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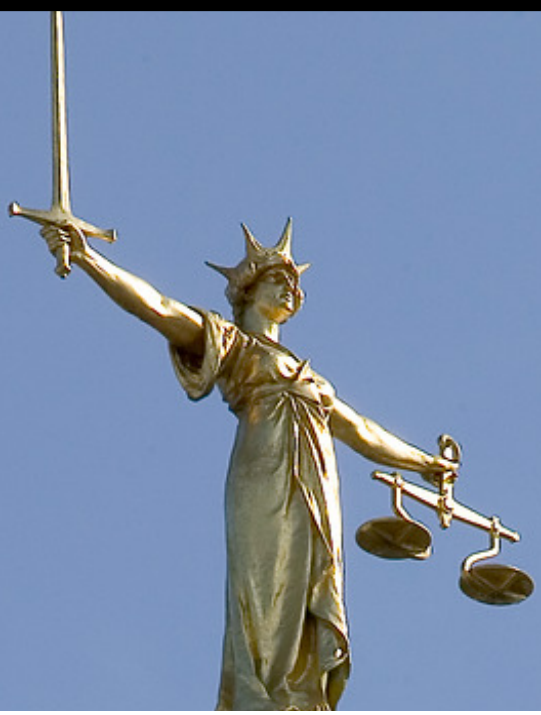

INDEPENDENT REVIEW OF LEGAL SERVICES REGULATION

The Scope of Legal Services Regulation

Working Paper LSR-2 | March 2020

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Stephen Mayson[1]

1. Introduction

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

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

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

This project was undertaken independently and with no external funding.

This is the fourth of five Working Papers that address the issues and challenges raised by five fundamental questions for the Review:

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

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

The work of the Review has been helped by input from the members of an Advisory Panel[2]. Some of the published work and comments of Panel members are referred to and referenced in the working papers. However, the content of this working paper is the work of the author, and should not be taken to have been endorsed or approved by members of the Panel, individually or collectively.

1. The author has led the Independent Review, and is an honorary professor in the Faculty of Laws and the chairman of the regulators' Legislative Options Review submitted to the Ministry of Justice in 2015.
2. For details, see: https://www.ucl.ac.uk/ethics-law/publications/2018/sep/independent-review-legal-services-regulation.

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

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

This Working Paper next examines the scope of legal services regulation – that is, the legal services to which regulation should apply.

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

2. What are the legal services that should be regulated?

2.1 The policy of regulatory scope

The scope of legal services regulation – that is, the legal services to which regulation should apply – is fundamentally a policy issue, driven by a mix of political, social, economic and professional considerations. The outcome of balancing those considerations can place regulatory scope on a spectrum between 'all' and 'none'.

Regulatory theory recognises this spectrum, and offers a number of justifications for regulatory intervention (these were alluded to in LSR-1 2020: paragraph 3.1). The practical effect of regulation in most jurisdictions, though, is perhaps less to define the services that are or are not regulated, but rather to decide the points at which regulation 'lands' and so determine the extent of the legal profession's monopoly over the provision of legal advice and representation.

Claessens (2008: pages 122-123) has analysed the observable spectrum of legal monopoly in terms of:

- 'low', where there is no or little monopoly for the profession and no qualification as a lawyer necessary for the provision of advice or representation;
- 'intermediate', where "the legal professions have, more or less, a monopoly in representing clients in court, but the giving of legal advice is free from regulation, or at the very least is less regulated"; and
- 'high', where there is a monopoly for lawyers for both representation and advice.[4]

Both the Legislative Options Review (2015) and the CMA's market study (2016) considered the question of regulatory scope, and described a spectrum in similar terms to Claessens. The Legislative Options Review explained (2015: paragraph 6.1):

> In the legal services sector, a wide range of approaches to regulation have been adopted in different jurisdictions. Internationally, there are examples of regulation taking place at a variety of points on a spectrum ranging from limited or no sector-specific regulation (as in, for example, the current regulatory model in Finland), through to a position where substantially all legal activity attracts sector-specific regulation (as in, for example, the concept of the 'unauthorised practice of law' which can be prosecuted in the United States of America).[5]

The CMA elaborated (2016: Appendix I, paragraph 4):

> It is possible to distinguish between a number of more or less restrictive models in relation to the scope of legal service regulation. In broad terms, the number and scope of activities reserved to lawyers in England and Wales is more limited than in many other countries. Many jurisdictions maintain broad reservations around the assistance (including legal advice) and representation of clients which limit the provision of these services exclusively to lawyers (eg France, Germany, Italy). In some circumstances, depending on the relevant court, this reservation might also involve placing limits on self-representation by the consumer.[6] Other more restrictive models, as seen in the US and Canada, maintain extensive lists of activities that constitute legal services and the

4. Claessens applied these categories to the legal professions in the EU, and analysed Finland and Sweden as low monopoly, Belgium, Ireland, Netherlands and the UK as intermediate, and the rest (at that time, Austria, France, Germany, Greece, Italy, Luxembourg, Portugal and Spain) as high.
5. The different approaches adopted in other jurisdictions are explored in the Legislative Options Review (2015: Annex 3). That report recognises that these systems may not be directly comparable with England & Wales. There is also a fascinating account in Hadfield (2017: Chapter 5) of how, in the US, "an initially small and elite group of lawyers and law professors secured a pivotal role in shaping law, legal institutions, and legal practice" and paved the way for the 'unauthorised practice of law'. See also Donaldson (2018).
6. Assy (2011) notes that legal representation is generally mandatory in civil proceedings (with some exceptions for small claims and certain tribunals) in Austria, Belgium (before the Court of Cassation), France, Germany, Greece, Italy, Luxembourg, the Netherlands, Poland (before the Supreme Court), Portugal, and Spain.

performance of which by a non-lawyer would be considered an unauthorised practice of law. Other models reserve the engagement in legal practice in general (eg Australia).

It is probably worth noting at this point that those jurisdictions with high degrees of legal monopoly often express discomfort and concern with the current approach in England & Wales. This is usually because it is considered to be too liberal and therefore too susceptible to their perceived concerns about maintaining quality and avoiding undue interference when 'non-lawyers' are involved in legal practice.

Such international sensitivities are important, though, because they can influence the perceptions of, and continued engagement with, the legal system in England & Wales through choices of governing law clauses and as a forum for the resolution of disputes.

While the described range of regulatory positions undoubtedly exists and all are available in principle, it is not my intention to explore all of them here. I am content to adopt the same approach as the Legislative Options Review (2015), and for broadly the same reasons:

> 6.2 The working hypothesis of this paper on the spectrum of regulation is that neither extreme (of no regulation or full regulation) would be appropriate for England and Wales. While this is to express a preference and so exclude the exploration of some options, it is believed to be a justifiable position to take in order to contain the scope of this paper within reasonable and pragmatic bounds.
>
> 6.3 An approach based on:
>
> (1) *the regulation of all legal activities and providers* may not provide sufficient opportunity to assess any given legal activity against a logical and informed framework of benefit and risk before imposing regulation, which would otherwise allow regulation to be risk-based, targeted and proportionate. Proportionate and flexible regulation in turn supports the reduction of regulatory burdens and cost which can free up the sector by encouraging competitiveness, innovation and sustainable growth, and thereby contribute to addressing economic growth and unmet needs for legal advice and representation.
>
> 6.4 On the other hand, a regulatory approach in which there is:
>
> (2) *limited or no sector-specific regulation* would mean that the public interest issues identified at paragraph 4.5 above[7] could be insufficiently addressed and protected. In turn, this might reduce public and consumer confidence in the rule of law and the administration of justice, as well as in the legal services market, to such an extent that societal and economic harm could result.

This approach is also consistent with the CMA's conclusion that general and consumer laws alone are not sufficient to protect consumers in their purchase and experience of legal services (CMA 2016: paragraph 4.11). It then follows that regulation should settle at some intermediate point on the spectrum rather than at either end of it.

The purpose of the rest of this Working Paper, therefore, is to examine in detail the current approach (which already takes an intermediate position). It seeks to identify whether the basis of that approach remains valid, or whether an alternative and different intermediate point would better serve the purposes of legal services regulation in the post-Brexit 21st century.

Several amendments have been made to this Working Paper since the first version was published in October 2018. These are mainly intended to reduce the emphasis in that version on reservation and before-the-event authorisation. This allows a more nuanced

7. These are the public good and consumer protection justifications for sector-specific regulation recorded in full in LSR-1 (2020: paragraph 4.2).

consideration of the scope of regulation that is not constrained by any initial threshold for such prior authorisation.

2.2 Current scope of regulation

The present scope of legal services regulation in England & Wales can be summarised as follows:

(1) There are six 'reserved legal activities' that can only be provided to the public by those who are expressly authorised to do so (whether individuals or entities[8]).

(2) There are some other legal activities that, while they are not reserved legal activities, are also subject to specific regulation such that they, too, can only be provided to the public by those who are expressly authorised to do so. These are immigration, insolvency, and some aspects of claims management.

(3) All other 'legal activities' are then, by default, non-reserved and prior authorisation is not required.

(4) Where non-reserved activities are provided by those who are legally qualified (say, as a solicitor, barrister, or licensed conveyancer), those activities are in fact regulated by the regulator responsible for those who hold the relevant qualification[9].

(5) Where non-reserved activities are provided by those who are not legally qualified, those activities *cannot* be regulated by a legal services regulator, and redress is not available to any consumer (other than general consumer law[10], or as the result of a voluntary code adopted by a particular provider).

This scope remains the product of a largely 19th century society that held different views about the role and status of lawyers, the significance of certain legal activities, the abilities and needs of clients, and the role of regulation and markets.[11] It offers a patchwork of regulation and, through the pivotal function of the reserved activities, an outdated base on which to build the foundations of a modern, risk-based framework for regulating legal services and those who provide them.

2.3 The reserved legal activities

Under the Legal Services Act 2007, the legal professions' monopoly is created through the reserved legal activities. However, the current reserved activities have been preserved from pre-existing reservations that were simply affirmed by the Act. These activities are not derived from any systematic or principled approach to regulation, or related to any conception of relative public, market or consumer risks in the 21st century. They are simply a collection of historical practices, political expediencies and anachronisms[12].

The scope of each reserved activity varies; in some cases, it applies quite broadly (such as the exercise of rights of audience), and in others very narrowly (such as the preparation of

8. Since the changes in the SRA's practice regulations came into effect in November 2019, solicitors might now provide any non-reserved legal services to the public while employed in an unauthorised entity.
9. In addition, some of these qualifications result in protected titles (such as barrister and solicitor), whereas others do not.
10. The protections offered by general consumer law were summarised in LSR-1 2020: paragraph 2.
11. These origins are considered in LSR-3 2020: paragraphs 4.2 and 4.3.
12. See Mayson & Marley (2010). The Better Regulation Commission referred to laws "that reflect past circumstances and, when looked at from today's perspective, look increasingly anachronistic, cumbersome or irrelevant" as 'bad law' (2006: page 46).

documents for specific land registration or probate purposes). The absence of any underlying logic or rationale to the present scope arguably makes it inevitable that providers of legal services will sometimes respond in pragmatic, unpredictable and possibly even undesirable ways.

2.4 Unbundling, working around and 'gaming' the reserved activities

The existence of the reserved activities, and the requirement that those who provide them should be specifically authorised to do so, play out in practice in different ways because of the breadth of some and narrowness of others. The exercise of a right of audience, for instance, requires an individual to be in court, to examine and cross-examine witnesses and to address the court in person. These are not divisible functions.

However, the preparation of an application for grant of probate does not have to be carried out by the same person who administers the estate of a deceased person. The narrowness of the probate reservation does not prevent (and arguably even encourages) the unbundling of the distinct legal aspects of a service that, in the eyes of a consumer, is a single activity of winding up someone's affairs.

So, for example, many accountants and probate companies have historically undertaken the vast majority of an estate administration, outsourcing the narrow reserved requirement to have the preparation of the application for grant of probate carried out by an authorised person. (The approval of the ICAEW as a licensing authority for probate purposes in 2014 now allows chartered accountants to conduct the reserved probate activity.) The existence of the reservation in these circumstances forces some providers to unbundle the reserved and non-reserved elements of the service.

One could argue that the narrowness of the probate reservation, for example, has in fact allowed competition and innovation in the market for estate administration, in that it has permitted accountants and specialist probate companies to provide welcome and cost-effective services to clients in need of help and support with estate administration as an alternative to instructing solicitors.

In that sense, there is little evidence that the reservation has discouraged competition; it just prevents the complete bundling of a one-stop alternative to solicitors (and now to probate-accredited chartered accountants).

It is perhaps also worth noting that the existence of reserved activities can encourage other forms of outsourcing or 'voluntary unbundling'. This occurs where a firm of solicitors, which could undertake a fully bundled service of reserved and non-reserved activities, chooses to retain the reserved elements – and perhaps some elements of the non-reserved work. It then outsources aspects of the non-reserved work that it believes can be more effectively or cost-efficiently undertaken by an outsourced provider.[13]

A variation on this theme could also be a provider undertaking the non-reserved aspects of a service but requiring the client to undertake the reserved activity on their own behalf. Sometimes this can mean submitting as their own product the relevant document (such as an application for probate) that was in fact prepared for them in return for payment by someone who is not an authorised person.

It is also perhaps difficult to 'police' the reserved instrument and probate reservations where the relevant documents might be prepared by a provider who is not an authorised person but then signed and presented by the client as their own (cf. CMA, 2016: paragraph 6.63).

13. Such a situation can also frequently arise where a firm's resources are over-stretched, and outsourcing provides additional capacity that allows the firm to meet its clients' needs within a shorter (or previously agreed) timescale.

However, I am not aware that this reliance on what is purporting to be self-representation is a common practice.

An analogous situation would be the use of a McKenzie Friend (in the truest sense of the term), where the Friend helps and supports a litigant-in-person with the preparation of a case, but it is the litigant who actually signs the necessary papers and carries out the advocacy.

These apparent circumventions of the requirements of the 2007 Act in relation to reserved activities are variously described as 'unbundling', 'working around' and 'gaming'. The use of these expressions is perhaps implicitly critical or pejorative.

Alternatively, it could be argued that providers of legal services are, on a more positive interpretation, simply making a common business decision of whether to 'make or buy' an element of their portfolio of services.

In doing so, they are then complying with Parliament's intention that certain of those elements can only be provided by authorised persons. If the business has those people internally, it can 'make'; if it does not, it must 'buy' them.

The issue here is not so much about whether unbundling is or is not a good thing: a recent broad assessment of it was, on balance, positive (Ipsos MORI, 2015). It can save costs for consumers and perhaps give them greater control over their legal work.

For providers, it can allow them to meet the rising expectations of informed consumers without having to offer, in the eyes of clients, an 'over-engineered' service that they do not think they need or would prefer not to pay for.

The question for this Working Paper is: where some legal services, or aspects of them, are sufficiently important for the public interest in the regulation of them to be engaged, is it then acceptable for providers (regulated or not) to offer ways of working around that requirement to be regulated?

Where such work-arounds or unbundling are perceived to expose consumers to additional risks (cf. Ipsos MORI, 2015: page 4; and see paragraph 4.2.1 below), the scope of regulation involved arguably needs to be considered very carefully.

Another crucial issue here is whether the reserved activities 'protection' is being circumvented in the guise of self-representation where a non-authorised provider is making money or a business out of charging for work done. If that work is not genuinely carried out by the relevant party to the transaction or dispute, it is being done for payment by someone who should be authorised and is not.

Given that the reservations in question apply to 'preparing' instruments or papers, such a situation must be covered by the offence in section 14(1) of the Legal Services Act 2007 of carrying on a reserved legal activity when not entitled to do so.

Any change to the number or scope of the reserved activities would still require firms to make decisions about what to retain and what to outsource. In principle, though, changes might encourage more outsourcing by alternative providers and greater internal retention of work by solicitors (if scope is extended). Or there might be less outsourcing by alternative providers and more outsourcing of non-reserved activities by solicitors (if scope is reduced).

2.5 The Competition and Markets Authority's assessment

The CMA, in their legal services market study of 2016, looked in detail at the current reserved legal activities and concluded (2016: page 13):

> Overall we have not found that the scope of the reserved legal activities has a significant negative impact on competition. We note that unauthorised providers, which may be lower cost providers, are restricted from competing to some extent in the legal areas to which the reserved legal activities relate. However, there are a large number of providers in these legal areas and the scope of the reservations tends to be narrow, which allows unauthorised providers to work around them.

The CMA did express concern that some of the current reservations "are poorly aligned with the risks of providing legal services to consumers" (page 13); but because at the moment only a very small proportion of consumers use unauthorised providers, in practice those risks are minimised.

However, they also wrote (CMA 2016: paragraph 5.8) that:

> The reservation of certain activities has a potentially adverse effect on competition by restricting who can provide these services. In particular, the reservation of an activity may restrict competition from potentially lower cost unauthorised providers. However, the reservations may be justified on the basis of ensuring consumer protection and/or securing specific public interest benefits. These justifications need to be examined carefully, since we would be concerned if reservations caused disproportionate restrictions on competition that were not adequately justified by the consumer protection and/or public interest benefits.

Given the pivotal nature of the reserved activities in the current framework, it is worth recording in full the CMA's assessment of them (2016: pages 173-177):

> *Consumer protection and public interest justifications*
>
> …
>
> 5.73 There is a broad agreement that the reserved legal activities represent 'an accident of history' and that there has not been a rigorous assessment of their potential justifications.[14]
>
> 5.74 Nevertheless, justifications for each of the reserved legal activities can in principle be made on the basis of consumer protection and public interest considerations. These arguments are stronger for some reservations than others and this has a direct bearing on whether any restriction on competition that may result in the reservation can be justified.
>
> 5.75 Based on our assessment …, we believe that consumer protection and public interest concerns are stronger for rights of audience and conduct of litigation, but weaker for probate activities and administration of oaths.
>
> 5.76 In considering consumer protection considerations, a particular concern is that some of the current reservations do not seem to be well targeted to the potential consumer detriment that might be suffered through poor provision. This is particularly the case with respect to probate activities (given that the current reservation is not targeted to the riskiest element of the wider estate administration process) and reserved instrument activities (which do not encompass key risks in the overall conveyancing process). In both cases, the reservations do not target the handling of clients' money which is where the greatest risks are likely to arise in both activities.
>
> 5.77 In practice, poor alignment between the reservation and actual risks to consumers does not currently cause significant difficulties due to the fact that … authorised providers are subject to regulation for all the activities they offer, both reserved and unreserved legal activities. Regulation by title therefore fills the 'regulatory gap' by extending regulation to all unreserved legal activities. For example, as noted above, the handling of client money in respect of conveyancing and estate administration is one of the riskiest types of activities,

14. The CMA report refers here to Mayson & Marley (2010).

but it does not fall within the scope of reservation. However, by virtue of title-based regulation, this activity is covered under the regulatory schemes of the frontline regulators. Although unauthorised providers may currently handle client money, the limited role currently played by unauthorised providers in these areas of law means that, in practice, their ability to carry out risky activities has not yet given rise to significant detriment.

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

Balancing competition and consumer protection and public interest concerns

5.79 In considering more generally the role played by reservation in ensuring consumer protection and the public interest, we believe that it is essential to give sufficient consideration to the adverse impact that reserving an activity to a select type of providers might have on consumers' ability to meet their legal needs.

5.80 While our findings suggest that the reservations are not primarily responsible for the lack of effective competition in the legal services sector and unauthorised providers can work around them to some degree, it is important to note that they still act as a barrier for unauthorised providers wishing to offer a complete service that includes undertaking both reserved and unreserved elements directly. This inability to offer a complete service may have the following effects:

- Unauthorised providers may find it difficult to attract and retain consumers so that these providers fail to expand and consumers do not derive the benefit of lower cost services.
- Outsourcing the reserved elements to another provider could introduce inefficiency and delay for the consumer which could result in raised costs that detracts from the unauthorised providers' market offering.

5.81 It is therefore important that the scope of the reservations constitutes an appropriate balance between securing consumer protection or public interest concerns while not unduly restricting competition. Having examined each reserved activity …, we believe that some reservations seem to strike this balance more effectively than others.

5.82 While reservation may ensure that only competent providers are allowed to undertake the legal activity (and that consumers have access to appropriate redress should things go wrong), this may have an impact on affordability. As a result, accessing legal services may become more difficult for the most vulnerable segments of the population who may be forced to choose between not meeting their legal need or handling the matter themselves, both of which present a number of risks.

5.83 We believe that these considerations are well illustrated by the current JEB consultation[15] which proposes to implement a ban on fee-charging McKenzie Friends. Overall, we recognise that the reservation of both rights of audience and conduct of litigation are based on strong arguments related to consumer protection and public interest grounds. Furthermore, it seems that increased competition between solicitors and barristers with respect to these reserved legal activities has increased choice for consumers in a number of legal areas.

5.84 However, unauthorised providers who operate as 'paid' McKenzie Friends may provide an important service to the vulnerable and those who cannot afford to instruct a solicitor or barrister. As not having advocacy or litigation support during legal proceedings is potentially very risky, any reforms aimed at reducing incentives for unauthorised providers to enter the market and provide these services should also take into account unmet demand considerations. Therefore, we believe that the proportionality of a blanket ban on fee-

15. For the Judicial Executive Board's conclusions on this, see footnote 24 below.

charging McKenzie Friends needs to be assessed carefully given its likely impact on consumer choice.

Conclusion on the impact of the reserved legal activities

5.85 While the reserved legal activities can only be provided by specific types of legal professionals, overall we have not found that these reservations currently have a significant adverse impact on competition. There tend to be a large number of providers that are active in providing the six reserved legal activities and the scope of the reservations is often narrow, allowing unauthorised providers the opportunity to work around them. However, we believe that the reservations may currently act as a barrier to unauthorised providers seeking to offer a complete service to consumers that includes both reserved and unreserved elements.

5.86 Arguments in favour of the current reservations are based on their importance in ensuring consumer protection and/or securing specific public interest benefits. These arguments seem to be stronger for some reservations than others meaning that any restrictions on competition will be more justifiable for some reservations and the need for reform will be stronger for others.

5.87 In considering the nature of these justifications, we are concerned that some of the current reserved legal activities are poorly aligned with the actual risks of providing legal services to consumers. In practice, the fact that authorised providers account for the vast majority of legal services coupled with the impact of title-based regulation means that this poor alignment between risk and the reservations does not seem to be a major issue at the current time. However, we are concerned that this misalignment may, in time, result in greater consumer detriment as the proportion of unauthorised persons operating in the legal services sector increases.

5.88 We have not attempted to carry out a full analysis of each of the reserved legal activities, and recognise that further work would have to be done before removing or amending the current list. Furthermore, on the basis of our analysis, we do not consider it a given that the reservation of any of these activities to a particular type of provider represents the most proportionate approach to addressing potential risks to consumer protection and the public interest connected to their delivery. However, on the basis of the information we have gathered, we consider that (a) the scope of some reserved legal activities seems better aligned to their proposed rationales for reservation, and (b) the underlying arguments in favour of reserving some of the reserved legal activities are stronger for certain activities than for others:

- Rights of audience and the conduct of litigation. In comparison to the other reserved legal activities, stronger arguments around public interest and consumer protection concerns can be advanced in favour of some form of restriction on who can provide these services. The scope of the current reservations also seems better aligned to the risks of provision while still allowing scope for potentially lower cost unauthorised providers to provide services to consumers who may not be able to afford an authorised provider.
- Probate activities and reserved instrument activities. While public interest and consumer protection arguments can be advanced in favour of some form of regulation on providers (although the public interest arguments seem weaker in relation to probate than in the case of reserved instrument activities)[16], the narrow scope of these current reserved legal activities do not seem well aligned with the riskiest activities associated with the relevant legal areas (wills/estate administration with respect to probate and conveyancing with respect to reserved instrument activities).
- Notarial activities. The current scope of the reservation seems unclear in nature and, unlike other reservations, the use of the regulated title of 'notary' in the reservation's definition raises further questions as to the extent to which an unauthorised provider can legitimately perform certain activities also undertaken by authorised notaries. However, in practice interactions with lawyers in foreign jurisdictions are likely to limit

16. The CMA report refers here to Mayson & Marley 2011: page 43.

the ability of unauthorised providers to provide these legal services even if these activities were not reserved.

- Administration of oaths. The relative lack of technical difficulty involved in the delivery of this service seems to call into question the need to reserve the activity to the current limited types of provider (as a greater number of providers are likely to be capable of providing the service to the requisite quality and consumers are more able to judge whether it has been done appropriately). However, the potential consumer detriment linked to this reservation is likely to be mitigated by the presence of price regulation set at such a low level of cost. Overall, a broader licensing system[17] that could ensure the trustworthiness and relevant training of the provider might be a more proportionate system than the current reservation.

2.6 Conclusions

This Working Paper might therefore summarise a tentative position on the present scope of the reserved activities as:

(1) The current reserved legal activities are an historical anachronism and are not, collectively, fit for purpose for the effective future regulation of legal services.

(2) An assessment of the reserved legal activities is therefore required that addresses their individual and collective scope and identifies which legal activities should, in the public interest, continue to be regulated and provided for payment only by those who are required to have before-the-event authorisation.

(3) Candidate activities for regulation should be considered on a consistent, principled, basis that takes account of the rationale and objectives for, and risks to, sector-specific regulatory intervention (cf. LSR-1 2020).

(4) The principal *objective* of any changes to the reserved activities should not therefore be an increase in competition or innovation in legal services, though if those *outcomes* are achieved by any redefinition in the number or scope of the reserved activities they should be welcomed.

(5) Any assessment of reserved legal activities should also not proceed on the presumption that they should be retained, or that there should be either an increase or a reduction in their number or in their scope.

(6) Although the Legal Services Act already contains provisions (in sections 24 to 26) allowing the addition or removal of reserved legal activities within the current regulatory framework, such a piecemeal approach would risk repeated unsettling of the market, possibly frequent revisiting of strategic and operational decision-making by providers, as well as prolonged confusion for consumers, over an extended period.

17. For a consideration of licensing, see LSR-4 2020: paragraphs 4.2.1 and 4.2.2.

3. The future for regulation and the reserved legal activities

LSR-1 addressed the fundamental question of whether there is something distinctive about legal services that requires sector-specific regulation. It posited an articulation of the public interest in the following terms (2020: paragraph 3.7):

> The public interest concerns objectives and actions for the collective benefit and good of current and future citizens in achieving and maintaining those fundamentals of society that are regarded by them as essential to their common security and well-being, and to their legitimate participation in society.

It then concluded that there *is* something distinctive about legal services, and suggested that regulation of them is particularly justified both to secure outcomes for the benefit of society as a whole (expressed in terms of building, protecting or maintaining the fabric of society and of 'UK plc'), and to promote and secure the participation of individual citizens in society.

More particularly, and in summary, the ***public good*** is engaged in (LSR-1 2020: paragraph 4.2):

- supporting the constitutional principle of the rule of law;
- furthering the effective the administration of justice and access to justice;
- maintaining public confidence in the justice system;
- securing positive externalities (societal and third-party benefits) from the justice system, including resolving disputes and settling case law;
- supporting a strong judicial framework that enlightens and frames the resolution of disputes outside the formal legal process;
- guarding against negative externalities (societal and third-party detriment);
- encouraging independent, strong and effective legal advice and representation;
- promoting and protecting the law of England & Wales as a governing law of choice, as well as the UK and its justice system as a legal forum; and therefore
- advancing the commercial interests of 'UK plc'.

Similarly, a ***consumer protection*** rationale also justifies regulation (LSR-1 2020: paragraph 4.2) to protect or enhance, or remove or reduce impediments to, the ability of citizens, on an equal basis, to exercise their claims to civil, political or social freedoms and participation. This is particularly important within the legal sector because some activities:

- carry significant risk of detriment (for example, holding client money);
- contain scope for irreversible loss or harm (such as loss of liberty, citizenship or home) for which after-the-event redress is likely to be an inadequate remedy;
- necessarily involve vulnerable citizens (for example, in immigration and asylum, and social welfare), or citizens at a time of vulnerability (for example, family breakdown, homelessness), or where there is an 'inequality of arms" (say, in dealing with the government, other public sector agencies, or large businesses);
- involve forced participation in the justice system (for example, in criminal law); or
- result in or from information asymmetries relating to the understanding of legal issues (particularly by consumers and small businesses), the appropriate choice of legal services provider, and assessment of quality of the advice and representation received.

This Working Paper therefore proceeds on the basis that the approach to legal services regulation in the future might take these articulations of the public interest as its foundations. In particular, the need for, and identification of, legal activities that require any form of regulatory intervention, should then be assessed in accordance with these foundations.

In its market study, the CMA expressed the preferred view that any future review of regulation would replace the current reservations (or at least supplement them) with "an ability for the regulator to introduce or remove regulation directly in legal service areas which it considers pose the highest risk to consumers" (2016: page 17).

This raises a number of possibilities, including: removal, amendment, replacement, and supplements. It would leave the decision about the extent and form of regulatory intervention to the regulator. In so doing, it would avoid the existing inflexibility of the reserved activities.

But it also avoids addressing two prior questions: the first is whether the current list of reserved activities is fit for purpose (or would add certain activities to that list or remove others from it); and the second is whether the notion of reservation is required at all.

In their assessment of the current reserved activities, the CMA (2016: paragraph 5.61) nevertheless balanced the potentially competing interests at play as follows (and in a way that is consistent with the public interest foundations articulated in LSR-1 (2020) and summarised above):

> while reserved legal activities may restrict competition between different types of legal services provider, they may be justified on the basis of their importance in ensuring consumer protection and/or securing specific public interest benefits. In particular:
>
> - Given the substantial risk of detriment that may be a consequence of poor-quality legal services and the difficulty a consumer faces in assessing quality and value for money, the reservation of an activity to a specific authorised provider may provide an important upfront assurance of quality and/or regulatory protection.
> - The reservation of an activity may help secure public interest considerations such as the fundamental public interest in supporting the rule of law; protecting the legal rights of individuals and ensuring access to justice so that individuals can participate equally in society.

Accordingly, a new approach to regulation must bear consideration, in the expectation that a more modern, principled and risk-based framework might result. As the CMA also said (2016: paragraph 6.31):

> As a result of the lack of targeted regulation, the least risky reserved legal activities are likely to be over-regulated. This has the potential to exclude low-cost and high-quality unauthorised providers from the sector. By contrast, other high-risk activities, for instance those involving handling of clients' money (for instance, estate administration), are unreserved and thus in principle are under-regulated, so that consumers might not receive sufficiently [*sic*] protection when using unauthorised providers.

Such a conclusion suggests that the current 'intermediate' position on the spectrum for legal services regulation is almost certainly drawn in the wrong place. On that basis, a re-examination of the activities that should or might fall within the scope of regulation is in order.

According to Semple, though, we should probably expect incumbent providers who are authorised for the currently reserved activities to resist suggestions that they should be altered. This is because (2019: paragraph 4.2) reservation is a "market shelter" for those who provide the activity, and "this constituency can be expected to lobby against de-reservation".

4. Consideration of various legal activities for regulation

4.1 Introduction

This paragraph includes a detailed consideration of currently reserved and otherwise regulated legal activities. Adopting the public interest foundations articulated in LSR-1 (2020) and summarised in paragraph 3 above, it explores the arguments in favour (or not) of regulation.

This Working Paper is intended to focus for the most part on *what* should be regulated, while consideration of *who* should be regulated in respect of regulated activities and *how* that regulation should be structured is dealt with in LSR-3 (2020, on the focus of regulation), LSR-4 (2020, on the form of regulation), and LSR-5 (2020, on the structure of regulation).

In the assessment that follows, the principal distinction being drawn is in relation to, on the one hand, those activities that might in the future require some form of before-the-event regulation (broadly in the same way that reserved legal activities do now) and, on the other hand, regulated legal activities that might then not necessarily be provided only by authorised persons.

The main consequence is the identification of legal activities that may only be provided by those who are authorised to do so (through before-the-event authorisation by a regulator).

Other legal activities would not require before-the-event authorisation, but could nevertheless be subject to some form of regulatory protection (arising from during-the-event obligations, such as professional indemnity insurance, or after-the-event redress, such as access to the Legal Ombudsman). The way in which these different types of regulatory intervention might be described, applied and enforced are addressed in LSR-4 (2020: paragraph 4).

Having drawn this distinction, the Working Paper then mainly (but not exclusively) considers those activities that are currently reserved or otherwise specifically regulated. It is, in essence, posing the question of whether or not before-the-event authorisation might (continue to) be justified in relation to particular legal activities and, where not, whether other forms of regulation might nevertheless be appropriate.

In the longer term, therefore, the following assessment should not necessarily be thought of only in terms of reservation, but rather as an assessment of whether there might exist, for certain legal activities, a public interest justification for before-the-event authorisation.

Whatever the language used, this approach should nevertheless present a high threshold, because the requirement for prior approval constitutes, in Ogus's words (2004: page 9) "the most interventionist of regulatory forms"; and it almost certainly leads to during-the-event and after-the-event regulation as well, thus imposing the greatest regulatory cost and burden on providers.

It must therefore also be balanced against the requirement for risk assessment and proportionality in regulation if a requirement for before-the-event authorisation of providers is not to increase unmet needs for legal advice and representation by pricing more consumers out of the market for legal services (cf. paragraph 2.5 above).

Finally, it is perhaps worth emphasising that this Working Paper is directed to 'legal services' rather than 'lawyers'. It is the case that the providers of legal services might also be subject to regulation in respect of other services that they offer, or in the way in which they offer or conduct them. This might cover, for instance, regulatory and compliance obligations in relation to data protection, money-laundering, consumer credit advice, and investment business.

There may well be other regulators (including the Financial Conduct Authority) who will also have jurisdiction over lawyers and other providers of legal services. These other obligations are not part of the discussion in this Paper.

4.2 Regulation for public good reasons

A policy-based approach to regulation could support (as in the current framework) the reservation of certain legal activities to authorised persons in order to secure the public good (as summarised in paragraph 3 above).

Under this heading, the justification to regulate should be recognised as a policy decision and might be supported by *principle*: this could be different to the consumer protection reservations discussed in paragraph 4.3 below, which might need to be supported by *evidence* of risk or detriment to consumers.[18]

This line of thinking is consistent, for example, with Milne's view that (1993: page 49) "many judgments of the requirements of the public interest have to be based on reasons which are not decisive and evidence which is not conclusive". It could, however, present difficulties for regulators who seek always to be 'evidence-based', and who rightly prefer decisions made on the basis of fact rather than the special pleading of factions. Nevertheless, implicit faith in the availability, reliability or determinative power of evidence to inform every policy decision could be misplaced.

As Gillers puts it (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.

Such challenges are necessarily part of the backdrop of assessments that arise in a risk-based approach (see further, LSR-4 2020: paragraph 3).

4.2.1 Activities connected to the administration of justice and due process

Regulation to secure the public interest objectives and public good outcomes relating to the rule of law, the administration of justice, access to justice, and independent, strong and effective legal representation could justify a continuing requirement of before-the-event authorisation for:

- *rights of audience*;
- *rights to conduct litigation* (with associated legal professional privilege[19]); and
- *court-related reserved instrument activities* (these are preparing an instrument relating to court proceedings in England and Wales: see Legal Services Act, Schedule 2, paragraph 5(1)(c) and (2)).

For this purpose, 'court' includes the first-tier and upper tribunal (section 207(1) of the Legal Services Act).

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18. This is not to suggest that no supporting evidence of any kind might be needed to support a policy position. Economists and others might, for example, be able to ascribe a value or metric to the rule of law and other important policy objectives or outcomes (cf. World Justice Project 2020) and in doing so be able to argue for some measurable benefit or detriment to society. I would, however, regard this as different to empirical evidence of benefit or harm to consumers.
19. The additional regulatory challenges connected with legal professional privilege are recognised and acknowledged, but are not dealt with in this Working Paper.

A conclusion that these activities should remain subject to before-the-event authorisation would be consistent with the view in the final report of the Royal Commission on Legal Services (1979).

It suggested that the need for effective administration of justice was validation for the reservation of rights of audience (1979: Chapter 18, with a particular emphasis on the skills required and independence) and the conduct of litigation (1979: paragraph 19.17, which emphasises the knowledge and integrity of officers of the court). The proper discharge of these responsibilities assists in the smooth functioning of the court system.

The continuation of authorisation for these current reservations would secure the public interest objectives and public good outcomes relating to the rule of law, the administration of justice, access to justice, and independent, strong and effective legal advice and representation.

It would also promote and protect the interests of the UK in general, both commercially and as a leading global legal forum. The standing and reliability of precedent in a common law system are vital to the underlying credibility of the legal system as a whole (which is important to supporting the rule of law).

For these reasons, these authorisations need not be restricted only to criminal proceedings or where the liberty of the citizen is at risk: the public interest in confidence in the effectiveness of the justice system is much more extensive.

The extra cost that would be borne by an individual consumer as a result of engaging authorised legal representation (as opposed to being a litigant-in-person or being allowed to instruct a non-authorised advocate) could be balanced by gains in a number of areas:

(i) the personal benefit to the individual consumer of being represented in court by someone trained to do so;

(ii) the gains made by all other consumers within the justice system in having that structure operating as effectively as possible and delivering reliable outcomes;

(iii) securing equality of citizenship and participation;

(iv) reduced costs to public finances through having a justice system that operates more efficiently; and

(v) the continuing additional revenues brought into the UK from cross-border and international dispute resolution that such a system attracts.

Authorisation also achieves an additional consumer protection benefit (cf. paragraph 4.3 below) in the purchase of 'credence' services. Incompetence or poor service in the delivery of these activities could result in irreparable detriment to the client – such as imprisonment, fines, a criminal record, loss of assets or of access to children, and so on.

These consequences might arise, for instance, from failing to obtain evidence or call witnesses, not calling expert evidence, failing to object to evidence, conducting a cross-examination that is not in accordance with instructions, asking questions that allow the introduction of otherwise inadmissible evidence, missing relevant deadlines, or problems with disclosure, in addition to the consequences of incompetent, or inadequate, advocacy or case preparation.

Proven incompetence in the exercise of rights of audience is not necessarily sufficient to overturn a judicial result, such that before-the-event assurance becomes more valuable in the possible absence of after-the-event redress.

As Buxton L.J. explained in *R.* v. *Day* [2003] EWCA Civ 1060 at paragraph 15:

> While incompetent representation is always to be deplored; is an understandable source of justified complaint by litigants and their families; and may expose the lawyers concerned to

> professional sanctions; it cannot in *itself* form a ground of appeal or a reason why a conviction should be found unsafe. We accept that, following the decision of this court in *Thakrar* [2001] EWCA Crim 1096[20], the test is indeed the single test of safety, and that the court no longer has to concern itself with intermediate questions such as whether the advocacy has been flagrantly incompetent. But in order to establish lack of safety in an incompetence case the appellant has to go beyond the incompetence and show that the incompetence led to identifiable errors or irregularities in the trial, which themselves rendered the process unfair or unsafe.

Lord Hoffman addressed the same point in relation to the conduct of litigation in the *Arthur Hall* case[21]:

> If a client could sue his lawyer for negligence in conducting his litigation, he would have to prove not only that the lawyer had been negligent but also that his negligence had an adverse effect upon the outcome. This would usually mean proving that he would have won a case which he lost.

After-the-event restitution or compensation might be available, but in many of these circumstances this might not represent a sufficient justification for failing to assure before-the-event competence. In addition, it can prove challenging to establish negligence, and this might deter otherwise worthy claimants from taking any action – especially where the consequences are not as dire as those suggested earlier.

Further, for a consumer to rectify any harm caused by the negligent exercise of a right of audience, he or she will have to engage another lawyer to bring a claim. From the point of view of the wronged consumer, this potentially raises the (off-putting) perception of a conflict of interest – even if no such conflict in fact exists.

Removing or diluting the requirement for these court-related activities to be carried out by authorised persons would probably lead to suggestions that there would be even higher levels of self-representation and litigants-in-person, as well as – perhaps more disturbingly – representation by paid but incompetent or inexperienced advocates.

This, in turn, could create greater inefficiencies in the justice system as courts and judges were forced to deal with, and assist, those with little or no experience or competence[22]. Such inefficiencies could greatly reduce the efficacy as well as the cost-effectiveness of the justice system, and potentially result in less credible and reliable justice and dispute resolution as well as in much poorer value for money to the public purse.

Where a significant proportion of civil and family cases are already undertaken by litigants-in-person, the practical implications of regulation that allowed only self-representation[23] or representation by authorised persons (whether paid or pro bono), but not by non-authorised

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20. The Court of Appeal in *R.* v. *Joshil Thakrar* [2001] EWCA Crim 1096 developed the 'safety of the conviction' test, to be considered alongside a person's right to a fair trial under Article 6 of the European Convention on Human Rights. Irrespective of the need to comply with the Convention, the public good of securing fair trials should be an important consideration in assuring the competence of those who represent both the prosecuting authority and the accused.
21. See *Arthur J.S. Hall and Co.* v. *Simons*, and *Barratt* v. *Ansell and Others (trading as Woolf Seddon (a firm))*, and *Harris* v. *Scholfield Roberts and Hill* (conjoined appeals) [2000] UKHL 38, at paragraph 34.
22. Over time, as self-representation and other challenges to the smooth running of judicial lists increase, one might also expect that the number and quality of applications for judicial office could also decline. On the other hand, work in Canada, which looks to support 'self-helpers' as they navigate their way around the courts system, might point to ways in which the overall efficiency (and cost-efficiency) of the system could be promoted.
23. The 'right' to self-representation is not uncontentious: "The right to self-representation is a general right that is conferred upon all litigants, not just those who cannot afford lawyers. The literature completely overlooks the more general question of whether an absolute entitlement to self-representation is always desirable, irrespective of financial inability…. What remains an open question is whether litigants should be allowed to represent themselves *as a matter of principle*, regardless of whether they can afford legal representation…, or irrespective of the costs she may cause to her opponent and to the administration of justice as a result of failing to use the system properly…. A more balanced approach requires taking into account the legitimate interests of represented litigants who are also entitled to protection against the extra delays and costs engendered by [litigants-in-person] or by actions taken to assist them" (Assy 2011, emphasis in original).

persons (whether paid or not), could result in denying too many citizens the access to legal advice and representation, and to justice, that a decent society should secure. As the CMA suggested (2016: paragraph 5.84, recorded in paragraph 2.5 above), a prohibition on paid McKenzie Friends might be disproportionate.

However, the Ipsos MORI analysis of unbundled legal services contains the following point (2015: page 4): "It was felt particularly important by judges that advice and assistance was given by regulated advisers. Some reported seeing a rise in litigants in person being assisted by advisers who appeared to be unqualified, which was felt to be a risk for the client's representation."

This presents strong support for the proposition that, for this set of court-related legal activities, there should be no exemption for non-authorised representatives, whether paid or not.

Public interest regulation therefore should not remove or undermine the continued right of individuals to represent themselves. The possible continued exclusion of non-authorised persons where they act for reward – but also arguably where they do not – is a particularly challenging issue. There are currently no exemptions for rights of audience or rights to conduct litigation being carried out otherwise than for or in expectation of any fee, gain or reward.

The continuation of this position needs to be considered, along with the practice of paid McKenzie Friends or similar being allowed by judges to appear[24]. If it does, then consideration might need to be given to removing the exemption that currently applies under Schedule 3, paragraph 3(10) for court-related reserved instrument activities.

Finally under this sub-heading, the public interest could also justify continuing authorisation for

- *the administration of oaths*.

The reliance that can be placed on oaths duly administered has many public good benefits in securing confidence and efficiency in the administration of justice (in relation, say, to affidavits), as well as in transactions and appointments (such as a change of name or power of attorney). This potentially avoids the costs and uncertainty of establishing or contesting what would be otherwise disputable statements.

The possible consequences of an oath being improperly administered are as varied as the situations in which they are required, from a doctor embarking on his or her career to a witness giving evidence in court. In some situations rectification may be possible simply by the client involved swearing a valid oath[25]; in others, irreparable harm may have occurred.

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24. The Judicial Executive Board have very recently concluded their review of representation by McKenzie Friends (available at: https://www.judiciary.uk/wp-content/uploads/2016/02/MF-Consultation-LCJ-Response-Final-Feb-2019.pdf), saying (at page 3): "The JEB remain deeply concerned about the proliferation of McKenzie Friends who in effect provide professional services for reward when they are unqualified, unregulated, uninsured and not subject to the same professional obligations and duties, both to their clients and the courts, as are professional lawyers. The statutory scheme was fashioned to protect the consumers of legal services and the integrity of the legal system. JEB's view is that all courts should apply the current law applicable to McKenzie Friends as established by Court of Appeal authority."
25. Every commissioner for oaths should state when and where each oath is taken (Commissioners for Oaths Act 1889, section 5). Failing to make such a statement would therefore render an oath invalid, as would swearing an oath before a person who was not a commissioner for oaths or who was representing a party in legal proceedings in which the person swearing the oath was involved.

A significant part of the reliability of an oath and the credence which may be attached to it is a consequence of the standing of the commissioner for oaths who administered it. For this reason, there are criminal penalties attached to forging or fraudulently altering a commissioner's seal or signature, or knowingly tendering or using an affidavit having such a forged or fraudulently altered seal or signature[26].

While this may serve to punish the perpetrator involved, it will do little to rectify any harm caused to an innocent client or third party relying on or affected by the relevant document. Again, therefore, the continuation of authorisation for this legal activity, to achieve the public good identified (as well as some incidental after-the-event consumer protection), could be justified.

There are, of course, many documents which are of public importance that do not need to be sworn (such as a passport application or a will); these documents are not currently subject to any form of reserved legal activity. Documents that are notarised (cf. paragraph 4.2.2 below) are also regulated separately.

It is arguable that the special status of the administration of oaths should derive from the status of the person administering the oath being in some way an officer of the court or other public official. This makes it questionable whether the authorisation should be extended (as now) to essentially all authorised persons.

The training to discharge this reserved function currently seems to be superficial (at best), and the activity is often carried out with little regard for its solemnity and by those who often take the fee as a personal reward (even where they are employed by a firm).

Consideration might therefore be given to confining the authorisation to administer oaths to those authorised persons who are separately trained and accredited in respect of future public good legal activities. This authorisation might possibly be linked to those already authorised in respect of activities related to being an officer of the court, namely, rights of audience or to conduct litigation, and the preparation of court-related reserved instruments, and to notaries. The training for these rights should include appropriate training for the administration of oaths.

Again, the absence of an exemption for services provided without reward appears appropriate: the nature of the oath and the value that must be attached to it suggest that oaths administered by non-authorised persons for free cannot be considered to carry the required degree of credibility or veracity. For the same reason, self-administered oaths would be nonsense.

4.2.2 Notarial activities

Securing the effective administration of justice and global legal reputation within the UK, as well as protecting and promoting confidence in the global trading position of 'UK plc', can be argued to justify the continuing need for before-the-event authorisation for:

- *notarial activities*.

The existence of well-defined and enforceable property rights is also important for the proper and effective functioning of a market economy. So, in the context of the mandatory use of a notary, Van den Bergh & Montangie (2006: pages 8-9) point out (though perhaps in language more familiar to economists):

> Through the mandatory mediation of a [notary], the government aims at minimising the risk that transactions cause legal uncertainty, and thus attempts to minimise the negative effects on

26. Commissioners for Oaths Act 1889, section 8.

> welfare. The [notary] acts as a compliance officer who will exert an *ex ante* control of the quality of the transactions. In this way *ex post* transaction costs, such as litigation costs are reduced or even totally eliminated. Obviously, this creates benefits for the parties involved, but the mediation of the [notary] transcends this micro-level, which is why it is classified as a public function. There are positive externalities for the community as a whole: the government saves resources, otherwise engaged in a more extensive judicial apparatus, and third parties have more and correct information concerning a certain transaction.

This quotation emphasises the public function of notarial activities, and supports the proposition that they achieve a public good and play a role in generating and protecting economic wealth. The role of notarial activities particularly assists international commerce, although private individuals may also make use of a notary's services.

The reservation of notarial activities (which can only be carried on by notaries) is somewhat unhelpfully – and circularly – defined in Schedule 2 to the 2007 Act as "activities which … were customarily carried on by virtue of enrolment as a notary in accordance with section 1 of the Public Notaries Act 1801". In other words, notarial activities are what notaries do! A more helpful description can be found in Ready (2013: page 21):

> a notary public in England may be described as an officer of the law appointed by the Court of Faculties whose public office[27] and duty is to draw, attest or certify under his signature and official seal in such a manner as to render them acceptable, as proof of the matters attested by him, to the judicial or other public authorities in the country where they are to be used, whether by means of issuing a notarial certificate as to the due execution of such documents or by drawing them in the form of public instruments; to keep a protocol containing originals of all instruments which he makes in the public form and to issue authentic copies of such documents; to administer oaths and declarations for use in proceedings in England and elsewhere; to note and certify transactions relating to negotiable instruments, and to draw up protests or other formal papers relating to occurrences on the voyages of ships and their navigation as well as the carriage of cargo in ships.

Notaries therefore verify the capacity of their clients to enter a transaction, confirm the identity of clients, and record all of this information; they maintain detailed records, including copies of all documents certified with copies of the relevant clients' identity attached.

This record-keeping forms a paper 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 have already been made 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. Without regulatory force, 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.

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27. The nature of this public office is an important part of the public interest consideration, and provides a point of distinction for notaries in England & Wales as opposed to the United States (where notaries are typically lay persons and unregulated). As a consequence of this public office, a notary's primary duty is to the integrity of the notarised transaction, rather than to a client.

Given the nature and importance of notarial activities, and the credence that must be placed on the notary's verification (and professional regulation and standing to back it up), the current exemption in Schedule 3, paragraph 5(4) of the Legal Services Act for individuals carrying out notarial activities otherwise than for or in expectation of a fee, gain or reward seems out of place, and consideration might be given to whether this exemption can be justified on public interest grounds.

There is arguably a stronger case in relation to notarial activities than there is for the administration of oaths (which has no such exemption). There is also no case for self-representation here: an individual cannot credibly provide notarial services for themselves when the whole rationale of notarial services is *independent* verification.

In the current framework, notarial activities remain the one reservation that is limited to just one regulator, the Master of the Faculties. Questions for the future concern whether this should continue, whether other regulators should be allowed to authorise the carrying on of notarial activities (especially since the vast majority of notaries are also qualified as solicitors), or whether, given the distinct nature of notarial activities, they should be treated as a special case and removed from the framework for regulation of legal services.

4.2.3 Immigration advice and services

Immigration advice and services are currently regulated, but not reserved, activities. Under the Immigration and Asylum Act 1999, 'immigration advice' relates to a particular individual in respect of the following matters, provided that it is not given in connection with representing an individual before a court in criminal proceedings or matters ancillary to criminal proceedings (section 82(1)):

(i) a claim for asylum;
(ii) an application for, or for the variation of, entry clearance or leave to enter or remain in the United Kingdom;
(iii) an application for an immigration employment document;
(iv) unlawful entry into the United Kingdom;
(v) nationality and citizenship under the law of the United Kingdom;
(vi) citizenship of the European Union;
(vii) admission to Member States under EU law;
(viii) residence in a Member State in accordance with rights conferred by or under EU law;
(ix) removal or deportation from the United Kingdom;
(x) an application for bail under the Immigration Acts or under the Special Immigration Appeals Commission Act 1997; and
(xi) an appeal against, or an application for judicial review in relation to, any decision taken in connection with a matter referred to above.

'Immigration services' means making representations in connection with one or more of these matters, on behalf of a particular individual, either (a) in civil proceedings before a court, tribunal or adjudicator in the United Kingdom, or (b) in correspondence with a Minister of the Crown or government department.

The original suggestion in 2005 in the legal services white paper[28] that these activities should become reserved was not pursued in the Legal Services Act 2007 for policy and pragmatic reasons. This could now be revisited.

The public interest must be defined by reference to a State or territory[29], and the right of individuals to participate in society is an integral part of whose public interest is at stake and by reference to which conception of 'the public' it is framed. It might therefore be suggested that it is in the public interest that advice and representation in relation to a citizen's status should be given only by those appropriately qualified.

This would help to secure the public interest in ensuring that only those who are entitled to the benefits of citizenship have the rights attached to it, but also that those who are so entitled are then able to participate fully and equally (cf. paragraph 3 above).

Consequently, there is an argument that only those who are legitimately entitled to settle in our society should expect the public interest to further their interests as part of the collective. The question of establishing who is or is not so entitled could arguably be founded only on the advice and representation of those who are suitably authorised to provide it. This could then support (as originally indicated in the legal services white paper)

- *immigration advice and services*

becoming public interest legal activities requiring before-the-event authorisation.

Given that the current notion of reserved legal activities is specific to England & Wales, consideration would need to be given to whether there is any insurmountable difficulty in having the same activities regulated differently (by a different regulator with comparable powers) in Scotland and Northern Ireland.

There would also be a consumer protection benefit (as intended by the 1999 Act) in that those seeking to clarify or confirm their immigration or asylum status should not be represented by those who are not appropriately trained and qualified.

After-the-event complaint or compensation is likely to be a most inadequate remedy for someone denied a right to enter or reside, or who is wrongly deported to a country in an asylum case, as a result of incompetent or ineffective advice or representation.

Consideration would need to be given to whether self-representation should be allowed (there are arguments both ways), but it is difficult to see any justification on such an important public interest issue for any exemption for those who are not appropriately authorised choosing to act without reward.

A recent report, JUSTICE (2018) identified a number of instances where unqualified representation has led to significant concerns about the administration of justice and its quality.

The sub-text of the assessment has so far assumed that reservation might continue as a distinct concept in legal services regulation. Were it to be replaced by regulation that attaches different forms of regulatory consequences to some legal activities but not all, and without the label of 'reserved' activity, there might be a less convincing case to change the current position under which immigration advice and services are already subject to before-the-event regulation.

28. Cf. Department for Constitutional Affairs (2005: Appendix B).
29. This is implicit in the references to 'citizens' and 'society' in the articulation of the public interest suggested in LSR-1 (2020) and repeated at paragraph 3 above.

However, given the challenges and shortcomings identified in JUSTICE (2018), and the current structure that requires solicitors and the SRA to operate under a different regulatory framework for immigration advice and services[30], the matter is worth further consideration.

4.2.4 Public law advice and services

Immigration advice and services are addressed separately in paragraph 4.2.3 above because these are already regulated (albeit not currently reserved) legal activities, but immigration is just one of a number of areas involving legal advice and representation that affects the individuals in their relationship with the State[31]. Others include: crime and human rights, social welfare and housing, health care, education, taxation, planning, infrastructure and the environment.

To the extent that elements of these relationships require governmental or regulatory decisions, those decisions can be challenged in courts or tribunals. Absent self-representation, where the exercise of rights of audience is a regulated activity, then someone with authorisation for the relevant rights is required to appear, and the public interest in the effective representation of a party, in access to justice and in the effective administration of justice is thereby secured (as discussed in paragraph 4.2.1 above).

However, where non-contentious advice or services are needed, arguably different considerations apply to the question of whether or not the provider of that advice and service should be required to be appropriately accredited or qualified in order to offer advice on a paid basis.

Such advice actually or potentially affects an individual's relationship with the State, and therefore goes to the heart of maintaining the fabric of society and enabling the legitimate participation of citizens in it (the two key components of the conception of the public interest articulated in paragraph 3 above).

This raises a question of whether the public interest requires that

- *public law advice and services*

should be regulated legal activities and providers authorised.

Before-the-event authorisation could provide assurance of competence and experience in circumstances where an individual's participation in a relationship with State bodies is forced, where the citizen is often vulnerable, and where after-the-event redress will too often prove inadequate.

These areas of law are also areas in which there will usually be a considerable asymmetry of knowledge and resource as between the individual and the State. Indeed, these are often some of the most technically complex areas of law and affect the most vulnerable in society.

Access to appropriately qualified advice is part of the way in which, through regulation, the public interest could address this imbalance. It would be consistent with the statement advanced in LSR-1 (2020: paragraph 3.7) supporting "full participation in society based on fairness and a balance in relationships such that one cannot inherently take advantage of another. The ability to take advantage could relate to an imbalance or asymmetry of power".

30. The following comment (JUSTICE 2018: paragraph 3.57) points to a particular concern: "we were surprised to learn that the OISC standard of accreditation is not equivalent to the Law Society's Immigration and Asylum Accreditation Standards. We could see no immediate justification for that".
31. In this context, 'State' includes central and local government and their agencies, as well as regulatory authorities.

It would further be consistent with the view advanced by Mates & Barton (2011: page 183) that:

> Although there are no universally accepted criteria, reasons for which one party might be described as weaker include the economic circumstances of the contracting parties, their professional skills, and the fact that one party has no choice but to enter into the contract.

The use of the word 'contract' in this context should perhaps be interpreted widely: there are many circumstances where the might and resources of the State are ranged against the citizen and there is 'no choice but' to respond – criminal charges, immigration, welfare benefits, taxation, and the like.

As with immigration advice and services, there would also be a consumer protection benefit to reservation in that those seeking to clarify or confirm their rights in relation to the State and public bodies should not be represented by those who are not appropriately trained and qualified. After-the-event complaint or compensation is likely to be an inadequate remedy for someone wrongly denied, say, healthcare or housing, as a result of incompetent or ineffective advice or representation.

Again, self-representation should be allowed, but it is questionable whether there should be any exemption for others who are not appropriately authorised choosing to act without reward.

It might be that it would not be sensible to introduce a 'catch-all' requirement for before-the-event authorisation for all public law advice and services. Instead, a regulator might be empowered to make a risk-based assessment in relation to different types of advice and services, or in relation to particular types of (vulnerable) consumers, or in relation to certain types of provider.

The consequence of such a targeted assessment might then be identified conditions in which one or more of before-, during, and after-the-event regulation could be required (cf. LSR-4 2020: paragraph 4.1).

4.2.5 Property-related activities

It has arguably become quite difficult to discern the 'mischief' that the current property-related reservation is intended to address[32]. Under the Legal Services Act, the concept of 'reserved instrument activities' means preparing any instrument of transfer or charge for the purposes of the Land Registration Act 2002, or making an application or lodging a document for registration under that Act.

For this purpose, an 'instrument' includes a contract for the sale or other disposition of land (except a contract to grant a short lease within the meaning of s. 54(2) of the Law of Property Act 1925), but excludes wills and other testamentary instruments, agreements not intended to be executed as deeds (other than the contracts already mentioned), letters or powers of attorney, and transfers of stock that contain no trust or limitation (Legal Services Act 2007, Schedule 2, paragraph 5(3) and (4)).

The reservation also extends to preparing any other instrument relating to real or personal estate for the purposes of the law of England and Wales (Schedule 2, paragraph 5(1)).

32. Indeed, the historical analysis in Mayson & Marley (2010: paragraph 2.4.2) suggests that the origins had less to do with any perceived mischief, but more with Pitt offering a 'consolation prize' to lawyers in return for higher taxes on articles of clerkship and practicing certificates.

There are exemptions in respect of:

(a) farm business tenancies where the activity is carried out by a Fellow of the Central Association of Agricultural Valuers, or a Member or Fellow of the Royal Institution of Chartered Surveyors (Schedule 3, paragraph 3(5) and (6));

(b) a person employed merely to engross the instrument or application (Schedule 3, paragraph 3(9)); and

(c) an individual who carries on the activity otherwise than for, or in expectation of, any fee, gain or reward (Schedule 3, paragraph 3(10)).

Before land registration (or still for first registration of title[33]), there would have been a strong public interest argument for suggesting that those who verified title (and thereby ensured the buyer of good title to the property acquired) should be appropriately qualified and experienced. In fact, assurance could reasonably be sought both by the State (to provide substance to the State-backed guarantee inherent in land registration) and by the buyer (to provide greater certainty and security to the purchase).

There are, therefore, public interest justifications (both public good and consumer protection) for the proper registration of title. The advantages are expressed by the Land Registry in this way[34]:

> Registration supports home and property ownership and the secured credit market by:
>
> - providing state-backed registration, giving greater security of title
> - providing greater protection against the possibility of losing title by adverse possession
> - indemnifying the proprietors against any loss if they are deprived of their state-backed title on a rectification of the register
> - introducing certainty and simplicity into conveyancing
> - setting out, or referring in the register to, all the rights that benefit and affect the title other than certain overriding interests
> - showing the general extent of the land in each title by means of a title plan
> - ensuring that capital can circulate freely in the economy by making land readily available as security
> - making large holdings of land and portfolios of charges readily marketable.

These considerations are only relevant, of course, to registered title. However, if appropriate expertise would be justified in relation to first registration because of the requirement to investigate hitherto unregistered land, logically it should also apply to any other transactions and transfers relating to unregistered land.

The potential complexity and uncertainty of unregistered title strongly suggest that appropriate expertise should be applied in transactions involving transfers and other dealings in unregistered real estate. This would offer consumers confidence in the competence of the practitioner as well as a degree of protection in an otherwise potentially uncertain and complex process.

For these reasons (and to fulfil public good objectives in relation to registered land, and consumer protection objectives in relation to unregistered land), there is a case for examining the reserved instrument reservation in respect of:

(a) preparing any instrument for the purposes of first registration under the Land Registration Act 2002;

(b) making an application or lodging a document relating to first registration under that Act; and

33. About 13% of land in England & Wales is still unregistered: www.landregistry.gov.uk.
34. See http://www.landregistry.gov.uk/professional/guides/practice-guide-1.

(c) preparing any other instrument relating to unregistered real estate in England and Wales.

In these circumstances, authorisation should logically extend to the preparation of any contract for the sale or other disposition of the land in question.

However, even in relation to registered land, there are further – and broader – justifications that merit exploration. First, despite the Land Registry's reference to the State-backed guarantee of title, there are still overriding interests, local land charges, and possibly other obligations or restrictions which could affect the value of the property (and therefore the value of any security) or the ability to use it.

There are, therefore, potential (and avoidable) risks to the client that are not covered simply by registration of title, and the involvement of appropriately qualified and experienced advice would reduce the risk of consumer detriment arising from ill-advised transactions or inadequate representation.

Second, there is a further dimension to confidence and efficiency of process that arises from the involvement of authorised persons (such as solicitors and licensed conveyancers). At the point of completion, there will often be a mortgage to be discharged on the property being sold. The buyer will need to know that title to the land will pass without being subject to that financial charge.

There is a timing issue: until sellers receive the buyers' funds from the sale, they are not in a position to discharge their secured loans, and therefore could not give the assurance of unencumbered title.

This conundrum is usefully solved by the seller's conveyancer giving an undertaking to the buyer that the funds received will indeed be used to discharge the mortgage. On the basis of that undertaking, the buyer should have the confidence to complete the purchase even though at the moment of completion the property has not yet been released from the mortgage.

Further, both the buyer and seller can have confidence that their money in the hands of their respective authorised conveyancers is protected by the approved regulators' arrangements for the protection and repayment of client money if the conveyancer absconds with it.

If there was any danger that the 'chain' of simultaneous conveyancing transactions might break down, the efficiency of the conveyancing process and transfer of title to real estate could be compromised to the detriment of society at large.

The conveyancing 'chain' simply could not work if every party had to be physically in the same place at the same time, simultaneously exchanging bankers' drafts. The public good of an efficient and reliable property market therefore depends on the credibility and enforceability of conveyancers' undertakings.

It is difficult to accept that this should arise merely as an incidental (or coincidental) benefit of the conveyancer being an authorised person in respect of a different reserved legal activity. The public interest might suggest that such an assurance should arise as a direct result of a relevant regulatory intervention.

Confidence in the conveyancing market, and its efficiency, is therefore underpinned by the undertakings of conveyancers. The regulation of the practitioners (whether solicitors or licensed conveyancers, or others in the future) is crucial. Their undertakings are binding as

a professional obligation[35], and are backed up by professional indemnity cover and compensation fund arrangements.

However, it should be noted that these protections are all forms of during-the-event regulatory obligations (cf. LSR-4 2020: paragraph 4.3), albeit ones that presently only flow from before-the-event authorisation. There is a question for the future about whether such during-the-event obligations could be imposed on relevant practitioners independently of authorisation.

On this basis, one could conclude that the current reservation is too narrowly drawn:

(a) In relation to registered land, there is a justification for regulation founded on consumer protection. The 'guarantee' of title registration is incomplete if there are risks to the quality of the title and the enjoyment of the property potentially compromised by inadequate investigation or representation. There is also risk of fraud and practitioners absconding with purchase money or proceeds of sale. Regulation offers either or both of an assurance of competence or additional protections.

(b) On even stronger ground, however, is the public good in the effective and efficient operation of the housing market, in confidence in land registration, and in some protection to consumers engaged in transactions involving unregistered land. The purpose of regulation here would not be related directly to the validity of the contract, or completing the land registration process. It would be to protect the public (economic and social) interest in the credibility and reliability of the property market – including the significant contribution to this of conveyancers' undertakings, as discussed above[36].

Accordingly, if regulation is to secure the public good objective in (b) (as well as offering consequential protection to the client, based on the importance of the transaction, the asymmetry of information between adviser and client, and the consequences of poor advice or dishonesty, referred to in (a) above), then the regulated activity would need to be drawn differently and more broadly than at present.

It may well be that the public interest in public good benefits and consumer protection coincide on this issue: much will depend on the rules of conduct and discipline that apply to those authorised to carry on conveyancing and to the enforcement of their undertakings, as well as the existence of indemnity and compensation arrangements that are sufficient to cover the value of the property concerned[37].

To be effective, all of these provisions rely on enforcement powers (rather than voluntary self-regulation, from which rogues could easily exclude themselves), and this might tip the balance in favour of reservation. More accurately, perhaps, the balance is tipped in favour of regulation of some kind rather than before-the-event authorisation in particular: there are

35. The obligations of undertakings are onerous, in that the court will normally require a solicitor (and, presumably, a licensed conveyancer) to perform an undertaking (though it does have power to order instead that the solicitor make good any loss arising from a failure to perform): *Clark* v. *Lucas Solicitors LLP* [2009] EWHC 952. Conveyancers therefore need to be very careful in offering undertakings: for example, if a conveyancer has undertaken to discharge a seller's outstanding mortgage in full then, subject to the discretion of the court, the undertaking must still be fulfilled even if the proceeds of sale are insufficient to meet the debt or the conveyancer has not received the proceeds of sale.
36. It must follow that all practitioners for the purposes of this regulated activity should be able to offer similar confidence in their undertakings through professional obligations, indemnity insurance and compensation fund arrangements, and regulators would need to assure themselves that this is the case.
37. Unlike bank deposits, where consumers are able to split their cash among a number of banks to gain the advantage from each of deposit protection, conveyancing transactions cannot be split. The dependence of each client on the scope and enforceability of their conveyancers' compensation arrangements is therefore key to consumer confidence.

other regulatory schemes which require parallel protections to those found for lawyers (see the Compensation Act 2006, for example) that could be applied to regulation in this area.

On this view, (b) above might offer a better foundation for regulation. To achieve these broader objectives, one approach could be to extend the current reservation to apply to:

- *conveyancing services*.

These could be defined along the lines of section 11 of the Administration of Justice Act 1985: "the preparation of transfers, conveyances, contracts and other documents in connection with, and other services ancillary to, the disposition or acquisition of estates or interests in land", and would include the grant and assignment of leases (other than short leases).

As with court-related reserved instrument activities (cf. paragraph 4.2.1 above) and notarial activities (cf. paragraph 4.2.2 above), given the reasons outlined here for a public good justification for the broader regulation of conveyancing services, there is a need to consider withdrawing the current exemption in paragraph 3(10) of Schedule 3 for individuals who carry out the relevant activities otherwise than for or in expectation of any fee, gain or reward.

The reasons for regulation would be connected to the regulated status of someone acting on another's behalf: these are not achieved by someone who is not regulated, and the absence of reward would not seem to outweigh the public interest in the need for regulation. This would not, of course, prevent someone who is regulated acting without reward.

The proper protection of patents, trade marks, designs and copyright in itself serves a public good and consumer protection function, in that it offers incentives for invention, innovation, research and development (for the economic benefit of society and UK plc) as well as discouraging others from misleading the public and consumers about the origins or quality of protected products or services.

The activities of patent attorneys and trade mark agents may not be carried on by those who are not appropriately qualified and registered, the professional titles are protected, and it is a criminal offence to use those titles when not registered (sections 274 and 276(1) and (6) of the Copyrights, Designs and Patents Act 1988, and section 84(1) and (4) of the Trade Marks Act 1994).

This suggests that

- *intellectual property activities*

might also be considered for before-the-event authorisation.

There are already statutory definitions that could form the basis for reservation (section 275A(7) of the Copyrights, Designs and Patents Act 1988 and section 83A(7) of the Trade Marks Act 1994): "work done for others for the purpose of applying for or obtaining patents or the registration of trade marks in the United Kingdom or elsewhere, or conducting proceedings before the Comptroller-General of Patents, Designs and Trade Marks relating to applications for, or otherwise in connection with, patents or the registration of trade marks".

As with immigration advice and services (paragraph 4.2.3 above), this assessment should not assume that reservation might continue as a distinct concept in legal services regulation. Similarly, if it were to be replaced by regulation that attaches different forms of regulatory consequences to some legal activities but not all, and without the label of 'reserved' activity,

there might be a less convincing case to change the current position under which intellectual property activities are already subject to before-the-event regulation.

4.3 Regulation for consumer protection reasons

There are some aspects of 'public good' regulation covered in paragraph 4.2 above that might also be conceptualised as consumer protection regulation, often on the basis of the before-the-event assurance provided for these 'credence' services.

For example, rights of audience could also be included here, on the basis that they protect the client's physical, personal, social or economic well-being (cf. paragraph 2.2 above). Similarly, advancing a public good rationale in relation to real estate transfers could lead to broader regulation than currently exists, with consequential consumer protection benefits (cf. paragraph 4.2.3 above).

It was suggested at the beginning of paragraph 4.2 above that regulation justified by the public good might be granted as a matter of principle and that evidence of actual or potential consumer risk or detriment should not be required. Regulation to provide consumer protection could, however, be different: it reflects risks to personal circumstances, and arguably evidence of those risks should be required as part of the justification for regulatory intervention. Evidence would be needed of the specific risks and detriment, and the implications for consumers of those risks or detriment arising.

This might include, for example, circumstances in which consumers are widely known to receive incompetent or sub-standard advice and representation; where there are known to be providers preying on vulnerable consumers, providing services where they are not required, or in combinations or at prices that take advantage of the vulnerability; and where there are instances of providers absconding with consumers' money.

In probably all of these instances, 'rogue traders' would not choose to bring themselves within any framework of self-regulation, and would almost certainly actively arrange their businesses either to avoid or ignore mandatory regulation.

If risk and detriment were known to exist and, in these and similar circumstances, consumers were offered no mandatory alternative which would allow them to check the regulatory status of advisers, they would be knowingly left to the devices and deviance of an unregulated market.

The question then becomes whether, as a matter of public interest, there are some legal activities that are so important to consumers, or the need to protect them so evident, that they should not be left to market forces and the general principle of 'buyer beware', or to the application of general consumer law and trading standards protection. This paragraph explores those activities.

The CMA's market study identified a number of areas in which consumers and small businesses are considered to be at a disadvantage under the current framework, largely because of information asymmetries and infrequent purchase (cf. LSR-0 2020: paragraph 3). However, there are some buyers and users of legal services who are better informed and frequent purchasers. These are typically larger corporate and institutional organisations, many of which have their own internal legal team.

A further question therefore arises in this assessment of perceived risks and need for consumer protection whether the risks and need apply with equal force to these more sophisticated buyers and users of legal services. If they do not, it might be that a more proportionate and risk-based approach to regulation would not impose the same regulatory interventions in all circumstances, and might – as with the Legal Ombudsman's scheme –

exclude those who do not qualify as individual consumers or micro-enterprises[38], allowing them to make their own decisions – and take the (presumably informed) consequences.

4.3.1 Will writing

Despite full investigation and proposals to the Lord Chancellor from the Legal Services Board in 2013, will writing is not presently reserved to authorised persons or, indeed, formally regulated at all – except when carried out by someone who is an authorised person in respect of a reserved activity and consequently regulated by their approved regulator in the provision of all services.

The previous unwillingness to reserve will-writing activities can be revisited as part of this review. There might be a case, supported by evidence, for before-the-event authorisation being extended to:

- *the preparation of a will or other testamentary instrument*; and
- *the preparation or lodging of a power of attorney*.

This need not necessarily be based on broad consumer protection issues – such as pressure selling or cold calling, inappropriate bundling or pricing of services, misleading advertising, and the like – which can be covered by other approaches and for which before-the-event regulation could very easily be argued to be a disproportionate and unnecessary response.

Rather, authorisation might be justified on the basis that, as a result of unregulated provision, detriment to the consumer could be caused by incompetent, inadequate or biased advice or by an invalid will or one that does not properly give effect to the testator's intentions – especially in circumstances where the clients are often elderly, in ill-health or otherwise vulnerable.

Consumer detriment might arise, for example, from: the adviser failing to address the tax consequences of testamentary dispositions resulting in avoidable or higher-than-necessary tax liabilities to the estate; the adviser failing to consider the legitimate claims of some potential beneficiaries, resulting in post-death disputes and cost to the estate; or the adviser failing to ensure a valid execution (when, for example, the attestation is witnessed by a beneficiary).

Given that many failures of advice and representation in these circumstances will only come to light when the clients have died and can no longer articulate or clarify their intentions, or execute a new, valid will, after-the-event compensation will hardly ever represent an adequate or reasonable remedy and will almost certainly involve the estate in some cost and inconvenience.

Although it would be possible to regulate against the inappropriate 'bundling' of estate administration into will-writing engagements, regulation could give rise to an alternative approach. By bringing will writing directly into regulation, a set of the 'professional principles' (currently set out in section 1(3) of the 2007 Act[39]) and a regulator's conduct rules would come into play.

Rather than regulating separately against inappropriate bundling or charging, regulated persons who provide will-writing and estate administration services would instead be obliged

38. These are currently defined in European Commission Recommendation 2003/361/EC as a business or enterprise with fewer than 10 employees and turnover or assets of €2 million or less.
39. The professional principles are: 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.

to show that they had acted in the best interests of the client and could therefore be called on to justify to a regulator any bundling of services or charges made.

Given that such an issue is only likely to arise after the testator's death, there will always need to be an element of retrospective remedy. The advantage of authorisation would be to provide some before-the-event assurance to the testator that such inappropriate action is less likely with regulated providers and that his or her executors and beneficiaries would have some recourse.

Finally, in the public interest of parity of treatment within the United Kingdom, the power in Scotland to regulate will writing (see the Legal Services (Scotland) Act 2010, Part 3, Chapter 2, albeit that these provisions have yet to be brought into force) might be argued to strengthen the case for regulation in England and Wales.

It would seem sensible for testators to be able to draw up their own wills[40], and for an exemption to continue for individuals acting otherwise than for or in expectation of a fee, gain or reward[41]. As regulation for consumer protection, consumers should perhaps be allowed to make a free choice whether or not to gain the benefit of protection by instructing a regulated person.

While a case can be – and has been – made, it is perhaps appropriate to acknowledge here that the rejection of the previous recommendation by the Legal Services Board indicates that the threshold for regulation on this activity is high. It might also point to a broader issue in this review, namely the potential difference between 'reservation' and 'regulation'.

The CMA, in their market study, also remained to be convinced, but hinted at some need for regulation (Appendix A, page A42, paragraph 142):

> We have found that the nature of will writing, particularly consumers' difficulty in assessing quality and the potentially long delay before the will is used, means there is potentially a role for ex-ante regulation, eg training and entry requirements. The benefit of any such regulation would have to be weighed against the burdens it placed on businesses and the impact on choices for consumers. However, there is not clear evidence on how widespread consumer protection problems are and therefore the extent to which further regulation would be beneficial. More robust evidence about the unauthorised sector would allow this question to be assessed more comprehensively.

If, in the future, before-, during- and after-the-event interventions could be applied separately, there is a further policy question to be addressed. Even if a case can be made for regulatory intervention, it might be arguable whether before-the-event authorisation of will-writers should be required.

While it seems clear that after-the-event remedies alone would not be sufficient, adopting the CMA's position in relation to 'robust evidence', this might allow a future regulator to decide whether that evidence supported before-, during- and after-the-event regulation, or whether a combination of during- and after-the-event requirements would represent a more targeted and proportionate response.

4.3.2 Probate and the administration of estates

The current reservation of the preparation of papers for the grant of probate or letters of administration is possibly the most problematic of the existing reservations, and most difficult to justify in its current form. As with reserved instrument activities in relation to the transfer

40. In this context, there would not seem to be any reason to regard as 'preparation' for the purposes of this reservation any off-the-shelf will templates (whether paper-based or online) that are completed wholly by the testator with no interaction or advice (other than any offered by individuals without reward).
41. Arguably, this exemption should not be available to those who offer free will writing in expectation of being appointed as executor: such bundling seems to imply that the will is in fact written with some expectation of future reward.

of real estate (cf. paragraph 4.2.5 above), it might be that the current reservation is inappropriately drawn.

The CMA's conclusion on probate activities is expressed as follows (2016: Appendix A, page A68):

> 225. The probate reservation is narrow and does not extend to the administration of the estate, which involves handling of client's money and potentially may be a major source of consumer detriment. Hence, from a consumer protection perspective, the scope of the current reservation creates a regulatory gap. However, authorised providers are subject to strict requirements in relation to handling clients' money and their consumers benefit from greater redress mechanisms. The impact of the gap is therefore currently limited, given the limited role played by unauthorised providers. However, it may become a more significant issue in the future if consumers become more aware of unauthorised providers, potentially because of increased price transparency, but they will continue to assume that all legal services providers are regulated in the same way.
>
> 226. The narrow probate reservation does not appear to be a major entry barrier for unauthorised providers wishing to offer an estate administration service that is similar to the one offered by authorised providers. In fact, reservation can be easily worked around by unauthorised providers and typically the reserved element is outsourced to authorised providers, although outsourcing might create extra costs and delays for consumers and may be a source of inefficiencies.

Under the current reservation, the only part of the entire process of dealing with an estate that is reserved to authorised persons is preparing papers on which to found or oppose a grant of probate or of letters of administration[42]. The public good justification for this bears examination.

There are numerous tasks and processes that must be completed during the administration of an estate. Amongst these are activities that appear more obviously open to abuse than that which is reserved, such as collecting the assets due to the estate, releasing monies to pay any debts or make distributions, or preparing the estate accounts.

From a consumer protection viewpoint, it is difficult to account for these steps in the probate process not being carried on by regulated persons, while the preparation of papers to apply for a grant of representation (which papers are then scrutinised by a public official) is.

Although problems might arise in relation to contested probate, or estates involving foreign assets, it is questionable whether these, by themselves, represent a strong enough argument to support authorisation. In these circumstances, a sensible executor or administrator would probably seek professional advice.

The strongest reason for any probate regulation therefore appears to lie in the protection of the estate's assets from maladministration or misappropriation by someone carrying out estate administration for reward. It would be a consumer protection justification.

Although there are obviously criminal sanctions if there is evidence of fraud or misappropriation, these would not necessarily help the estate or its beneficiaries. The standard of proof threshold might deter prosecution in cases that are less than clear; nor would the protection or restitution of the assets be guaranteed.

On balance, it might be that there will be significant and irrecoverable loss for which available after-the-event redress is an inadequate remedy.

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42. The equivalent Scottish process of 'confirmation services' is similarly narrowly drawn: cf. Legal Services (Scotland) Act, section 90(2).

There is, therefore, a case for consumer protection regulation. However, in submissions to the CMA, there were also suggestions of potential public good justification that (Appendix A, page A62, paragraph 207):

> ensures that the inheritance tax is correctly calculated and properly collected. Specifically, the Law Society noted that reserved activities, including probate, are critical for a well-functioning economy and rely on the trust placed in authorised persons to act not only in the interests of the client but to uphold the duties they hold to others (eg in relation to probate, to HMRC or other third parties) to ensure the effective functioning of the legal services sector.

On balance, it is not clear why reservation or specific regulation (such as prior authorisation) would necessarily represent a proportionate response to secure duties arising separately under tax legislation.

Interestingly, the 'administration' of an insolvent company's 'estate' is a regulated – though not currently reserved – activity (cf. paragraph 4.3.3 below). To regulate this while not regulating the administration of a deceased individual's estate could seem illogical. The risks to the assets in the hands of those who are not suitably qualified or regulated are arguably no different.

The equivalence of processes, as well as the public interest in the efficiency of these State-authorised collections and dispositions of property, coupled with consumer protection for creditors and beneficiaries, could provide a strong argument for comparable regulation in both cases.

Also of interest is that if part of the rationale for regulation is the potential benefit of compensation fund arrangements that arise from being an authorised person, this might inhibit the authorisation of chartered accountants, for whom there are no such arrangements (even though the ICAEW is the largest licensing authority of insolvency practitioners, who also collect assets).

As with reserved instrument activities, therefore, it is arguable that the current probate reservation is too narrow. In the public interest of consumer protection, consideration could therefore be given to whether

- *the preparation of papers on which to found or oppose a grant of probate or letters of administration*; and
- *the administration of an estate following a grant of probate or letters of administration*

need to be regulated legal activities.

Arguably, any case for before-the-event authorisation is weakened by the new approach to online probate applications[43] and by insolvency practice being regulated rather than reserved. However, this would not weaken the case for *regulation*, but instead put the emphasis on the choice of regulatory approach.

A balance could be explored between an approach that would offer before-, during- and after-the-event regulation (as reservation would now), as opposed to an alternative approach that did not require authorisation but did incorporate during-the-event requirements in relation to, say, handling of client money and participation in a compensation fund, as well as after-the-event complaints and redress mechanisms.

It might also be that the public interest requires relative parity of regulation and protection, even if the choice of approach is not identical.

43. See https://www.gov.uk/government/news/probate-applications-made-simpler-and-easier-with-online-service.

In the case of simple estates, administration by authorised persons would often not be required. If regulation is introduced, it might therefore be sensible to continue to allow executors and administrators to carry out the relevant activities themselves; whether there should also be a case for an exemption for individuals administering estates otherwise than for or in expectation of a fee, gain or reward could also be tested.

4.3.3 Insolvency practice

Insolvency practice is currently a regulated, but not a reserved, activity. It is an offence to act as an insolvency office-holder without being authorised as an insolvency practitioner. Acting as an insolvency office-holder includes acting as a liquidator, administrator or administrative receiver, trustee of a partnership, trustee in bankruptcy or under a deed of arrangement or in a sequestration, administrator of a deceased insolvent estate, or as a nominee or supervisor of voluntary arrangement.

Authorisation is given by a recognised professional body, or by the Department for Business, Energy and Industrial Strategy (through the Insolvency Service as an executive agency, which also acts as the oversight regulator for insolvency practice). The Insolvency Act 1986 applies across the UK; for England and Wales, the relevant recognised professional bodies are: the Law Society of England and Wales, the Institute of Chartered Accountants of England and Wales, the Insolvency Practitioners Association, and the Association of Chartered Certified Accountants.

At one level, as explored in paragraph 4.3.2 above, it is difficult to see why the distribution of assets of a 'deceased' company or business, or of an individual in financial distress, should be regulated when the administration of the estate of a deceased human being is not (unless the deceased was insolvent).

The potential mischief that could justify regulation in relation to the administration of estates, and the benefits to be derived from regulation, could apply with equal force to insolvency practice. There are assets to be collected and distributed, the value of the 'estate' to be preserved, the risk of assets being misappropriated, and the potential claims of the 'beneficiaries' to be met[44].

A case for the before-the-event authorisation of

- *insolvency activities*

(as carried out by persons acting as insolvency practitioners under the Insolvency Act 1986) might therefore arise from its current regulation and similarity to other reserved activities.

In one sense (as with immigration and intellectual property activities), before-the-event authorisation would not be necessary to achieve the benefits of regulation. However, the existence of multiple regulators, and of multiple regulatory frameworks for practitioners and regulators (such as solicitors and accountants, and the SRA and ICAEW), suggests that a new, principled approach to legal services regulation might at least suggest that consideration would not be inappropriate.

However, I understand that few insolvency case managers are now lawyers, suggesting that insolvency practice, although it does at its core involve legal advice and services, might be best left sitting outside the framework for legal services regulation.

44. One principal difference could be that executors and administrators of estates collect the deceased's assets and distribute them to beneficiaries in accordance with a will or the rules of intestacy; insolvency practitioners not only collect and distribute assets, but also have to apportion them among creditor 'beneficiaries' when there is not enough available for distribution to satisfy their legitimate claims.

As with estate administration (cf. paragraph 4.3.2 above), a more targeted approach to regulation might suggest that this consideration should examine whether before-, during- and after-the-event regulation is required, or whether a during- and after-the-event approach would be sufficient to address the assessed risks.

4.3.4 Claims management services

Although the Government in 2005 expressed an initial intention to add claims management to the list of reserved activities[45], this addition was not included in the Legal Services Act 2007. Claims management services can only be provided by those who are authorised under the Compensation Act 2006 or who are exempt. There are exemptions, for example, for lawyers, those subject to FSA regulation, charities and not-for-profit advice agencies, unions, and individuals who are not acting for reward.

The range of claims covered by the Compensation Act 2006 is broad and includes claims for: personal and criminal injuries; industrial injuries disablement benefits; employment-related payments, wrongful or unfair dismissal, redundancy, discrimination and harassment; housing disrepair; and in relation to financial products or services (paragraph 4(3) of the Compensation (Regulated Claims Management Services) Order 2006 SI No. 3319).

In section 4(2) of the Compensation Act 2006, 'claims management services' are defined as "advice or other services in relation to the making of a claim" for compensation, restitution, repayment of other remedy or relief, whether the claim can be made in legal proceedings or under a compulsory or voluntary scheme. This is elaborated in paragraph 4(2) of the Compensation (Regulated Claims Management Services) Order 2006 to mean advertising for or otherwise seeking out claimants, advising claimants or potential claimants, making referrals, investigating claims, and representing claimants.

This will mean that some claims management services would qualify as 'legal activities' under the Legal Services Act and some would not. Given that reservation can only presently be extended to activities that are legal activities, claims management services would not present a straightforward case under the current regulatory framework for legal services.

However, there are elements of claims management that are definitely legal activities (namely, "advising a claimant or potential claimant in relation to his claim or cause of action" and "representation of a claimant (whether in writing or orally, and regardless of the tribunal, body or person to or before which or whom the representation is made)": paragraphs 4(2)(b) and (e) respectively of the 2006 Order).

There was clearly a Parliamentary wish to regulate claims management activities – and particularly the claims-farming, referral and investigation elements where there was previous evidence of malpractice by unregulated businesses. However, this has, in the process, been extended to incorporate the provision of legal advice and representation.

As a result, authorised persons under the Compensation Act (who need not be lawyers but who are nevertheless subject to satisfying the regulator that they are competent and suitable to provide regulated claims management services) are able to provide legal advice and representation under a parallel regulatory framework.

The purpose behind the Compensation Act would clearly satisfy a consumer protection rationale for public interest regulation. The totality of claims management services as defined under the 2006 Act do not currently qualify as 'legal activities' under the Legal Services Act 2007, and could not therefore become reserved as a package of advice and services within the 2007 Act.

45. Department for Constitutional Affairs (2005: Appendix B, Section 7).

Further, if some claims management activities remained subject to the regulatory regime of the Compensation Act, while the legal activities elements became reserved under the Legal Services Act, there would potentially be a need for some businesses to apply to different regulators in order to continue providing the same range of services as now.

With a broader review and simplification of the statutory basis for regulating legal activities, and closely related or incorporated services, there might now be an opportunity for achieving the original intention of bringing claims management services within the same regulatory framework as other legal services. An alternative approach to regulation might provide an opportunity to remove the parallel framework in respect of claims management activities.

This suggests that consideration might be given to determine whether at least

- *claims management advice and representation*

should become a specifically regulated legal activity (defined for this purpose as in the 2006 Order).

These activities are so closely connected to – if not already part of – the rights of audience and conduct of litigation activities considered earlier (cf. paragraph 4.2.1 above) that there is a strong argument for treating them in the same way. Alternatively, consideration might be given to bringing all claims management services currently covered by the Compensation Act 2006 within the legal services framework.

4.4 Regulation of non-reserved legal activities

The Legal Services Act contains in section 12(3) a definition of 'legal activity' which – ignoring any reserved legal activity – is either or both of:

(i) the provision of legal advice or assistance in connection with the application of the law or with any form of resolution of legal disputes;

(ii) the provision of representation in connection with any matter concerning the application of the law or any form of resolution of legal disputes.

Judicial, quasi-judicial and mediation activities are excluded (section 12(4)).

If reservation or before-the-event authorisation remains the principal approach to providing regulation of legal activities where the public interest requires their direct regulation and performance by authorised persons, then the definition above provides a basis for regulation of non-reserved activities.

Authorisation can address before-the-event, during-the-event and after-the-event solutions in relation to the most critical legal activities[46]. For other legal activities, during-the-event protection or after-the-event remedies and redress (or both) might prove to be sufficient.

The current regulatory gap[47] excludes many legal services from the possibility of remedy or redress unless they happen to be provided by otherwise authorised persons. A 'de-coupling' of authorisation and redress could therefore be beneficial.

For example, a relatively simple extension of the Legal Ombudsman's jurisdiction to allow any client or other person affected by the provision of any legal activity (as defined above) to refer a complaint to the Ombudsman where the activity has been provided either by an

46. The nature and range of these solutions is addressed in detail in LSR-4 (2020: paragraph 4) on the focus of regulation.
47. Cf. paragraph 2.5 above, and LSR-0 (2020: paragraph 4.5).

authorised person or for, or in expectation of, any fee, gain or reward would extend after-the-event consumer protection without first requiring before-the-event authorisation.

The CMA recommends that consideration be given to an extension of the Legal Ombudsman's jurisdiction (2016: paragraphs 6.87), because at the moment access is effectively linked to providers who hold a professional title (cf. 2016: paragraph 6.66), and because consumers otherwise "need to use [a provider of alternative dispute resolution (ADR)[48]] (when … the ADR scheme has not been taken up by many providers and does not apply to business-to-business transactions) or sue their legal services provider through the courts (which is typically more costly and time-consuming … unless Trading Standards intervenes[49])" (2016: paragraph 6.32).

Such an extension could achieve two objectives. First, it would help to match consumer expectation and regulatory scope[50], and consequently generate greater confidence in legal services[51]. Second, it would allow the Ombudsman's remedy or redress in respect of all legal services, regardless of who provided them.

The Ombudsman's powers could be different in relation to complaints relating to an authorised activity, or where the legal activity in question is provided by a person who is otherwise regulated (for example, where non-contentious tax advice is provided by a member of the ICAEW).

In addition, although the professional principles (currently set out in section 1(3) of the 2007 Act) apply mainly to authorised persons, in reaching a determination on a complaint against a provider of non-reserved legal activities who is not an authorised person, the Ombudsman should be able to take those principles into account as though the provider were an authorised person.

The funding of such a broader approach would need to be considered carefully, though the relative informality of ombudsmen schemes should keep costs lower than formal regulation. If authorisation were no longer a precondition to the regulation of non-reserved activities, consumer access to the Legal Ombudsman might offer a way forward.

This might be available without the need for non-authorised providers of non-reserved activities to submit to a voluntary scheme. There could also be some variant of 'polluter pays', with discretion for the Ombudsman to award costs compensation against a frivolous or vexatious complainant.

In the same way that an authorised person can lose their licence to practise, consideration could be given to a power to determine that any individual or entity should be prohibited from providing one or more (or indeed all) of the legal activities because of conduct meriting such an outcome – whether the provider was previously an authorised person or not.

This could be reinforced by a public register of such prohibited providers of legal services – including those who lose or are denied a licence to practise by decision of a regulator or disciplinary tribunal, or by order of a court. There could, if thought necessary, be a new offence of providing legal activities for reward while on the prohibited register.

48. Under the Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015.
49. Which? (2019: pages 7-8) observes that: "One of the major weaknesses of the current consumer enforcement system is that it relies too heavily on local authorities…. Local authority Trading Standards Services (TSS) … have had to deal with cuts of more than 50% over the past seven years and some parts of the country have been hit particularly hard".
50. Cf. LSR-0 2020: paragraphs 4.4 and 4.5.
51. Cf. LSR-0 2020: paragraph 4.8.

Indeed, one might go a stage further and require the maintenance of a single public register of all those individuals and entities that (subject to limited exemptions and exceptions) offer legal services to the public for reward.

Such a register could disclose which activities a provider is authorised to carry on (where prior authorisation remains a condition), the appropriate regulator of that individual or entity, and (as above) any record of a prohibition of that provider.

This would offer transparency to consumers in knowing whether or not an individual or entity that they were using, or intending to use, was in any way regulated for (or prohibited from) carrying on one or more legal activities. Consumers would also know that, as a minimum, anyone on the register was subject to the jurisdiction of the Legal Ombudsman.

In this way, a distinction might then be drawn between higher-risk legal activities (which must be provided pursuant to before-the-event authorisation) and other regulated legal activities (which, at least, could all be within the Legal Ombudsman's jurisdiction, irrespective of provider or the need for voluntary submission to that jurisdiction).

It is a moot point whether this rather more 'all-inclusive' approach to legal services regulation amounts to 'full regulation' of the type this Working Paper said in paragraph 2.1 above that it was not going to contemplate! Arguably, it does not – at least in the sense that it would not entail all legal activities having to be carried on only by those who were legally qualified or subject to prior authorisation. On the other hand, it would – if 'full regulation' refers to *any* regulatory intervention in respect of *any* provider of *any* legal activity.

5. Conclusions

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

Using the public interest as a criterion, the case for regulation is stronger for some of the current reserved activities than others, and there could also be alternative or additional candidate activities. Whether the notion of 'reservation' needs to be retained should be considered, given that what would be most important in the public interest is some form of before-the-event authorisation.

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

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