 266  
technology insurance..... 138
- legal advice and representation .. 1, 9-11, 29, 31, 40, 44, 52, 66, 70, 72, 84, 85, 93, 108, 110, 115, 122, 134, 143, 146, 151, 156, 188, 195, 201, 212, 229, 249, 255, 272, 274, 280
- legal aid..... 2, 4, 32, 40, 45, 71, 143, 223, 228, 256, 269, 272
- legal capability..... 37, 110, 282
- legal confidence.....31, 32  
see also consumers: confidence
- legal education and training... ..... 15, 102, 185, 186, 192, 225, 233, 235, 236, 244, 245, 270  
see also continuing professional development
- legal need.....xi, 27, 29-32, 40, 45, 66, 88, 99, 194, 240
- Legal Ombudsman.. 37, 38, 41, 46, 47, 62, 64, 65, 69, 71, 88, 89, 95, 98, 105, 127, 171, 173, 174, 199, 227, 258, 259, 261, 263, 265, 266, 273, 281, 283  
and see legal services ombudsman and Office for Legal Complaints
- complaints..... see consumers:complaints
- enforcement powers..... 171
- hybrid industry ombudsman ..... 172
- own-initiative powers..... 266
- powers of investigation ..... 172
- powers of redress..... 266
- scheme rules .....64, 173, 263, 266
- thematic reviews .....64, 65
- triage role ..... 173
- voluntary jurisdiction .....89, 172
- legal professional privilege..... 150, 206, 249, 250
- legal rights..... 5, 37, 72, 84, 115, 118
- legal services
- definition..... 108, 114-116, 120, 128, 137, 138, 147, 162, 167, 200, 203, 205, 245, 246
- independence ..... 41, 76, 84, 104, 147, 148, 185, 212, 243, 279
- legal information ..... 15, 115, 123
- licensing applications..... 106, 152
- meaning of 'provider' ..... 121-123, 132, 137, 138, 147, 155, 263, 280
- public confidence..... 60, 61, 71, 72, 75, 85, 90, 102, 105, 167, 172, 210, 212, 218, 241, 255, 257, 267, 271, 282
- risk: see risk and regulation: risk-based regulation
- specialisation: see specialisation
- subsidiary but necessary services ..... 106, 123, 155, 199, 246

Legal Services Act 2007 .....	ix, 1, 7, 12, 27, 41, 42, 45, 51, 52, 54, 55, 64-66, 71, 73, 77, 78, 83, 86, 87, 89, 115, 121, 123, 124, 129, 144, 145-147, 152, 156, 161, 171, 172, 178, 183, 187, 193, 201, 204, 205, 209, 216, 218-220, 222, 231, 232, 236, 240, 243, 245, 248, 249, 255, 257-263, 265, 271, 272, 279
Head of Finance & Administration.....	129
Head of Legal Practice.....	129
Legal Services Board.....	15, 27, 34, 41, 44, 56, 62, 67, 68, 76, 93, 98, 99, 134, 135, 141, 143, 209, 210, 212, 216, 217, 218, 230, 232, 236, 243, 244, 261-264, 266, 271, 279
Legal Services Consumer Panel .....	35, 36, 41, 47, 60, 85, 98, 134, 218, 219, 263
legal services ombudsman.....	xi, 151, 171-174, 219, 248, 281, 288
complaints and redress.....	171-173, 282
enforcement powers.....	171
expressions of concern .....	173, 281
fair treatment .....	172
group investigations .....	173, 174
investigation.....	172, 282
own-initiative powers.....	172, 174
scheme rules .....	15, 173, 174
thematic reviews.....	172, 173
triage role.....	173, 248, 281
Legal Services Regulation Authority.....	210, 212-214, 216, 217, 219-222, 224, 226, 228, 231-237, 239, 241, 244, 247, 248, 279, 281, 284-287
advocacy and litigation regulator .....	15, 224, 225
alternative regulatory arrangements .....	66, 146, 199, 225, 234, 247
designated body .....	119, 155, 205, 221, 224-226, 248
establishment, board, and accountability .....	213, 214, 279, 287
statutory duties .....	176, 213, 214, 216, 224, 285, 287
letter of engagement .....	35, 95
licensed bodies: see alternative business structures	
licensed conveyancers.....	27, 34, 40, 68, 88, 92, 122, 164, 171, 182, 183, 190, 232, 241, 261
see also Council for Licensed Conveyancers and qualified lawyers	
litigants-in-person .....	45, 70, 89, 193, 257, 258, 267, 272
see also self-representation	
Lord Chancellor.....	7, 74, 75, 205, 213, 214, 216

---

## M

Master of the Faculties.....	41, 55, 203-205, 222, 225
see also notaries	
McKenzie Friends.....	45, 67, 122, 187, 192, 193, 258, 259, 267, 272-274
mediation.....	69, 106, 115-119, 131, 174, 195, 198, 226, 257, 265
see also dispute resolution	
Ministry of Justice .....	74, 76, 213, 258, 266, 279
multidisciplinary businesses.....	18, 109, 122, 129, 133, 152, 154, 155, 197, 249, 264
public register .....	155
registered manager .....	155
subsidiary but necessary legal services.....	155

---

## N

National Audit Office .....	214
New York.....	102, 265
New Zealand.....	204
non-lawyers.....	2, 7, 8, 11, 36, 92, 133, 257

non-reserved legal activities.... 24, 42, 44, 46, 47, 50-52, 85, 87, 91, 130, 131, 140, 153, 154, 176, 178, 201, 202, 257, 262, 263, 265, 272-274, 280, 283

Northern Ireland ..... 204, 271

notaries ..... 27, 123, 159, 160, 182, 183, 203-205, 225, 237, 286,  
see also Master of the Faculties *and* qualified lawyers

notarial activities ..... 41, 106, 115, 122, 159, 163, 203-205, 222, 225  
see also reserved legal activities

---

## O

Office for Legal Complaints..... 41, 62, 173, 219, 266,  
see also Legal Ombudsman *and* legal services ombudsman  
establishment, board, and accountability ..... 219

Office for Professional Body Anti-Money Laundering Supervision ..... 205-206

Office of the Immigration Services Commissioner..... 144, 201-202, 222, 271  
see also immigration

ombudsman: see Legal Ombudsman *and* legal services ombudsman

Ontario, Canada ..... 102, 265

---

## P

Papua New Guinea ..... 204

paralegals ..... 10, 69, 109, 122, 131, 152, 183, 187, 190, 257, 259, 265  
Professional Paralegal Register ..... 131, 265

pensions law ..... 194

personal injury ..... 31-33, 35, 37, 195

powers of attorney..... 164, 203, 204, 259, 260, 269

pro bono ..... 5, 28, 73, 122, 124, 129, 143-147, 152, 198, 244

probate ..... 35, 37, 44, 67, 68, 86, 101, 108, 122, 154, 160, 195, 268  
see also reserved legal activities: probate activities

professional bodies.. xi, 15, 33, 55-59, 100, 101, 165, 173, 200, 205, 206, 210-212, 218, 219, 221, 223, 227, 231-240, 244, 245, 247, 251, 265, 279, 282, 286  
see also representative bodies

professional aspirations ..... 56, 100, 101, 238, 240, 251, 278, 282  
see also professional standards

professional ethics ..... 2, 148, 169, 183, 233, 278  
see also professional standards *and* professional misconduct

professional misconduct..... 88, 126, 174, 205, 211, 227, 228, 229, 238, 239, 260, 283  
see also regulation: conduct and discipline

professional principles..... 41, 83  
see also codes of conduct *and* professional standards

act in the client's best interests..... 41, 83, 84, 204

act with independence and integrity..... 41, 84, 185

client confidentiality ..... 84

maintain proper standards of work ..... 41, 84

professional standards ..... xi, 57, 100, 149, 230, 234, 236-240, 244, 267, 268, 271, 278, 282, 286  
see also professional ethics *and* professional misconduct

Professional Standards Authority..... 112-114, 130, 157, 169, 228, 279

professional titles ..... xi, 9, 15, 16, 46, 47, 50-53, 56, 70, 81, 84-88, 91, 93, 94, 99, 100, 102, 109, 121, 122, 125, 128, 131, 132, 156, 157, 159, 163, 176, 177, 182-190, 193-196, 199, 201, 207, 209, 220, 222, 225, 227-236, 238, 241-243, 245, 247-249, 251, 265, 277-281, 283, 286

statutory protection..... 128, 183, 233-235

property agents ..... 76, 125, 226, 246  
see also estate agents

provider of legal services: see legal services: meaning of 'provider'	
Public Accounts Committee .....	214
public confidence.....	69, 75, 99, 172, 241, 269, 277, 279
public interest.....x, 11, 15, 41, 51, 58, 59, 72, 74, 75, 81-84, 90, 96, 123, 138, 148, 149, 159, 160, 163, 167, 172, 186, 189, 200, 204, 207, 212-215, 235, 244, 278, 284, 287	
administration of justice: see administration of justice	
consumer protection... x, 5, 27, 66, 67, 70, 82, 96, 125, 143, 145, 160, 161, 163, 164, 167, 168, 172, 192, 193, 204, 207, 216, 217, 242, 243, 260, 277, 278, 280, 281, 285	
fabric of society .....	4, 7, 33, 43, 60, 75, 82, 83, 113, 163, 185, 240
legitimate participation.....	11, 33, 66, 82, 257
public good.....	15, 43, 82, 96, 104, 160-164, 167, 172, 200, 204, 215-217, 223, 224, 240
public institutions .....	75
rule of law: see rule of law	
UK economy.....	76, 82, 83, 139, 203, 204
public legal education .....	4, 37, 72, 86-88, 130, 171
public officers .....	15, 123, 205
public register..... x, 15, 125, 126, 128-130, 132, 156, 168, 173, 174, 177, 191, 193-198, 226, 230, 234, 239, 247, 262, 263, 265, 271-274, 281, 285, 286, 288	
business unit.....	17, 18, 129, 149, 151, 155
conditions on registration .....	132, 230
in-house lawyers.....	149
law centres and pro bono services .....	145, 147
lawtech.....	138
mediation.....	131
multidisciplinary businesses .....	155
multiple registration .....	194, 195, 198, 285, 286
power to suspend or remove.....	177, 229, 239
prohibited persons .....	132, 138, 168, 230
registered manager .....	125, 129, 130, 132, 137, 151, 155

---

## Q

qualified lawyers .....	x, 2, 4, 10, 27, 39, 42, 50, 65, 68, 92, 103, 182, 185, 243, 256, 265, 267, 268, 280, 285
and see barristers, chartered legal executives, costs lawyers, intellectual property practitioners, licensed conveyancers, notaries, and solicitors	
'dabbling'.....	87, 97, 178, 182, 192, 194, 201, 256, 268, 281, 284
non-practising lawyers .....	234

---

## R

registration .....	see public register
regulation	
accountability ....	83, 103, 104, 129, 130, 135, 136, 137, 138, 149, 151, 210, 212, 213, 214, 226, 251, 287
accreditation: see accreditation	
activity-based regulation.....	120, 188, 198, 222, 230, 280
after-the-event regulation....	15, 24, 46, 51, 81, 89, 91, 94-96, 99, 102, 106, 107, 126-130, 133, 137, 138, 146, 156, 159, 161, 167-169, 171, 182, 194, 207, 216, 217, 227, 247, 248, 277-281, 286
approved regulators.....	15, 55, 56, 59, 60, 205, 209, 211, 219, 221, 231, 232, 240, 243, 248, 261
barriers to entry.....	44, 50, 52, 53, 101, 103, 182
before-the-event regulation.	18, 46, 51, 81, 94, 96, 99, 128, 133, 151, 155, 159, 160, 171, 194, 207, 215, 278-280, 282, 286
better regulation principles.....	51, 77, 212
see also Better Regulation Commission	
bribery .....	97, 105, 199

(regulation)

codes of conduct: see codes of conduct	
co-existing regulation.....	199
compensation fund: see compensation fund	
complexity .....	191
conduct and discipline.....	46, 227-229, 231
see also professional misconduct	
cost of regulation .... x, 39, 44, 72, 89-91, 95, 101, 102, 130, 146, 151, 170, 174, 176, 189, 191, 197, 209, 226, 245, 263, 265, 278, 279, 282, 283, 288	
criminal offence.....	110, 125, 128, 131, 132, 183, 234, 247
data protection .....	97, 199
deregulation.....	2, 89, 90
disciplinary tribunals.....	88, 168, 227, 228, 239
see also professional misconduct, regulation: conduct and discipline and Solicitors Disciplinary Tribunal	
during-the-event regulation... 15, 24, 51, 81, 91, 94, 96, 99, 128, 129, 146, 159, 176, 180, 194, 207, 216, 217, 249, 278-282, 286	
economies of scale .....	220, 221, 229, 283
entity regulation .....	124, 125, 145, 149
see also alternative business structures	
exemptions .....	15, 108, 122, 124, 145, 162, 203, 205, 216, 217, 224, 225, 234, 246, 264
fit and proper person .....	125, 129, 132, 133
fitness to practise .....	99, 125, 126
flexibility .. 4, 53, 54, 64, 70, 94, 98, 120, 124, 142, 144, 146, 163, 187, 215, 216, 221, 277, 278, 284, 286	
handling client money .....	46, 97, 107, 112, 120, 121, 171, 195, 228
individuals and entities .....	124, 133, 177, 195, 196
lawtech: see lawtech	
limited licence .....	92, 93, 102, 162, 265
minimum necessary standards .... x, 58, 95, 96, 99-101, 168, 172, 176, 230, 231, 236, 251, 274, 278, 282, 283, 285-287	
money-laundering .....	97, 105, 106, 144, 199, 205, 206
narrow gateway.....	51, 81, 182, 265
negative licensing.....	96, 177
personal integrity .... ix, 1, 10, 17, 54, 77, 99, 121, 124, 125, 145, 160, 182, 186, 189, 221, 224, 229, 242, 270	
positive licensing.....	96
practice conditions .....	96, 176-178, 180
proceeds of crime .....	97, 188, 199
professional misconduct: see professional misconduct	
proportionality ... 4, 24, 39, 54, 72, 77, 86, 90, 94, 103, 106, 107, 108, 111, 116, 133, 138, 141, 142, 144, 151, 156, 171, 189, 216, 225, 226, 235, 264, 278, 280, 282	
provider of legal services: see legal services: meaning of 'provider'	
regulatory arrangements .....	71, 123, 184, 202, 228, 231-234, 238, 239, 247, 248, 262
regulatory bodies: see regulatory bodies	
regulatory capture.....	58, 141
see also regulation: regulatory independence	
regulatory independence.....	55, 56, 210, 212, 213, 221, 226, 228, 230, 232, 279, 283, 284
see also regulatory capture	
regulatory overlap .....	226, 245, 246
risk-based regulation ....24, 50, 51, 54, 76, 81, 86, 92, 94, 95, 103-105, 107, 111-113, 120, 126, 145, 156, 159, 167, 185, 195, 210, 230, 231, 258, 278, 281, 282, 284, 286, 287	
see also risk	
role of Parliament.....	54, 75, 86, 161, 214-217, 219, 249, 261, 279, 285
role of regulation.....	56, 99, 211, 230
sandboxes.....	141-143

<i>(regulation)</i>	
scope of regulation.....	15, 50, 52, 58, 81, 83, 86, 87, 89, 90, 92, 93, 95, 106, 108, 109, 114-116, 118, 119, 120, 121, 124, 142, 143, 156, 163, 167, 171, 199, 216, 217, 224, 242, 255, 257-266, 268, 284, 285, 286
self-regulation .....	55, 58, 118, 212, 231
undertakings .....	97, 124, 230
waivers .....	141, 142, 143
regulatory bodies.....	15, 41, 42, 54-57, 59, 64, 71, 77, 105, 209, 212, 218-223, 227, 231, 232, 239, 243, 244, 281
freedom of information.....	218
regulatory gap .....	47, 70, 71, 77, 81, 84-87, 137, 245, 255, 260, 280, 281
regulatory independence .....	287
regulatory objectives.....	41, 56, 70, 82-84, 139, 189, 213, 214, 226, 233, 235, 237, 278, 279, 284, 285, 287
access to justice.....	84
see also access to justice	
access to legal services .....	84, 90
competition.....	84
see also competition	
diversity.....	84
see also diversity	
independent provision of legal services.....	84, 279
see also legal services: independence	
interests of consumers.....	84
objectives vs. outcomes.....	83
primary regulatory objective .....	81, 82, 213, 278, 285, 287
professional principles .....	41, 84
see also professional principles	
public legal education.....	84
see also public legal education	
subordinate regulatory objectives.....	83, 84, 278, 285, 287
the public interest.....	82
see also public interest	
regulatory scope: see regulation: scope of regulation	
regulatory status .....	38, 86, 168, 191, 200, 263
representative bodies.....	1, 57, 58, 59, 60, 191, 210, 211, 223, 232, 236, 241, 244
see also professional bodies	
permitted purposes funding .....	243-245, 288
representative interests .....	24, 55, 57, 58, 77, 211, 212, 227, 232, 234, 240, 244, 245, 251, 279, 283
reserved legal activities ...	ix, xi, 9, 15, 24, 41, 42, 44, 46, 47, 50-53, 70, 77, 81, 85-88, 91, 96, 105, 107, 109, 116, 120, 121, 124, 126, 127, 131, 133, 137, 140, 144, 153, 154, 159-161, 167, 178, 199, 205, 215, 220, 222, 223, 232, 244, 245, 248, 249, 258-261, 264, 265, 272, 273, 277, 278, 286
administration of oaths .....	41, 163
see also administration of oaths	
conduct of litigation.....	41, 51, 52, 178, 187, 272
see also conduct of litigation	
notarial activities.....	41, 204, 205
see also notaries: notarial activities	
probate activities.....	41, 51, 53, 220, 245, 248, 260, 264
see also estate administration <i>and</i> reserved legal activities, see also probate	
reserved instrument activities.....	41, 106, 260
see also document preparation	
rights of audience.....	41, 51, 52, 178, 185, 187, 220, 232, 272
see also rights of audience	
rights of audience .....	159, 161-163, 178, 192-194, 224, 225, 241, 272
see also advocacy <i>and</i> reserved legal activities	
before-the-event authorisation .....	15, 105, 186-188, 194, 223, 224

risk.....	x, 24, 108, 110, 112, 207, 216, 278, 280, 282, 284
complexity .....	104, 112, 114
defining risk .....	108, 287
see also risk assessment	
high-risk legal services.....	24, 51, 86, 95, 96, 98, 100, 101, 103-105, 107, 111, 120, 121, 131, 146, 159, 161, 167, 182, 187, 207, 236, 282
intermediate-risk legal services.....	96, 107, 131, 176, 177, 194, 196, 207
low-risk legal services .....	34, 95, 96, 98, 102, 104-108, 111, 119, 120, 127, 128, 130, 137, 152, 156, 167, 169, 170, 194, 196, 207, 216, 217, 264, 277, 278, 285
risk assessment.....	x, 95, 98, 101, 104, 105, 108, 111, 112, 114, 116, 180, 209, 284-288
situational risk .....	110
technology .....	135, 139
vulnerability: see consumers: vulnerability	
risks .....	285
Royal Institution of Chartered Surveyors.....	106, 123, 155, 247
see also surveyors	
rule of law.....	ix, x, 1, 3, 4, 7-11, 15, 41, 50, 60, 66, 69, 72, 74-76, 82, 83, 104, 161, 185, 212, 223, 279, 282
see also public interest	

---

## S

Scotland .....	27, 43, 60, 115, 130, 162, 204, 265, 271
Secretary of State for Justice.....	213
see also Lord Chancellor	
self-representation.....	5, 8, 10, 11, 15, 45, 70, 72, 73, 89, 122, 257, 272, 280
see also litigants-in-person	
small businesses.....	xi, 15, 29, 44, 71, 85, 171, 173, 177, 195, 198, 263, 282, 285, 286
see also consumers: small businesses	
social welfare law .....	33, 35, 68, 93, 104, 164
social workers .....	10, 33, 66, 187, 190, 274
Society of Trust and Estate Practitioners.....	166, 180, 181, 184, 268
Society of Will Writers.....	268
sole practitioners .....	27, 44, 132, 196, 227
solicitors	11, 27, 32, 34-38, 40, 44, 47, 52, 68, 86, 88, 100, 110, 122, 124, 130, 152, 159, 160, 162, 163, 171, 178, 182-187, 189, 190, 194, 196, 200- 202, 205, 220, 225, 227, 232, 235, 239, 244, 249, 256, 261, 264, 270, 271, 285
see also Law Society, qualified lawyers and Solicitors Regulation Authority	
duty solicitors.....	190, 264, 270
officers of the court .....	124, 150, 225
solicitor-advocates.....	52, 162, 185, 187, 220, 232
Solicitors Disciplinary Tribunal.....	62, 63, 227
see also regulation: disciplinary tribunals	
Solicitors Regulation Authority ..	37, 41, 42, 55, 61-63, 73, 110, 123, 141, 142, 185, 201, 202, 218, 220, 227, 232, 239, 247, 263, 268, 271
special educational needs .....	164
specialisation .....	10, 59, 100, 101, 162, 171, 176, 178, 184, 187, 188, 190-192, 194, 195, 197, 201, 210, 212, 222, 236, 237, 243, 267, 284, 285
accreditation: see accreditation	
advocacy: see advocacy	
consumer rights law.....	106
conveyancing: see conveyancing	
costs law: see costs law	
criminal practice: see criminal law	
dispute resolution: see dispute resolution	
employment law: see employment law	



(specialisation)

family law: see family proceedings	
housing law: see housing law	
immigration law: see immigration	
insolvency law: see insolvency law	
intellectual property law: see intellectual property law	
litigation: see conduct of litigation	
notarial activities: see notaries: notarial activities	
pensions law.....	104
planning law.....	98, 123, 155, 245
social welfare law: see social welfare law	
tax law: see tax advice	
wills and probate: see wills, probate, and estate administration	
surveyors.....	123, 155, 245, 265

---

## T

tax advice .....	98, 104, 115, 122, 145, 160, 164, 165, 166, 169, 173, 181, 188, 190, 194, 195, 226, 228, 245, 249, 263
chartered tax adviser.....	245
technology .....	xi, 2-4, 8, 10, 15, 34, 40, 45, 54, 67, 68, 90, 92, 104, 115, 120-122, 124, 134-140, 152, 170, 204, 221, 255- 257, 264, 280, 286
artificial intelligence.....	3, 45, 137, 140
comparison websites.....	35, 46, 116, 120
computers.....	91
lawtech: see lawtech	
machine learning.....	3, 45, 135, 137
technology insurance.....	138, 170
turnover.....	27-29, 173, 263

---

## U

United States.....	93, 102, 113, 115, 123, 142, 162, 192, 265
unauthorised practice of law.....	115
unmet need.....	8, 30, 31, 72, 91, 143, 191, 257
unregulated providers.....	x, xi, 5, 10, 33, 34, 36, 38, 40, 44, 46, 47, 65, 67-71, 83, 85-90, 93, 127, 131, 137, 165, 169, 170, 176, 177, 178, 180, 182, 242, 255-262, 267, 268, 271, 274, 280-283
Utah.....	102, 113, 142, 265

---

## V

value for money.....	36, 39, 43, 89, 214, 218
vulnerability: see consumers: vulnerability	

---

## W

Washington State.....	93, 102, 265
wills .....	10, 34, 35, 37, 44, 64, 67, 68, 70, 86, 97, 98, 100, 106, 109, 115, 122, 154, 164, 177, 180-182, 184, 195, 203, 242, 255, 258-261, 267-270, 281





