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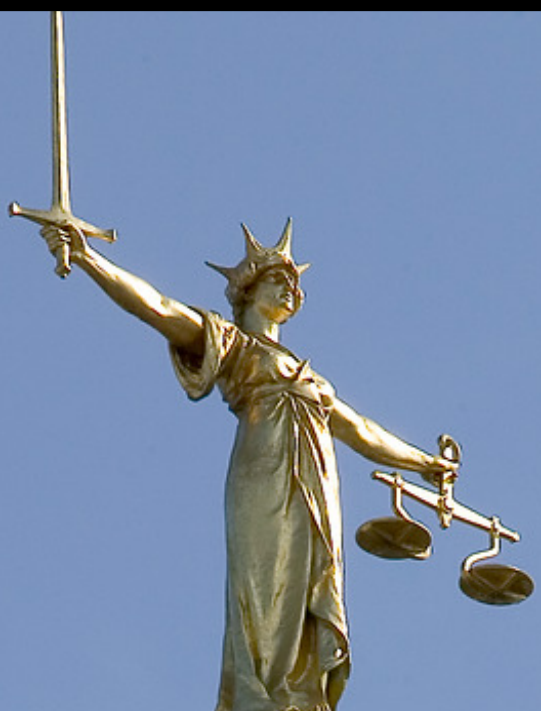

INDEPENDENT REVIEW OF LEGAL SERVICES REGULATION

The Form of Legal Services Regulation

Working Paper LSR-4 | March 2020

Stephen Mayson

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

www.ucl.ac.uk/laws

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THE FORM OF LEGAL SERVICES REGULATION

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1. Introduction

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

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

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

This project was undertaken independently and with no external funding.

This is 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.

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

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

Using the public interest rationale from LSR-1 (2020) as a criterion, the case for regulation is stronger for some of the current reserved activities than others, and there could also be alternative or additional candidate activities. LSR-2 (2020) suggested that the question of whether the notion of 'reservation' needs to be retained should be considered, given that what would be most important in the public interest is some form of before-the-event authorisation.
This, along with other forms of during-the-event and after-the-event approaches, could be applied to defined legal activities without necessarily needing to characterise them as 'reserved'. This might also allow after-the-event regulation to be applied in some form to all legal activities, or at least to provide protection to individual consumers and small businesses where it is most needed.

Having considered *why* legal services should be regulated and *which* of those services should fall within the scope of regulatory intervention, the third Working Paper (LSR-3 2020, *The focus of legal services regulation*[3]) turned to the potentially more challenging issues that arise from proper focus of that regulatory attention, whether that is on one or more of activity, title, individual, entity, or provider.

This Working Paper now explores the nature of risk in legal services, and the possible combination of before-, during- and after-the-event regulation as a more flexible way of providing targeted, proportionate and cost-effective intervention.

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

2. Forms of regulation

Once a policy decision has been taken on the legal services that should fall within the scope of regulation (cf. LSR-2 2020), and the appropriate focus for that regulation (cf. LSR-3 2020), the issue that next arises is what form that regulation should take and when it should be applied.

In its market study, the CMA suggested that (CMA 2016: paragraph 6.22) "an optimal regulatory framework should not try to regulate all legal activities uniformly, but should have a targeted approach, where different activities are regulated differently according to the risk(s) they pose rather than regulating on the basis of the professional title of the provider undertaking it".

The CMA continued (CMA 2016):

> 6.23 Adapting regulation to the level of risk means that the form of regulation might differ in practice across legal activities. For instance, regulation could:
>
> (a) set entry standards that providers (individuals or entities) are required to meet before they are entitled to provide certain legal activities, for instance through licensing of certain activities ('before-the-event regulation');
> (b) set training requirements to ensure that providers continue their professional development ('during-the-event regulation'); and
> (c) allow consumers to have access to specific redress mechanisms (for instance, access to the LeO, mandatory PII, and access to compensation funds) ('after-the-event regulation').
>
> 6.24 Regulations setting entry requirements on providers appear to be more appropriate for the activities that pose the highest risk to the primary objective. By contrast, during-the-event or after-the-event regulations are likely to be more appropriate for low-risk activities, although they may also be made available as an additional protection for higher risk ones.

The CMA's comments echo the earlier work of the Legislative Options Review (2015):

> 8.2 The current regulatory framework, through the entry point of the reserved legal activities, applies a regulatory 'gate' through which all forms of intervention then become possible. Authorisation to conduct one or more of the reserved activities requires before-the-event (BTE) regulation. Once through that gate, both during-the-event (DTE) and after-the-event (ATE) regulation are then also applied.
>
> 8.3 In this sense, the current forms of intervention are 'all or nothing'. The LSA therefore prescribes BTE regulation and DTE and ATE regulation follows. The LSA further prescribes certain types of DTE intervention (such as professional indemnity and compensation fund arrangements for ABSs) and ATE intervention (such as access to the Legal Ombudsman).
>
> 8.4 However, because of this prescription in the LSA, there is no opportunity for separate access to ATE intervention by the Legal Ombudsman for, say, consumers who have sought non-reserved legal services from unregulated providers.
>
> 8.5 Equally…, when a provider has been authorised for one or more of the reserved activities (for which BTE regulation is prescribed in the LSA), they may then become subject to DTE and ATE regulation on their non-reserved activities (for which BTE regulation is not required in the LSA). A risk-based and proportionate approach to such regulation might conclude that only ATE intervention of some kind would be appropriate for certain non-reserved activities without the need to subject all providers to full BTE, DTE and ATE regulation in respect of all legal activities they conduct.
>
> 8.6 With less prescription in the statutory framework, and regulators adopting a more risk-based assessment of why, when and how regulatory intervention is required, a more proportionate, less burdensome and more cost-effective approach could emerge. For example, regulatory interventions which take place before or during service delivery could be considered most appropriate in response to those activities which are classified as posing the highest risk to the public interest or the regulatory objectives, while interventions taking place after the event, such as a redress or compensation scheme, would be more appropriate on their own

for low-risk activities, while also being available as an additional safeguard for higher risk activities.

3. Regulation and risk

3.1 Introduction

Risk-based regulation is not new, but it has not yet reached the point of allowing a clear, undisputed and operational definition and methodology.[4] Nevertheless, risk-based analysis is now "a first-order regulatory tool" (Ford 2017: page 72). Ford explains (2017: page 72):

> Risk-based analysis as an approach tries to make things measurable and apparently objective, based on the careful dissection of phenomena into their component and causative parts. Modern regulation too aims to be empirically grounded, dispassionate, and analytically robust. It aims to compensate for the impossibility of certainty by relying on data as much as possible. But even where clarity is elusive, risk-based analysis is appealing as a response to uncertainty. Risk-based approaches use empirical analysis and probabilities to try to wrest knowable bits out of contexts that indisputably will never be completely known. Such an approach does not deal in certainties. As the UK FSA was fond of pointing out, the goal was not to run a "zero failure" regime but rather to generate an informed estimate about where problems are most likely to lie and thereby determine how to allocate inevitably scarce regulatory resources. Moreover, the move toward risk analysis is a move from sweeping conviction to the specific, fine-grained, contextual knowledge about individual and collective action that only became possible as our own knowledge and capacity to manage information increased. In this way, perhaps, our certainties fell away even as actual understanding grew.
>
> Flexibility in regulation attempts to respond to the profound dynamism, uncertainty, and complexity that characterize contemporary society.

It is also worth noting the following conclusion from Black & Baldwin (2012: page 146):

> risk-based regulation cannot be viewed in any way as a mechanical and uncontentious approach that targets the highest risks and allocates priorities accordingly. Decisions regarding the balance of priorities between higher and lower risks are both contentious and shaped by particular conceptualizations of risk. The bad news, for those who are attracted to modes of numerical quantification, is that these matters are largely insusceptible of such determination and require the exercise of managerial and political judgements, and are shaped by considerations that range well beyond the technocratic.

3.2 A starting point

In terms of risk, a starting point might be to propose that risk in legal services can arise from:

(a) the need to protect the public good;
(b) the complexity of the underlying law;
(c) the complexity of the transaction or dispute in respect of which the client seeks advice and representation;
(d) the inherent vulnerability of the client;
(e) the relative vulnerability of the client, arising from the circumstances giving rise to the need for legal support; and
(f) the vulnerability of practitioners to compromising influences[5].

Each of these factors will now be considered in more detail.

4. For a brief history and exploration of the subject, see Professional Standards Authority (2015).
5. This primarily includes inverse vulnerability as described in paragraph 3.6. However, it also includes other risks identified externally and arising from money-laundering, bribery and similar: see also, therefore, Financial Action Task Force (2019).

3.3 Protecting the public good

The need to protect the public good (particularly, say, in relation to the exercise of rights of audience and the conduct of litigation) to my mind implicitly suggests a high threshold for practitioners to meet in relation to prior authorisation and the imposition of other regulatory requirements.

For those legal services that remain subject to BTE prior authorisation (on this, see further paragraph 4.2), it might well be that the approach to authorisation and risk will remain much as it is at present.

3.3 Complexity of the underlying law

In relation to the complexity of the law, there might be some debate among lawyers. In broad terms, there could be recognition of some areas of legal practice where inherent complexity and the consequent need for specialisation is accepted.

This could apply, say, to tax law, pensions law, intellectual property, and immigration and asylum law. There might be a question about whether such inherent complexity would be sufficient to justify BTE authorisation.[6]

Perhaps more importantly, the question might not be addressed in terms of inherent complexity but rather in terms of the risks of 'dabbling' or lack of familiarity. Those who do not regularly practise, for instance, in conveyancing or drawing up wills, or advising on corporate finance and acquisitions, could soon find themselves significantly out of their depth and present a risk to their clients.

Even here, the boundaries are not clear between what is a 'simple' will or 'straightforward' domestic conveyance, and something more challenging. For example, an apparently 'straightforward' domestic conveyance or estate administration, while perhaps presenting low risk from a technical perspective can still be high risk to a client given that their life-savings or entitlement to assets could disappear if something goes wrong or fraud is involved.

Nor will it always be clear what areas of related law a practitioner might need to be familiar with in order to offer competent and effective advice. Few will-writers will be able to ignore trusts or the tax consequences of their advice; and conveyancers will need to be aware of planning law. It would be open to a regulator to prescribe DTE accreditation and continuing competence requirements for distinct areas of practice.[7]

However, a differentiated approach to regulation cannot afford to become tangled in its own detailed complexity of over-prescription, and a balance would be needed. This should be based on an assessment of risk following relevant consultation (including with practitioners, consumer groups and indemnity insurers). It might be that something akin to the Legal

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6. I am aware that, in Germany (and within a structure of self-regulation), the Lawyers' Parliament has created Bar-approved specialisations. These include, for example, family law, immigration, insolvency, insurance, information technology, and transportation and freight-forwarding law. Similarly, but more generally, the CCBE (2015) notes that the number of specialisation fields varies by jurisdiction but that it is usually about 20. he most common are: family law, criminal law, commercial law, labour law, social law, intellectual property law, tax law, information technology law, banking law, administrative and public law, and law of insurance.
7. It might also be pertinent here to mention the role of indemnity insurers as quasi-regulators, in the sense that, based on their claims data or as a condition of cover, they might require evidence of an appropriate risk assessment for the practice (including the firm's need for continuing competence to address the identified risks). They are also in a position to advise regulators on specific and emerging risks.

Service Board's segmentation matrix, with a combination of legal service, type of client, and type of problem, could provide a starting point.[8]

The need for prescription might be avoided by reliance on DTE practice requirements – say, as now, relying on personal integrity to ensure relevant competence and acting in the client's interests – and backed up by taking any failure fully to discharge those obligations in considering ATE redress.

One of the determining factors here might then become the extent to which ATE redress would be capable of effectively and quickly dealing with any failure – including whether compensation, return of fee paid, further work or other remedies would be able to resolve the client's position. If it was not, then the case for more protection and prescription would almost certainly be made.

3.4 Complexity of the transaction or dispute

Although undoubtedly a risk factor, the complexity of the transaction or dispute in respect of which the client seeks advice and representation is unlikely to be one that a regulator could take into account directly. It might wish to assume some correlation between complexity and value and, accordingly, set out criteria or expectations for, say, transactions or disputes where the value involved exceeds a certain amount.

More likely, though, that a regulator will more often wish to identify this as a risk factor to be taken into account by a regulated provider in the knowledge that after-the-event assessments might be made of whether or not this was done effectively.

3.5 Client vulnerability

The greater risks are likely to arise from the client's vulnerability, and more so where this is combined with any of the public good, or legal and transactional complexity factors identified.[9] It is also affected by whether the citizen's need to engage legal advice and representation is based on choice or need. Moving home or writing a will is a choice; defending a criminal charge or deportation, or administering a deceased's estate is a need.

Inherent client vulnerability could result from, say, age, physical or mental health, having English as a second language, or other causes giving rise to cognitive, learning or language difficulties. It might arise from being a single parent or a carer, or being homeless or unemployed. In many cases, it might not be too difficult to identify these sources of vulnerability, but it is the case that not all vulnerability is obvious.

Research also shows the likely correlation between some forms of vulnerability (such as ill-health) and a need for legal services – and, indeed, also in the opposite direction, that is, the stress of dealing with legal issues leading to health problems.[10]

But practitioners should also remember that their familiar 'day job' is often, for the client, an occasion of great personal distress or challenge. Dealing with a breakdown in a relationship with a member of the family, or with a neighbour, landlord or employer, or coping with bereavement, or facing prison, all create *situational vulnerability*.

Situational vulnerability can also arise from consumers: being first-time users of legal services (where lack of experience makes them less likely to question or challenge a

8. See https://www.legalservicesboard.org.uk/research/reports/market-segmentation201.
9. The Legal Services Consumer Panel (2014) has provided a very helpful guide. See also MacDowell (2018).
10. See Genn (2019).

provider's actions); making significant, long-term purchases (say, of a house or a will) where any detriment or harm might take a long time to materialise or become apparent; or being persuaded to buy 'linked' services (say, executorship and estate administration services when drawing up a will).

Vulnerability can also arise from disparity in knowledge, resources or power as between the parties: forced participation in the criminal justice system when charged with an offence and facing the might of the state, being a citizen in dispute with a government department, or as a consumer seeking redress from a very large retailer or manufacturer, can all be daunting.

The need for legal advice and representation in these circumstances may be involuntary and urgent: competition and transparency are going to achieve little to help when choice and possible future redress mechanisms are far from the citizen's mind.

It is worth repeating here the observation from a recent consultation paper from the Solicitors Regulation Authority (SRA) that "even the most sophisticated and empowered clients can be vulnerable when they are dealing with critical, often life-changing and distressing circumstances" (SRA 2019: page 5). This is one reason why an approach to regulation cannot readily be founded on differences between 'sophisticated' and 'vulnerable' clients[11].

Consequently (borrowing from the financial sector): "The reality is that most people are likely to be vulnerable consumers at some point in their lives, in that they face a higher risk of detriment, although not all vulnerable consumers will actually suffer detriment. Vulnerability to the risk of detriment … is particularly widespread given the current context of markedly low levels of … capability in the UK" (Financial Services Consumer Panel 2012: page 2).

Nevertheless, even where classes or categories of vulnerability might reasonably be identified, "it is unlikely that *everyone* who falls into one of those categories faces the same level of risk" such that it is "unrealistic and, arguable, patronising to assume that everyone in these categories will experience being a consumer in the same way" (2012: page 1, emphasis in original).

Accordingly, that Panel suggests that (2012: page 1):

> A more effective framework to help … identify and communicate the risk of consumer detriment … would support proactive and proportionate regulatory activity by:
>
> - recognising the distinction between being vulnerable to the risk of detriment and actually experiencing it;
> - capturing diversity both within and between different consumer groups and recognising the experiences of consumers who fall outside groups commonly perceived to be vulnerable;
> - going beyond a consumer's personal characteristics or income, raking a wide view of their circumstances, resources, experiences and expectations; and
> - highlighting the way that the actions of the regulator and providers can make it more risky for consumers to access or use goods and services.

3.6 Inverse vulnerability

There is also an inverse form of vulnerability that is seldom discussed. While the clients of the largest law firms are unlikely to need regulatory protection in relation to the competence or quality of service of their legal advisers, the integrity of those advisers might nevertheless need to be assured in relation to matters such as non-disclosure agreements, money-

11. It is worth recording that more than one general counsel has emphasised to me during the Review that in-house lawyers are *not necessarily* informed or expert buyers of legal services in the way that is too often assumed in any discussion about 'sophisticated clients'.

laundering and managing conflicts of interest. Even those firms can face pressure from large or strategically important clients[12] to push the limits of the law or professional ethics.

Individual lawyers in law firms of any size or in in-house legal departments (cf. paragraph 4.7) can face similar pressures. The conflict between retaining employment or a client relationship, on the one hand, and complying with professional obligations, on the other, can place individuals in an invidious position.

This form of vulnerability, and the challenges to professional integrity that arise from it, might be easier to address with a strong sense of allegiance to the obligations placed on them. But this in turn requires a strong personal commitment to professional ethics as well as a culture and feeling of appropriate support (whether from the firm itself or from a regulator).[13]

Vaughan & Oakley (2016) found in a study of City of London corporate finance lawyers that "they were largely unenthusiastic, disinterested and unconcerned about the ethics of what they and their clients were doing" (2016: page 74). Such 'ethical apathy', as Vaughan & Oakley describe it, is disturbing and perhaps raises questions in the context of large-firm corporate practice whether it is the lawyers who should be protected from the potentially over-bearing expectations of their more powerful employers.

The issue that arises, therefore, is whether individual practitioners might need protection through the regulatory framework to allow them to withstand pressure from overbearing, misguided or unethical clients and employers.

3.7 Conclusions

We should not be surprised by the realisation that risk assessment in a complex and fast-changing world is neither straightforward nor static. As Black & Baldwin write (2012: page 4):

> How risks are selected, framed and categorized for attention is a complex process, involving a mosaic of technical, psychological, cultural, social, political, organizational, and economic concerns…. There is, however, no single and uncontentious way to define and 'rate' many risks – what is a 'low risk' or a 'high risk' is a matter of construction – and risk categorization is an art rather than a science, notwithstanding the prevalence of quantitative risk models in much risk regulation.

Even so, they claim (2010: page 182) that although "there are considerable difficulties to be faced in seeking to apply risk-based regulation really responsively", nevertheless "the payoffs from doing so outweigh any such difficulties".

A more conscious and explicit link between risk and vulnerability might in turn lead to regulatory focus and action not simply founded on a 'legal service' but equally – and perhaps even separately – on vulnerability. This would obviously include explicit DTE regulatory requirements for such matters as handling client money and other assets. In addition, a code of practice could require a practitioners explicitly to consider and record an assessment of client vulnerability and how, as a consequence, interaction and communication with the client should best be managed.

It might be that an approach framed less in terms of service area and more in terms of 'life-event' could hold some promise. This could encourage regulators to assess the relative

12. It has been suggested to me that some of the larger clients might in fact be more interested in the existence of a legal services provider's indemnity policy than in the regulation that applies or the relevant professional duties and obligations.
13. This tension, and the possible responses to it, are highlighted in a recent practice note from the Law Society for freelance solicitors: see https://www.lawsociety.org.uk/support-services/advice/practice-notes/freelance-solicitors/ and https://www.legalfutures.co.uk/latest-news/unregulated-firms-should-offer-solicitors-ethics-guarantee.

risks and vulnerabilities in relation, say, to moving home, administering a relative's estate, facing a criminal charge, dealing with the break-up of a personal relationship, starting a business, and so on. This would bring together a number of the risk factors, such as complexity of law or circumstances, and relative vulnerability.

In the final analysis, it would be for a regulator to identify and set out its own approach to evidenced risk assessment. It must do this without over-simplifying the complexity and ambiguity of real-world situations, and bearing in mind the range in sources of risk in legal practice (as well as the psychological, social and cultural dimensions of risk assessment[14]). However, such an approach would also be consistent with that advocated by Which? in its report on effective responses and consumer redress (2019: page 9):

> There needs to be a robust and systematic approach to enable understanding of the potential risks posed by different products, sectors and businesses – including analysing trends and identifying new and emerging issues and threats…. There needs to be a risk-based approach to prioritisation which takes into account the nature of the business, scale and potential impact of any non-compliance, including the severity, number and nature of people affected and confidence in the management.

As they also emphasise (2019: page 6): "Joined up and real-time intelligence systems need to underpin a future regime so that emerging trends can be quickly identified and resources targeted at the areas of most potential harm."

Nevertheless, we need to guard against an unrealistic, unduly cautious or over-zealous approach to risk. For these reasons, it is worth restating the following propositions of the Better Regulation Commission's (2006: page 38)[15]:

- zero risk is unattainable and undesirable;
- any regulatory intervention should clearly specify the risk that is to be addressed or managed, the objective to be achieved, and the reason why intervention is considered the optimum solution;
- any intervention should be targeted on those who are most at risk;
- the costs and benefits of risk reduction should be assessed, including the opportunity cost of risk management; and
- any regulatory intervention should be reviewed on a regular basis to ensure that it achieves the intended outcomes and does so cost-effectively.

As the Professional Standards Authority has written (2015: pages 18-20), the benefits of risk-based regulation include not only protection for society and consumers, but also greater visibility, transparency, quality, consistency and economy in regulators' decision-making.

3.8 Comparative approaches

The legal sector in England & Wales is not the only occupational field with a need to address risk and vulnerability as part of its regulatory policy. Accordingly, there may be other experience that can be brought to bear on this challenging topic.

For example, in 2016, the Professional Standards Authority (2016) proposed a two-stage assessment of risk. Adapting for the legal services sector, this could translate into:

(1) Stage 1 would consider evidence of the risk of harm relating to –

  (i) the complexity of the legal services undertaken;

14. Which, as the Professional Standards Authority rightly points out (2015: paragraph 6.16), "touches on a key challenge for risk-based regulation: how to incorporate these subjective elements into an approach that appears to draw its value primarily from its objectivity".
15. These proposition are echoed in other sectors, such as healthcare (cf. Bilton & Cayton 2013: page 18).

(ii) where the service takes place (for instance, in someone's home); and
(iii) the vulnerability or autonomy of the client and their ability to make an informed choice about their circumstances.

(2) Stage 2 would address wider external factors –

(i) the scale of the risk: the size of the practitioner group or number of clients who are served;
(ii) means of assurance: the range of different ways in which the risk of harm can be managed;
(iii) sector impact: the implications of regulation for workforce cost and supply;
(iv) risk perception: the effect that regulation would have on the confidence of the public, employers and other stakeholders in practitioners; and
(v) unintended consequences of the preferred form of regulation.

These Stage 2 factors guard against the limitations of focusing risk assessment only on practitioners. As the Professional Standards Authority stated elsewhere (2015: paragraph 6.9): "The reality is that mistakes, poor practice, and perhaps less obviously deliberate harm are cause by a combination of factors relating both to the practitioners and to the systems and environments in which they operate".

Last year, the state of Utah published on 12 August 2019 the report and recommendations of a work group on regulatory reform. The group was formed under the auspices of the state's Supreme Court, and its recommendations were adopted by that Court on 28 August. This indicates the speed at which even court-driven regulatory reform can be conceived and implemented elsewhere in the world.

The recommendations of the Utah report contained the following passage on risk-based regulation, which bears inclusion in this interim report (Utah 2019: pages 55-56; emphasis added):

1. **Regulation should be based on the evaluation of risk to the consumer.** Regulatory intervention should be proportionate and responsive to the actual risks posed to the consumers of legal services.
2. **Risk to the consumer should be evaluated relative to the current legal services options available.** *Risk should not be evaluated as against the idea of perfect legal representation provided by a lawyer but rather as against the reality of the current market options*. For example, if 80 percent of consumers have no access to any legal help in the particular area at issue, then the evaluation of risk is as against no legal help at all.
3. **Regulation should establish probabilistic thresholds for acceptable levels of harm**. The risk-based approach does not seek to eliminate all risk or harm in the legal services market. Rather, it uses risk data to better identify and apply regulatory resources over time and across the market. A probability threshold is a tool by which the regulator identifies and directs regulatory intervention. In assessing risks, the regulator looks at the probability of a risk occurring and the magnitude of the impact should the risk occur. Based on this assessment, the regulator determines acceptable levels of risk in certain areas of legal service. Resources should be focused on areas in which there is both high probability of harm and significant impact on the consumer or the market. The thresholds in these areas will be lower than other areas. When the evidence of consumer harm crosses the established threshold, regulatory action is triggered. Example: Under traditional regulatory approaches, the very possibility that a non-lawyer who interprets a legal document (a lease, summons, or employment contract, for example) might make an error that an attentive lawyer would not make has been taken to justify prohibiting all non-lawyers from providing any interpretation. However, if the risk is actually such that an error is made only 10% of the time, then a risk-based approach would recommend allowing non-lawyer advisors to offer aid (particularly if the alternative is not getting an interpretation from an attentive lawyer but rather proceeding on the basis of the consumer's own, potentially flawed interpretation). If a particular service or software is actually found to

have an error rate exceeding 10%, then regulatory action (suspension, investigation, etc.) would be taken against that entity or person.

4. **Regulation should be empirically-driven.** Regulatory approach and actions will be supported by data. Participants in the market will submit data to the regulator throughout the process.
5. **Regulation should be guided by a market-based approach.** The current regulatory system has prevented the development of a well-functioning market for legal services. This proposal depends on the regulatory system permitting the market to develop and function without excessive interference.

These regulatory principles are purposely aimed at the consumer market for legal services. Accordingly, in my terms, they focus on consumer protection regulation rather than public good regulation. Nevertheless, it is encouraging to see another jurisdiction adopting risk-based regulation, and with the authority and oversight of the judiciary.

4. When regulation should be applied

4.1 Introduction

As the Legislative Options Review and CMA market study have pointed out, regulation can be applied before-, during- or after-the-event. Before-the-event regulation sets rules about who can act in a market, what they can do, and how they can do it. It thus aims to set certain standards before any transactions are entered into with consumers.

After-the-event regulation provides for remedies against professionals who have breached professional rules or service commitments, and so can only act after a problem has arisen. Before-the-event regulatory measures are generally regarded as being inherently anti-competitive, because they form barriers to entry in the market to which they are applied.

For this reason, there should be a compelling public good or consumer protection need to warrant such restrictions, such as the inadequacy of monetary compensation for harm caused. It seems logical that measures to ensure that a market functions properly can only be justified if no other measures are available that would have a similar purpose but less severe effects on competition.

For clarity, it should be observed that, in the context of this discussion, 'the event' is not necessarily the same for all three forms of regulation. For before-the-event intervention, 'the event' is the entry of a provider into the market. For during-the-event regulation, and after-the-event measures, 'the event' is either the coming into being of a formal relationship of legal representative and client (often referred to as a retainer) or the provision of any advice, service or representation by the provider to the client.

This paper will now adopt the approach of the earlier work of the Legislative Options Review and the CMA market study to consider the different forms of intervention. In considering these interventions, it might be worth framing the discussion against a regulatory context of legal activities being assessed as high-risk, medium-risk and low-risk, and with a working hypothesis of a 'layered' approach under which[16]:

- high-risk activities would attract before-, during- and after-the-event regulation;
- medium-risk activities would attract during- and after-the-event regulation; and
- low-risk activities would attract only after-the-event regulation.

Such an approach would be consistent with Barton's conclusion (2001: 440):

> the 'incompetent lawyer' justification for regulation cannot justify regulation of the legal market as a whole, because the entire market is not affected by information asymmetry or serious harms. Instead, limited subsections of the market, for example lawyers who represent clients in serious criminal matters or lawyers who tend to represent less savvy clients, may need to be regulated. The need for regulation based upon consumer protection should thus be understood as a sliding scale. The more serious and irreversible the potential harm, the greater the justification for regulation to counteract informational asymmetry. As the harms become more quantifiable and foreseeable the need for *ex ante* regulation lessens, because the danger of an irremediable harm lessens.

Activities thought to present no risk, or perhaps very little risk, could be subject only to general consumer law (cf. LSR-1 2020: paragraph 2) rather than any sector-specific protection. However, it is worth noting in this context that the Legislative Options Review posed a residual consideration (2015: Annex 4, paragraph 13(a)), namely:

> Whether, because non-sector responses might not fully understand the nature of (even no-risk) legal advice and representation and the need for timely resolution of some issues, any consumer of legal services should be allowed access to the after-service complaints jurisdiction and remedies of LeO.

16. This approach was foreshadowed in the Legislative Options Review (2015: Annex 4, paragraph 10).

This – and the associated cost of access to LeO – should be borne in mind before concluding that no sector-specific regulation is warranted in any given circumstances.

4.2 Before-the-event regulation

4.2.1 Different approaches

There can be different forms of before-the-event regulation, including licensing, certification, accreditation and authorisation. These terms are often used interchangeably.

In essence, the framework of the Legal Services Act 2007 – although it refers to authorisation – is more accurately a licensing system, because it achieves authorisation predominantly through professional titles. Licensing usually attaches to professions or occupations, and gives the members of those callings a licence to practise.

Certification or accreditation can be offered by any market actor, whether statutory, professional or commercial. It offers a statement that those who have complied with the certification or accreditation requirements (which, as with licensing, can include appropriate education, training, testing, and practical experience) are competent to carry on the certified activity or activities.

This method can therefore be seen, say, in accreditation under the Law Society's conveyancing quality scheme (albeit only open to those firms that are already regulated by the SRA)[17] and by the Society of Trust and Estate Practitioners, and in the certification of paralegals by the Professional Paralegal Register.

Authorisation would normally be given in relation to activities (hence authorisation in accordance with the Legal Services Act for carrying on a reserved legal activity). In the context of this Review, title-based licensing is a convenient route to authorisation, but nevertheless arguably confuses authorisation and licensing (hence the issues discussed in LSR-3 2020: paragraph 4.5). Similarly, the licensing of ABSs to carry on one or more of the reserved activities is in fact closer to authorisation than to licensing as usually understood.

4.2.2 Licensing, authorisation and certification

The rationale for professional regulation and licensing can be explained as follows (Białowolski et al, 2018: page 12):

> The key public policy justification for professional regulation in general, and licensing in particular, is its presumed ability to protect consumers and the wider public from incompetent and unscrupulous practitioners.... Consumers cannot easily obtain information or lack the knowledge to assess the quality of the product or service prior to its purchase, particularly where the provision of a technical service requiring specialist knowledge and skills is involved. Through setting minimum qualifications requirements for entry to occupations and making various postulations regarding work experience and continuous professional development, occupational licensing is expected to raise average skills/competence levels in the occupation, since low-quality providers will presumably be unable to meet the new qualification requirements and are driven out of the occupation.

Ribstein offers a critique of licensing as follows (2004: 305-308):

> A lawyer's license tells clients that the lawyer meets certain minimum qualifications. This information may be particularly helpful for clients who deal rarely with the legal system, lack independent resources for checking qualifications, or have relatively small or routine matters that do not justify substantial investigation….

17. See: https://www.lawsociety.org.uk/support-services/accreditation/conveyancing-quality-scheme/.

> [Lawyer] licensing arguably has four types of benefits. First, by providing quality assurances, licensing encourages people to use licensed professional advisors rather than other ways of dealing with the law, including self-representation. The question, then, is whether society is better off if people get their legal advice from professional advisors. Professionalizing legal advice arguably serves social justice, the rule of law, and the reliability of contracts. On the other hand, legal professionals may promote socially wasteful litigation. Also, licensing, by increasing the price of legal advice, may reduce low-income clients' access to legal services. This might be ameliorated by requiring lawyers to render services to the poor as part of the cost of the license. But this requirement could have its own negative consequences, including encouraging more inefficient litigation.
>
> Second, licensing may benefit lawyers by reducing their costs of signaling quality. But this benefit accrues mainly to lawyers who practice alone or in small firms and who have difficulty signaling quality in other ways. By contrast, large law firms can signal quality by posting substantial and long-lived reputation bonds. It is not clear how society gains by subsidizing small firms. Licensing may reduce concentration in the market for legal services, but the cost of such concentration is not clear. Also, even if licensing reduces concentration in the market for lawyers, it may increase concentration and reduce availability of legal services overall by blocking entry of low-end non-lawyer providers.
>
> Third, lawyer licensing arguably protects third parties who would be injured by unregulated legal advisors who enable others to break the law. But the costs and benefits of licensing must be compared to those of liability rules. One who hires a lawyer to harm third parties may be held liable as a principal, or the lawyer may be held liable for aiding and abetting the client's wrong. Focusing on lawyers' qualifications to practice would seem to be an ineffective way to prevent lawyers from engaging in misconduct.
>
> Fourth, lawyer licensing might be said to increase social welfare by backing lawyer regulation that improves the administration of justice. In particular, licensing law practice may help ensure good lawyer conduct in court by bringing the power of license revocation to bear on violations of conduct rules. But it is not clear whether this additional sanction is necessary to ensure compliance with conduct rules or that licensing contributes significantly to regulating lawyer conduct in court.

As Ribstein rightly observes (2004: 317): "The relevant question is not whether there is an information asymmetry between clients and lawyers, but whether licensing, with all its costs, more efficiently addresses this asymmetry than certification." As he says, there is a danger that (2004: 313):

> licensing hurts the ones who need it most, and helps those who need it least. Licensing is most important in ensuring quality where clients are least able to self-protect, as in small transactions where the costs of obtaining information outweigh the benefits, or where clients are relatively uneducated and unsophisticated. Yet at the lower end of the market licensing laws most restrict the supply of services.

Ribstein's conclusion is that (2004: 327):

> Information asymmetries between lawyers and clients do not clearly justify lawyer regulation…. Nor does lawyer licensing help ensure that lawyers will serve the public good. Indeed, lawyer licensing would seem to hurt the very people who most need protection – the poor and disadvantaged who cannot pay the highly trained lawyers the system requires.

Białowolski et al also address the potential downsides of licensing (2018: page 13):

> The effect of regulation on service quality can also be negative. Quality is not only linked to skill but also quantity supplied. To explore such an effect, it is useful to consider the imposition of barriers to enter occupations which are cumulatively imposed over time on occupations. Examples of such barriers include compulsory membership of professional associations, artificial limits on the number of professionals that are allowed to operate in the market, restrictions on corporate forms, shareholding requirements, restrictions on joint exercise of professions, incompatibilities of activities, etc. If an increase in quality through better-trained practitioners results in a subsequent fall in their supply (due to aspiring practitioners not meeting the entry or exercise requirements), the service actually received by the consumer suffers for the following reasons…. First, if a decline in the number of available practitioners leads to an increase in price of the product or service, then some consumers might opt for lower-quality

> services. In a context of licensing, such substitutes are confined to 'do-it-yourself' services…. Price increases can also be driven by consumers themselves. Regulation can reduce uncertainty or the likelihood of poor quality practitioners in the market. As a consequence, consumers perceive the service to be of higher quality and demand more of the service, thus pushing up the price….
>
> A more extreme unintended consequence of licensing could involve the decision not to consume the service at all, which could be a health and safety risk in itself. Such an effect is likely to be more pronounced among low-income consumers, meaning that any improvement in quality is only felt by those at the middle and upper quartiles of the income distribution…. Overall, the effects of regulation should be analysed not only in relation to improvements in skill levels but also price and availability of services. For example, while one might receive a better quality service from a licensed [practitioner], such effects cannot be realized if such individuals are in short supply and therefore access to [professional] services is restricted. Finally, licensing takes the form of a minimal human capital requirement to practise the occupation and often provides no incentives for human capital development after entry. It is therefore possible that the 'minimum' skill standard imposed by licensing becomes the 'maximum' across the occupation. Coupled with the fact that it restricts competition among practitioners, licensing can reduce the pressure to compete on quality, thus leading to a fall in the overall service quality received by consumers.

Ultimately, as Robinson points out (2018: 1908-1909):

> the choice of when and how to use licensing is a political decision that involves answering questions about what values the economy should prioritize and how it should function. For instance, is occupational knowledge and craft best generated and standardized through the market, professional communities, or other means? In a specific occupation, should the government promote labor market individualism or professional trusteeship? Or how should the regulation of a sector of the economy balance the interests of consumers with those of producers?

The 'all-inclusive' approach of licensing, whether or not based on professional titles, seems increasingly problematic. Given a world in which specialisation is increasing, it is not clear that licensing alone offers much assurance to the public or to consumers beyond a general statement that the individual licensee is a 'fit and proper person'. As such, the licence underpins personal integrity and subscription to an ethical code rather than being a warranty of much more than a limited field of competence.[18]

Consequently, authorisation or certification in some form in relation to specific legal activities is almost certainly needed to supplement a general licence (perhaps by way of additions to or endorsements on a practising certificate). And if licensing and authorisation are separated in this way, the opportunity is then created for authorising those who do not have a licence.

On this basis, it might be argued that professional licensing (title) might only survive for regulatory purposes (as opposed to market signalling: cf. paragraph 4.4 above) within a structure of co-regulation or earned autonomy (cf. paragraph 3.4 above, and LSR-5 2020: paragraph 2.2.3).

4.2.3 Before-the-event authorisation

The issue here is accordingly whether, and how, prior approval is given to providers before they are permitted to offer services to the public for reward, other than exclusively on the basis that they hold a professional title or qualification. The Legislative Options Review

18. This statement is based on the range and complexity of modern law being such that any claim to universal, continuing competence across that range is not credible. Indeed, one of the criticisms often levelled by students of vocational qualification courses is that they include far too much 'irrelevant' material that, given their intended areas of practice, they feel they will not need to know (such as business law for intending legal aid practitioners). These thoughts are also echoed by Howarth & Wegner (2019: 398-399), in relation to the notion of 'competence' not being easily or clearly defined, with efforts to evaluate or measure 'minimal competence' of entry-level lawyers proving "vexing".

addresses the requirement for prior authorisation as follows (2015: Annex 4, paragraphs 1 and 2):

> A regulator might decide, after clear and careful assessment, that an activity or provider is of such importance to the public interest or of such a high-risk nature that a preventative regulatory approach should be adopted. The premise of such targeted and proportionate intervention, following an appropriate and evidence-based risk assessment, should be that it is justified because during service and after service interventions would represent inadequate or unsatisfactory responses to the risks in question. However, such barriers and exclusions should carry a high burden of proof that they are necessary in the interests of the regulatory objectives.
>
> Any strong restriction or limitation on the carrying out of an activity would need to be transparently assessed against an agreed public interest and risk framework, but such strong regulatory intervention might occur where, for example, there are significant potential issues relating to an individual's position as an officer of the court, or where there is a significant risk of incompetence, fraud, improper investor or management influence, or other consumer detriment. A regulator would need to balance the protection of the public or consumer interest with the possible inhibiting effect any intervention might have on, say, innovation or access to justice.

Ogus describes 'the requirement of prior approval' as "the most interventionist of regulatory forms" (2004: page 9). The rationale and nature of that intervention must therefore meet a high threshold for justification. In the current framework, the requirement of prior approval derives from the need for authorisation in respect of the reserved legal activities.

LSR-2 (2020) explored whether the notion of reservation remains necessary, or whether a better approach simply requires the identification of those legal activities that present a sufficiently high risk to the public interest that before-the-event authorisation is warranted.

I therefore agree with the principle expressed in the statement in the Legislative Options Review (2015: Annex 4, paragraph 3) that:

> a future regulatory system may need to be more agile to meet the challenges of changing market conditions and emerging evidence of higher (or lower) risk. The process and principles for reservation or de-reservation of activities could, therefore, be part of a flexible risk assessment framework. Evidence-based risk assessment might take into account (for example) type of consumer, area of law and type of legal activity in determining whether or not the public interest benefits to be protected or maintained, or the potential harm or detriment to be avoided or reduced, warranted before-the-event intervention.

In the Legal Education and Training Review, the following observations are instructive (2013: paragraph 5.19):

> Defining areas of high risk may not be straightforward and could depend on changing market conditions…. More obvious risk areas include those where liberty is at stake (crime, immigration), perhaps where there is a significant risk of distress purchasing (crime, immigration, divorce, (public) child care, domestic abuse, repossession) or where services relate to proportionately high value items in terms of most consumers' net worth (wills, conveyancing). However, this does not address the extent to which complexity and risk may vary within an activity.[19]

These observations pick up a number of the activities and factors considered in relation to the scope of regulation in LSR-2 (2020).

Forms of before-the-event authorisation could include:

(a) licensing, based on the award of a professional title: as now, this would result in concurrent authorisation for several legal activities;

19. The LETR also notes: "Client characteristics in particular will be a significant variable, which might affect decisions as to the proportionality of activity-based requirements. At a relatively broad level, this could mean that, eg, separate authorisation of domestic conveyancing would be more proportionate than separate authorisation of commercial conveyancing, even though the latter may involve much higher value transactions."

(b) separate authorisation for each regulated activity, achieved by authorisation from a regulator, either by separate qualification, or from recognition or exemption based on a professional title; or

(c) certification in respect of specific activities, based on meeting the criteria for one or more approved certifying bodies, with certification recognised for all regulatory purposes and being an additional requirement for those holding professional titles (though appropriate exemptions might be available as a consequence of activity-specific prior training and experience).

Finally, any requirement for before-the-event regulatory intervention would also need to address the question of whether exemptions should continue in respect of self-representation, providing legal advice and representation without a fee or other reward, and other not-for-profit and similar provision (cf. paragraphs 4.5 and 4.6 below).

4.3 During-the-event regulation

The Legislative Options Review said this about during-the-event regulation (2015: Annex 4, paragraph 6):

> There are a number of existing regulatory interventions which are targeted at the period during which an activity or event is taking place, including as a last resort a regulator 'intervening' in (that is, taking control of) a law firm. They remain valid options for any future regulatory intervention. As with 'before delivery' approaches, the premise of during-the-event regulation could be that relying only on after-service intervention would be inadequate or unsatisfactory.

The assumption in this paragraph is that such intervention could be applied both in combination with and (unlike now) independently of before-the-event authorisation.

4.3.1 Standards and the professional principles

Ogus describes the use of standards as a regulatory technique that allows an activity to take place without any prior authorisation or before-the-event control, but a provider who fails to meet those standards will be subject to sanctions (including even criminal penalty) (2004: page 150).

Ogus then identifies three categories of standards that represent different degrees of intervention, from high to low (2004: pages 150-151). Such a spectrum, or sliding scale, of intervention would be consistent with a new approach of targeted and risk-based measures. The three categories are (2004: page 151):

(a) specification (or input) standards, either to compel a certain method of production or to prohibit the use of other resources or methods (such as the need for services to be carried on or supervised by authorised individuals);
(b) performance (or output) standards that require certain conditions of quality or behaviour to be met at the point of supply but leave the provider free (or somewhat free) to choose how to meet those conditions (such as a requirement to maintain client confidentiality, or for professional indemnity insurance);
(c) target standards do not prescribe any specific standard or process, but impose sanctions for detriment arising from the output provided (such as damages for professional negligence, or remedies imposed by the Legal Ombudsman).

In this context, the professional principles in section 1(3) of the Legal Services Act 2007[20] represent regulatory standards. As the Legislative Options Review said (2015: Annex 4, paragraph 7(d)):

> these are intended to impose obligations on practitioners to behave in a professional and ethical way (they are equally appropriate, though not currently obligatory, for those who provide legal services but do not otherwise have a professional title or membership of a professional group). It may be desirable to find a way for all providers to be bound by these sorts of ethical principles (e.g. through codes of conduct) and for the Legal Ombudsman to take account of them in adjudications. For the future, there might usefully be some debate about whether these principles should explicitly include a personal obligation to act in the public interest, and also whether there should be an explicit hierarchy of duties in relation first to the court, second to the client, and only then to the firm's owners or shareholders[21].

The CMA referred to codes of conduct in its market study (2016: paragraph 2.24):

> Authorised providers' codes of conduct require that authorised providers carry out their work with care, integrity and diligence and with proper regard for the technical standards expected of them.
>
> In addition, authorised providers must adhere to certain requirements that are designed to ensure an appropriate level of service. This includes requirements on key issues such as confidentiality, the handling of client money, and the provision of key information (such as information on the work that will be carried out, fees, the relevant complaints procedure and general obligations such as professional confidence) which is usually communicated in an initial letter to the client called a client care letter.

It is also worth mentioning in this context that formal regulation is not the only effective form of regulatory or behavioural control. Professional norms and peer pressure can exert a strong influence over attitudes and behaviour, whether or not they are incorporated into statutory requirements or a code of conduct.

Not all such norms and pressure, however, nudge attitudes and behaviour in a positive direction (and see paragraph 4.7). For example, in light of the experience of various corporate scandals in the early twenty-first century, Kouchaki suggests (2013: page 4) that "professional service firms' claims of 'professionalism' as a deterrent to their members' unethical behavior are not believable".

The principal intent of codes of conduct should therefore be that the behaviour of *individuals* should be influenced for the better. While there may be an organisational context within which that behaviour takes place, the emphasis for this form of during-the-event regulation is on individuals rather than entities[22].

As a member of the Advisory Panel suggested[23]:

> motivations often tend to be more mixed/complex/nuanced than some of the discourse around regulation seems to acknowledge. This may for example include their need to preserve their view of themselves as a person with a strong moral compass or their reputation for expertise and trustworthiness in the eyes of their peers. Regulators might need to spend more time understanding those motivations for internalising standards of good behaviour, and what is most likely to cause that mechanism to break down, when assessing where to focus their risk-based regulation.

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20. The 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.
21. This was the hierarchy of duties adopted in the initial public flotation in Australia of Slater & Gordon (with the approval of the regulator) and included in the prospectus.
22. However, it might be worth noting here the provisions of section 90 of the Legal Services Act 2007, which require those within ABS entities who are not authorised persons not to do anything "which causes or substantially contributes to a breach" by an authorised person of their professional duties.
23. See also Mark et al (2010) for a discussion of how legal services regulators can encourage practitioners in maintaining their ethical integrity in times of change.

4.3.2 Handling client money

When clients transfer (or authorise the transfer) of money to their representatives in a legal transaction such as a house sale or purchase or in the administration of the estate of a deceased family member, they are taking one of the highest risks to consumers. The question of whether or not practitioners should be allowed to hold client money and, if so, under what conditions, is therefore a very important element of during-the-event regulation.

The CMA points out that the current approach to reserved activities leaves the potentially riskier area of the handling of clients' money during conveyancing and estate administration outside the scope of regulation.

Unless the consumer chooses to have that work handled by a practitioner who is an authorised person or title-holder who is subject to entity or professional requirements to comply with specific accounting rules for the handling of client money, there is no mandatory protection (CMA 2016: paragraph 5.76; and cf. LSR-2 2020: paragraph 2.5).

It is possible to suggest that the regulatory requirements in respect of handling client money[24], and the consequential burden of a compensation fund (see paragraph 4.4.4 below), add to the cost of regulation and its oversight. This is so even for those authorised persons who do not hold client money but must nevertheless contribute to the overall costs of the regulatory framework (such as barristers[25] and costs lawyers).

The regulatory framework for the handling of client money might be an area where a predominantly organisational or entity approach could be appropriate (perhaps treating sole practitioners as if they were regulated entities for this purpose).

4.3.3 Undertakings

It is common for solicitors and licensed conveyancers to give undertakings to other parties and to the court (see, for example, LSR-2 2020: paragraph 4.2.5; and see Gould 2019: paragraphs 3.119-3.123). These performance standards create an absolute obligation on the individual who gave the undertaking to honour it. They are subject to unconditional enforcement – even if, for example, the individual concerned or their firm has not received the funds from which a financial undertaking would be discharged. This strict position ensures that business and transactions can proceed efficiently and more quickly on a basis of absolute trust.

Although undertakings can be given on behalf of a firm or entity, the responsibility remains a personal one, suggesting that this form of during-the-event regulation is more appropriate for individuals rather than entities.

4.3.4 Professional indemnity insurance

A requirement to take out professional indemnity insurance (PII) represents a specification standard. The terms of the specification (in terms, for example, of minimum and other levels of cover, or the requirement for and extent of run-off cover) offer assurance to clients that, if something goes wrong with the representation or retainer with a provider, there may be recourse that will provide some redress (see further LSR-5 2020: paragraph 7.7; and see Gould 2019: chapter 10).

24. See further, Gould 2019: paragraphs 3.151-3.157.
25. There are limited circumstances in which barristers might hold client money, but they will usually then be regulated under a different regime (for instance, as a manager or employee of a firm regulated by the SRA).

This form of consumer protection can be applied at both the individual and entity level.

4.3.5 Disclosure and transparency

In a sector where information asymmetry is often advanced as one of the principal reasons to justify regulatory intervention (cf. LSR-1 2020: paragraph 3.3), measures to reduce that asymmetry by requiring disclosure of relevant information might reasonably be expected.

Ogus describes 'information measures' as a requirement on suppliers to disclose certain facts, but as not otherwise imposing behavioural controls (2004: page 150). They fall at the low end of the spectrum of regulatory intervention, but are nevertheless potentially very important.

Disclosure of information to consumers might occur before any given provider is retained to provide services. In the context of the current discussion, though, 'the event' follows the entry of the provider into the market . In this sense, the required disclosure of the information to consumers is 'during-the-event' of the provider being in the market even if it takes place before any retainer or transaction is entered into with the provider by the consumer.

The CMA has been particularly active in encouraging legal services regulators to require greater transparency on price, service and quality in legal services (CMA 2016: paragraph 7.8). Their intention is to address the "lack of transparency in the sector and the limited extent to which consumers compare providers" which "softens competition and incentives for innovation both between different types of provider (eg authorised and unauthorised) and within provider type (eg solicitors)" (CMA 2016: paragraph 7.6).

However, Ogus poses (and answers) an 'intriguing basic question' (2004: page 127):

> Given the fact that most suppliers are under competitive pressure *voluntarily* to disclose prices, why is it necessary to *force* them to do so? From a public interest perspective, the answer probably lies in the mode of disclosure rather than its existence. Prices may be voluntarily disclosed, but unless they are in a form which facilitates comparisons with those set by other traders, they impede the competitive goal. In other words, the most significant welfare gains are likely to result from the requirement that prices be indicated with reference to standardized units….

The absence of such standardised units in legal services is perhaps the greatest impediment to achieving the intended benefits of transparency, but that does not necessarily militate against even trying – and it certainly does not justify the historical ban on disclosing prices.

The CMA market study recommended greater transparency, and the LSB and front-line regulators have been working towards the introduction of new rules to meet the CMA's expectations. Revised rules from the SRA, CILEx Regulation and CLC have been approved, and action plans are in place for the remaining regulators.[26]

Disclosure and transparency can be seen as part of a broader mission to improve consumers' legal capability and literacy[27] (which is just as important for consumers in the legal sector as financial capability and literacy is in the financial sector[28]). However, as

26. The latest published LSB assessment on progress seems to have taken place in October 2018: see https://www.legalservicesboard.org.uk/news_publications/LSB_news/PDF/2018/20181016_LSB_Issues_Second_Assessment_Of_Regulators_Transparency_Action_Plans.html
27. See, for example, Wintersteiger (2015); see further LSR-5 (2020): paragraph 2.2.2.
28. The assessment of the Financial Services Consumer Panel is of "markedly low levels of financial capability in the UK" (2012: page 2). Although lacking robust measurement (cf. Pleasence & Balmer 2019), there is little reason to doubt that levels of legal capability are significantly different (cf. Wintersteiger 2015 and LSB 2020).

discussed in LSR-5 (2020: paragraph 2.2.2), greater information and transparency might, as a result of the 'Dunning-Kruger effect', lead to greater or different harm for consumers.

Brownsword (2019: para 3.1.3) helpfully elaborates on what 'transparency' might mean in a regulatory context – and particularly in relation to LawTech. He distinguishes between:

- transparency as *openness* (but about what, for whom and for what purposes?);
- transparency as *explainability* (how something works – though not to the extent that disclosure could destroy the provider's competitive advantage or incentive); and
- transparency as *justification* (the appropriateness pf the variables taken into account and the weight given to them in reaching an outcome).

In order for transparency to be meaningful, therefore, it is important to be clear about its intended purposes, benefits and beneficiaries.

Even if disclosure, information and transparency remains on balance a good thing, the question of how much of the responsibility for raising the levels of capability and literacy lies with regulators and formal regulation is a different matter (cf. LSR-0 2020: paragraph 4.2).

Public legal education for the entire sector – even if targeted at individual consumers and small businesses – would be both extensive and expensive. It is not clear to me that the cost of such education should be borne by taxpayers or the regulated community.

There is a strong case to be made that some level of legal knowledge should be part of the preparation for citizenship and, as such, an element of the framework for general education that is, rightly, funded by the state. However, what is more normally referred to as 'public legal education' goes beyond this. It moves into notions of legal capability, capacity and confidence, as referred to above (cf. LSB 2020).

As an exercise in encouraging citizens to understand their legal rights and obligations and, as a consequence, instruct a provider of professional legal advice and representation, the dividing line between PLE and marketing is strained. Marketing - the persuasion of people to buy – is rightly, and only, a matter for providers and those who represent them.

The experience of the financial services sector might also be relevant and illuminating here. As stated above, financial literacy and capability is as much an issue in that sector as legal literacy and capability is in the legal world. However, research and analysis has shown (Fernandes et al. 2014: page 1872):

> The widely shared intuition that financial education should improve consumer decisions has led governments, businesses, and nongovernmental organizations worldwide to create interventions to improve financial literacy. These interventions cost billions of dollars in real spending and larger opportunity costs when these interventions supplant other valuable activities. Our meta-analysis revealed that financial education interventions studied explained only about 0.1% of the variance in the financial behaviors studied, with even weaker average effects of interventions directed at low-income rather than general population samples.

This questionable efficacy of financial education should give us pause before embarking on extensive and expensive PLE. In an observation that will resonate with many of those who have experience of PLE (and education generally), Fernandes et al. suggest (2014: page 1873):

> content knowledge may be better conveyed via 'just-in-time' financial education tied to a particular decision, enhancing perceived relevance and minimizing forgetting. It may be difficult to retrieve and apply knowledge from education to later personal decisions with similar relevant principles but different surface details, particularly decisions coming years after the education. Our findings suggest reexamining efforts at child and youth financial education, particularly if intended to affect behaviors after a significant delay. There must be some immediate opportunity to enact and put to use knowledge or it will decay. Moreover, without a ready expected use in the near future, motivation to learn and to elaborate may suffer.

This observation is more pertinent when consumers' needs are heterogeneous and infrequent (2014: pages 1874 and 1875) – as they are in most purchases of legal services.

4.3.6 Continuing competence

Although it is not always easy to agree on an effective regime for the assurance of continuing competence, it is now usual for those who hold themselves out to the market as competent in a particular area of practice to have to comply with requirements for some form of continuing professional development (CPD) or even reaccreditation.

The issue is complex and challenging, not least because of the disparity between the initial authorisation based on professional title and the variety of services, clients and contexts that emerge during the course of a practitioner's career. Any component of this variety could be far removed from the learning that resulted in the award of title many years previously.

It is also complicated by the need to be clear about whether the assessment that is being made relates to continuing competence to justify the retention of a professional title or the continuing competence to undertake specific legal activities.

The CMA pointed out in its market study (CMA 2016: paragraph 4.59) that:

> Since November 2016, all solicitors are required to meet the outcomes-based standard set out in the SRA competence statement. The first section of the SRA's Competence Statement states that solicitors must '[m]aintain the level of competence and legal knowledge needed to practise effectively, taking into account changes in their role and/or practice context and developments in the law' and any work beyond solicitors' personal capability should be disclosed. The introduction of the outcomes-focused standard has effectively replaced the CPD requirement for solicitors.

The Bar Standards Board (BSB) has a similar, more outcomes-focused approach[29], as has CILEx Regulation and ICAEW. The CLC, IPReg and the Faculty Office still maintain hours- or points-based requirements for CPD.

It is a matter for debate whether this aspect of legal practice should remain entirely an element of during-the-event regulation, or whether the assurance of continuing competence should include periodic re-accreditation or renewed authorisation (in effect, a periodic recurrence of before-the-event reauthorisation).

This is an issue that affects a number of professional activities where continuing competence and public trust and reliance are critical. For example, the 2007 White Paper, *Trust, Assurance and Safety – The Regulation of Health Professionals in the 21st Century*[30], recorded (Chapter 2, paragraphs 2.2 and 2.3):

> there has been long debate about whether the health professionals, and particularly doctors, should be required to demonstrate objectively that they have kept up to date with professional and clinical developments and that they continue to apply, through their practice, the values that they committed themselves to when their names were first placed on their professional register. Revalidation is a mechanism that allows health professionals to demonstrate that they remain up-to-date and fit to practise. For the large majority, revalidation will provide reassurance and reinforcement of their performance, and encourage continued improvement. For a very small minority, the scheme will provide a way of identifying problems and an opportunity to put things right.
>
> Public and professional opinion has moved on in the course of this debate, from a position where trust alone was sufficient guarantee of fitness to practise, to one where that trust needs to be

29. See: https://www.barstandardsboard.org.uk/regulatory-requirements/for-barristers/continuing-professional-development-from-1-january-2017/.
30. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/228847/7013.pdf.

> underpinned by objective assurance. Public opinion surveys suggest that people expect health professionals to participate in the revalidation of their registration and that many believe that this already takes place every year.

The Legal Education and Training Review noted, in line with the experience in the health sector, the Legal Services Consumer Panel's suggestion that "there is a strong expectation among consumers that lawyers are re- accredited, and that this offers some guarantee of competence" (LETR 2013: paragraph 5.116). However, the LETR offered this conclusion in relation to assurance of continuing competence in legal services (2013: paragraphs 5.118 and 5.119):

> CPD and re-accreditation offer two ways of achieving similar ends. Both are mechanisms for assuring a degree of continuing competence in the legal services workforce. CPD requires monitoring, either at an individual or entity level, but does not require an assessment of competence - continuing competence is inferred from the performance of activity. It may or may not be mandated against specific competencies or outcomes. Re-accreditation does require some evaluation or assessment of each individual practitioner. It tends to be competence-based, reflecting the range of actual work activities undertaken. It is therefore more direct, intensive, and demanding of resources.
>
> CPD has a reasonably long but not entirely happy history in the legal services sector…. Re-accreditation remains largely untested in a market-led professional environment. CPD has a level of acceptance in most of the professional groups; whereas re-accreditation is not necessarily well-understood and is a source of concern. As approaches to assuring competence, the evidence for both has its limits, and the necessity of either will depend on other elements of the [education and training] system, and the strength of the market itself as an arbiter of competence. The development of CPD or re-accreditation will need the support of the regulated community to succeed. At this stage, the research team does not consider that a strong case has been made out for a move to a universal re-accreditation scheme, for the following reasons:
>
> - Any further development towards re-accreditation needs to be considered in the context of other [developments]. It is notable that CPD is a key component of most modern professional revalidation schemes, and therefore a logical pre- (or at least co-)requisite to any move to re-accreditation. Key components, such as systems of personal development planning need to be put in place; there are also risk issues around the use of tools like critical incident reports, which would not be privileged, and might therefore be vulnerable to exposure in litigation for professional negligence.
> - A number of proportionality issues need to be considered. First, there appears to have been little formal analysis in the public domain of the (additional) cost burden re-accreditation may impose on professionals operating in a market-based environment. Secondly in a sector like law, where there is a significant proportion of sole practitioners, there are practical challenges in creating an appraisal-based model. Unless self-appraisal is permitted, some form of external system would need to be developed. Thirdly, unlike medicine which operates in a quasi-market, a proportionate risk-based approach needs to take account of the extent to which market mechanisms, in at least some parts of the sector, may limit or obviate the need for additional measures. This may point to the need, as the [Legal Services Consumer Panel] acknowledges, to develop a more nuanced activity-based approach to accreditation rather than a universal scheme.
> - Consequently, in the absence of a move to a universal scheme, additional work also needs to be undertaken to assess areas of risk where re-accreditation might be appropriate and proportionate. That would seem to be better progressed in conjunction with any work on activity-based authorisation.

Any consideration of a requirement for renewed authorisation in legal services would accordingly proceed against a sceptical background. Indeed, if the case for activity-based regulation is not compelling (cf. paragraph 3 above), the related case for periodic re-authorisation might also face some challenges.

In any event, continuing competence is a matter relating to the individual rather than an entity, except to the extent that a regulated entity might be required to assure itself that all

legal activities carried out on its behalf are done so by individuals who are themselves able to evidence that their competence continues to be up-to-date.

4.3.7 Judicial control and oversight

The 2007 Act imposes, through the professional standards in sections 1(1)(h), (3) and 188, an obligation on authorised persons who exercise a right of audience or conduct litigation to comply with their "duty to the court to act with independence in the interests of justice". There is thus a clear expectation that such during-the-event regulation will take place.[31]

The Legislative Options Review also mentions the judicial control of advocacy, litigation, case management and costs management as forms of during-the-event regulation (2015: Annex 4, paragraph 7(c)). This might include direct and specific control of the courtroom and who appears before the court, as well as over how advocates and advisers behave. It might also extend to more systemic observations and input on quality of services.

Such control as is exercised by judges will tend to be at an individual level for rights of audience and the conduct of litigation, though elements of the latter might give rise to particular issues of organisational process, efficacy and ethics of interest to the presiding judge.

As we saw with the aborted attempt to introduce the Quality Assurance Scheme for Advocates scheme (QASA), efforts to engage judicial involvement more explicitly in matters of lawyer competence can be challenging. This was also emphasised more recently in empirical research by Hunter et al. (2018) in research on judicial perceptions of criminal advocacy for the SRA and BSB.

However, as Barton pointed out some years ago (2001: page 483, emphasis in original):

> Courts may worry that a duty to report incompetent attorneys will interfere with their duty to impartially manage cases, and raise the spectre of bias against a particular litigant or attorney; likewise, lawyers will likely worry that this process will allow for judges with a personal bias against a lawyer to report her, regardless of her competence. Nevertheless, judges are a natural first line of administration in a regulatory system aimed at streamlining court processes. Furthermore, the lawyer's worry about biased judges can be controlled by a later, independent investigation by a separate regulator. The above system asks judges to *refer* cases of incompetence not to prosecute these cases on their own.

This is an issue of more than academic interest. Recent empirical research by Hunter et al into judicial perceptions of criminal advocacy has found, for instance, that judges have a particular concern that advocates (and particularly solicitor-advocates) are "taking on cases of a serious nature before they have the requisite level of experience" (2018: page 32).

Further, there is a judicial perception that this could be driven by solicitors' firms opting, "for financial reasons, to keep cases 'in-house' and instruct a less experienced advocate" (2018: page 33).

Somewhat disturbingly, when judges have, often reluctantly, reported their concerns to the appropriate regulator, those reports "had not been properly acted upon" (Hunter et al 2018: page 43), and they have expressed "frustration at the apparently lacklustre or uninterested responses" (2018: page 44).[32]

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31. For further information, see, for example, Gould 2019: paragraphs 3.93-3.118.
32. If regulators are giving "lacklustre and uninterested responses" to Her Majesty's judges, it would not be unreasonable to surmise that mainstream consumers who express complaints and concerns about practitioners would receive similar off-putting reactions – or think that it was not even worth complaining in the first place.

4.3.8 Risk-profiling

The Legislative Options Review identified risk-profiling by regulators as a way of facilitating effective and proportionate targeting of during-the-event regulation, together with appropriate supervision and monitoring by the regulator (2015: Annex 4, paragraph 7g)). This can provide reassurance to consumers that particular areas of practice or providers are subject to scrutiny and uphold the reputation of the sector.

Such an approach is consistent with a more explicit approach to regulation targeted on risk, as well as conformity with the better regulation principles incorporated by sections 3(3) and 28(3) of the Legal Services Act.

4.3.9 Non-sector-specific requirements

In addition to sector-specific measures of during-the-event protection, as discussed above, there might also be other measures that apply to the consumers of legal services, but are not sector-specific. Examples would include obligations relating to data protection, money-laundering, proceeds of crime, and bribery[33]. Obviously, such additional protection can be helpful and reassuring to consumers.

The Legislative Options Review raised the following question in relation to regulatory overlap (2015: Annex 4, paragraph 13(c)):

> Given that the general law always applies, whether steps should be taken to remove duplication or extension of general law provisions from sector-specific regulation (in relation to some aspects, say, of money-laundering or data protection compliance).

It seems clear that, when practitioners consider the costs and burdens of regulation, they are equally mindful of sector-specific and non-sector-specific burdens (see Legal Services Board 2015a).

In the interests of consistency and parity across sectors, there is a strong case for suggesting or requiring that any duplication – and particularly any extension of general law provisions – should meet a high threshold for inclusion in sector-specific regulation, based on the better regulation principles.

A particular need to justify additional targeting within the sector, and a confirmation of proportionality where the sector-specific requirements are more onerous, would not seem to be unreasonable burdens on a regulator in these circumstances.

4.4 After-the-event regulation

4.4.1 Redress

Once a consumer has entered into a relationship for legal advice or representation with a provider, a number of things can potentially go wrong. The advice or misrepresentation might be technically inaccurate or incompetent; the service might fall short of the requisite qualities of being timely, cost-effective, understandable or useful; the inadequacies of the legal advice and representation might result in harm or loss to the client (loss of liberty, increased costs to the client or compensation awarded against the client, an ineffective will or other transaction); or, in extreme cases, there might be theft or fraud by the provider.

The nature and variety of this potential for providers to fall short of expectations or engage in malfeasance suggests a need for different approaches to regulation. In some cases, the removal of a provider from the market might be an appropriate response, along with lesser

33. Cf. Gould 2019: paragraphs 3.212-3.240.

professional sanctions such as reprimands or limitations on future rights of authorisation or to practise. These response are, however, 'internal' to the provider and do not necessarily, without more, offer any compensation, restitution or other remedy to the affected client.

In their market study, the CMA referred to redress mechanisms as part of sector-specific consumer protection (2016: paragraph 2.24):

> Redress mechanisms and financial protection arrangements:
>
> — Consumers of services provided by authorised providers have access to a regulated redress mechanism for any conduct or service complaints. This includes the right to complain to the LeO.
> — In terms of financial protection arrangements, authorised providers are required to have PII, run-off insurance cover and some regulators also maintain a compensation fund that the firms which they regulate must pay into.

It also said (2016: paragraphs 4.90 and 4.91):

> 4.90 Redress mechanisms may not always be a relevant or satisfactory way to address instances of poor consumer outcomes. This is because in some cases the negative outcome experienced by consumers is either irreversible or difficult to identify until much later. That said, in most cases, redress mechanisms can be an effective way to compensate consumers when their legal services provider has acted wrongfully (eg by engaging in an unfair commercial practice), made mistakes (eg has provided poor-quality legal advice) or provided poor service (eg by not providing key information clearly). For consumers, the ability to obtain adequate redress (whether an apology, having the problem put right or compensation) increases trust and confidence and decreases perceived barriers to engagement with the sector.
>
> 4.91 Effective redress mechanisms can also improve the incentives for legal services providers to offer good quality advice and service. In addition, feedback from complaints enables providers to improve their services and helps regulators to identify systemic problems that might require intervention.[34]

A number of after-the-event mechanisms are already features of the regulatory framework.

4.4.2 Conduct complaints

Under the current regulatory arrangements, conduct complaints (those referring to the competence, dishonesty or similar behaviour of the provider) are dealt with by the relevant regulator for the individual whose conduct is complained of.

The title-based approach of the Legal Services Act and corresponding multiplicity of regulators led to different disciplinary systems in place, different forums for hearings, and different standards of proof (Legislative Options Review 2015: Annex 4, paragraph 8(b); and see further LSR-5 2020: paragraph 7.5 and Gould 2019: chapter 6).

Whereas Clementi sought to provide a single point of reference, through the Office for Legal Complaints and the Legal Ombudsman, for unresolved service complaints (cf. paragraph 4.4.3 below), the structure for conduct complaints and disciplinary processes remains substantially title-based.

There is some evidence that this structure now needs attention. For example, Boon & Whyte conclude (2019: page 14):

> Our assessment of the SRA's broad regulatory strategy suggests that it is ill-suited to the most salient problems of regulation. It is geared to organisations with significant infrastructure, not to the sole and small practices comprising the majority of organisations in which solicitors work…. Because of the difficulty of making private practice conform to its regulatory model, the SRA must

34. For the CMA's views about consumers' awareness of and trust in the available redress mechanisms, see CMA 2016: paragraphs 4.129-4.141.

> also rely on the disciplinary apparatus inherited from the Law Society. This system, based on monitoring and investigation, was geared to the use of specific professional rules of conduct. The abandonment of a conventional rule book causes difficulty both in prosecuting cases and in adjudicating on cases brought to the SDT.

The Legislative Options Review questioned whether the current approach remained necessary (2015: Annex 4, paragraph 9):

> Within a new regulatory settlement, the options could be to retain this division of responsibilities or to allocate them differently: for example, LeO could deal with both service and conduct issues, and a common disciplinary institutional framework could be shared across legal regulators.

In commenting on the notion of a single, sector-wide, disciplinary tribunal, Boon & Whyte suggest that (2019: page 24):

> Such a body could be established independently but given a remit clarifying the regulatory standards and methods to be promoted. This would be an opportunity to explore a different procedural basis for hearings, including replacing the current adversarial format with an inquisitorial approach.

Many of the underlying conduct issues that a disciplinary tribunal deals with are common across many areas of the professional and service sectors. For example, in the health sector, the Professional Standards Authority is in favour of a consolidated and consistent approach to the investigation, prosecution and adjudication of professional conduct matters (2016: page 11).

4.4.3 Service complaints

Providers are required to have their own internal ('first-tier') complaints-handling procedures. These procedures should have been notified to clients as part of the 'client care' communication at the outset of the retainer relationship. Such a procedure must be free of charge to the client, and should promptly either reject the complaint, or offer an appropriate remedy (such as an apology, further work to put the matter right, a refund or reduction of the fee charged, or compensation).

However, if (and only if) these procedures fail to resolve a complaint to a client's satisfaction, then the statutory ombudsman service can be engaged.

The Legislative Options Review noted that service complaints refer to the manner in which a consumer has received a service, and said (2015: Annex 4, paragraph 8(a)):

> A statutory independent Legal Ombudsman (LeO) deals with service issues that cannot be resolved by the provider to the consumer's satisfaction. The current remit of LeO only extends to those providers who are authorised persons, that is, those who are authorised in respect of one or more reserved activities. Where a consumer uses a provider who is, quite legitimately, providing a non-reserved legal service without being otherwise authorised, LeO has no mandate to investigate and award redress.
>
> Expansion of the remit of LeO could therefore facilitate greater confidence in both the regulated sector and that part of the legal services market which does not presently fall under sector-specific regulation, and ensure better standards of service provision across the sector. The ADR Directive, which [came] into force in July 2015, reinforces such a development, since it creates an expectation that consumers can access out-of-court dispute resolution for disputes with traders across the economy.

The CMA picked up the ADR theme as an alternative to LeO, and explained (CMA 2016: paragraph 4.98):

ADR involves using alternatives such as mediation and arbitration to resolve disputes without resort to litigation. Under UK law[35], all legal services providers (whether authorised or unauthorised) are required to make their clients aware in writing of an ADR provider that operates in the legal services sector. This requirement is triggered when a dispute has arisen between a provider and an individual consumer and the consumer has exhausted the provider's internal complaints-handling process. However, legal services providers are not obliged to use a certified ADR provider or, indeed, use an ADR procedure at all.

Their evidence also suggested that legal services providers are more likely to refer dissatisfied clients to LeO than to ADR (CMA 2016: paragraph 4.102).

The CMA further explained the LeO process in its market study (2016: paragraphs 4.106-4.108):

4.106 The LeO only accepts complaints that relate to an act or omission by an authorised person in relation to services provided directly or indirectly to the complainant. In addition, the LeO investigates complaints falling in the following categories: (i) Costs information deficient; (ii) Costs excessive; (iii) Delay; (iv) Unreasonably refused a service to a complainant; (v) Persistently or unreasonably offered a service that the complainant does not want; (v) Failure to advise; (vi) Failure to comply with agreed remedy; (vii) Failure to follow instructions; (viii) Failure to investigate complaint internally; (ix) Failure to keep complainant informed of progress; (x) Failure to keep papers safe; (xi) Failure to progress complainant's case; (xii) Failure to release files or papers; (xiii) Failure to reply. The LeO does not investigate conduct-related aspects of complaints, instead referring these to the approved regulators. The LeO has the ability to refer a particular act/omission as a test case to the High Court for it to determine whether or not that act/omission should be considered to be a conduct or service issues.

4.107 Before reaching a formal decision, the LeO will attempt to resolve most complaints informally. However, where informal resolution has been unsuccessful, an investigator will write a recommendation report. If both parties accept the report, it becomes the LeO's final decision and is binding on the provider. Through its decisions, the LeO can, among other matters, require the legal services provider to pay the complainant compensation for loss, inconvenience or distress (up to £50,000), require that they put things right if feasible or reduce the complainant's legal fees.

4.108 Final determinations by the LeO which are accepted by a complainant are binding on the provider, which then has 14 days to fulfil the compensation award. If the provider fails to do so, the complainant is advised to contact the LeO, in which case the LeO will follow up with the provider. If the provider fails to pay the complainant even after the LeO has followed up in this way, the LeO can seek to enforce the compensation award by suing the provider in court. The award would then be enforced by means of a court order. In situations in which compensation awards are made against firms which have closed, the LeO will then seek to enforce the award either against the firm's professional indemnity insurance or the individual partners themselves.

The complaints and ombudsman framework of the Legal Services Act 2007 is a reflection of one of the principal causes of the Clementi Review (2004) that led to the Act. This was the perception of increasing complaints against solicitors and the inadequacy of the timeliness or effectiveness with which those complaints were dealt with.

The effectiveness of the scheme is therefore a key issue in assessing the impact of the Act. The CMA believes that there is a mutually-reinforcing benefit to be gained (CMA 2016: paragraph 4.124):

The fact that complainants can take their complaints to the LeO may also incentivise providers to offer an effective first-tier complaints process in order to reduce the risk that the complainant will

35. The Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015 and the Alternative Dispute Resolution for Consumer Disputes (Amendment) Regulations 2015.

escalate a complaint to the LeO. This is particularly the case given that the LeO publishes information on formal ombudsman decisions.

Further exploration of the role of ombudsman schemes is contained in LSR-5 (2020: paragraph 8).

In its annual report for 2018-19, the pattern of issues complained about remained consistent with earlier years.[36] The legal areas attracting most complaints related (in decreasing order of volume) to residential conveyancing, personal injury, family law, will and probate, and litigation.

The annual report also shows that the service issues that were most complained about (again in decreasing order of volume) were delay (failure to progress a case and failure to advise), poor communication (failure to keep the client informed and failure to reply), cost (excessive cost and deficient information about cost), and failure to follow instructions.

The Legal Ombudsman concluded 6,206 complaints in 2018-19, with just over a third reaching an agreed outcome, but 41% needing a final ombudsman's decision (which is more expensive and takes longer). In more than half of those decisions (54%), the ombudsman found that the service provided was not reasonable.

Complainants were, by an overwhelming majority (88%), members of the public, but there were also complaints from beneficiaries, executors, personal representatives, trustees, and charities, as well as small businesses.

For the most part (40% of cases), where a remedy is awarded by the Legal Ombudsman, it was financial, such as paying an amount for the costs incurred by a complainant in making the complaint, paying compensation for loss suffered or emotional impact or disruption, paying interest on monies held, or paying for someone else to complete the legal work in question. In another 14% of cases, the remedy was also financial and related to fees, such as refund, waiver or a limit.

Interestingly, though, the most likely outcome (44%) was no remedy where, although the service provided was judged not to be reasonable, a remedy was not thought to be justified.

4.4.4 Compensation Fund

One of the distinctive features of after-the-event regulation in the legal sector is the existence of a compensation fund (see further LSR-5 2020: paragraph 7.8). The CMA explains (2016: paragraph 4.111):

> The function of a compensation fund is to enable such clients to make a claim if they are owed money by their legal services provider and have exhausted alternative routes for making their claim (for example, through an insurance claim or the court system). Typically, regulators impose strict rules around obtaining access to the relevant compensation fund.

A compensation fund is created and maintained by a front-line regulator for claims in respect of each of their regulated communities rather than as a single fund for the sector.[37] Accordingly, there are compensation funds for solicitors, licensed conveyancers, chartered legal executives, and patent and trademark attorneys.

The Faculty Office does not maintain a compensation fund for notaries, though The Notaries Society does provide fidelity insurance for the acts of its members. Even some self-regulatory bodies have chosen to establish compensation funds (such as the Society of Will Writers, and the Professional Paralegal Register).

36. See Office for Legal Complaints (2019).
37. For further details, see Gould 2019: paragraphs 10.206-10.261.

In general, claims can be made by individuals and small businesses in respect of losses caused by the dishonesty of a regulated person, hardship caused by a failure to account for money, or an uninsured loss that should have been covered by professional indemnity insurance, but was not.

The most likely reasons for payments from the solicitors' compensation fund relate to dishonesty – in probate, when solicitors misappropriate inheritances, and in conveyancing, when they take or lose deposits, mortgage monies or proceeds of sale.

In 2017-18, there were 2,648 claims made on the solicitors' compensation fund, and 1,553 payments made, at an average payment of £11,650, and the total of closed claims amounting to about £18 million. For 2019-20, annual contributions to the fund by individuals is £60 and for firms is £1,150 (both figures down by about a third on the previous year).

4.5 Special bodies

4.5.1 Background

The regulatory structure of the Legal Services Act requires that reserved legal activities may only be provided by authorised individuals, or alternative business structures licensed for that purpose. However, at the time the Act was passed, reserved activities were being provided by certain non-commercial and not-for-profit organisations such as trade unions, law centres and other advice agencies.

These organisations are often not owned or managed by otherwise authorised persons and so, in principle, once alternative business structures were introduced, licensing as an ABS would normally be the regulatory form that should be adopted.

Special transitional provisions were included within the Act to allow such organisations to continue to operate for a period of time, providing reserved activities, without an immediate requirement to convert to licensed ABS status. The LSB was given the power to recommend to the Lord Chancellor when this transitional period should end. So far, the LSB has chosen not to exercise this power, and special bodies continue to operate without the need for ABS conversion.

4.5.2 Law centres and clinics

As the annual report for 2017-18 of the Law Centres Network said (2018: page 6): "Law Centres are unusual organisations operating in complex circumstances. When introduced, their model of a law practice, that is a registered charity, was pioneering in the UK." Law centres continue to face a tough funding environment, and the financial sustainability of many of them remains a constant challenge.

In relation to law centres, charities and other non-commercial advice services, the SRA's current Handbook is much less restrictive and prescriptive than the previous version.[38]

Nevertheless, one of the many challenges for law centres is that the SRA is not the only relevant regulator, and they must (Law Centres Network (2018: page 7) "comply with up to seven regulatory bodies, so it is critical that LCN keep abreast of regulatory changes, updating and supporting Law Centres to remain compliant. It is also important that LCN inform regulatory bodies about our unique situation to ensure that our work is not held back by new barriers."

38. A guidance note is available at: https://www.sra.org.uk/globalassets/documents/solicitors/not-profit-guidance.pdf?version=496a9c.

The impact of regulatory costs and burdens on law centres and pro bono clinics can be disproportionate, and care must therefore be taken in the structuring of the regulatory framework to find the appropriate balance between that burden, on the one hand, and protection of public and consumer interests, on the other. As LawWorks has explained (2018: page 9):

> Clinics need to be able to adapt to a changing landscape. Many clinics have told us how important a supportive regulatory environment is for pro bono and encouraging legal volunteering.

4.5.3 Conclusion

Whether or not the focus of regulation is changed, the position of special bodies will need to be considered. As in other instances, it might be that a combination of provider-focused regulation (cf. LSR-3 2020: paragraph 7) with a differentiated approach to before-, during- and after-the-event measures could offer a risk-based and proportionate approach.

This might be able to deliver regulatory outcomes that protect potentially vulnerable citizens without undermining the valuable work that voluntary and non-for-profit special bodies provide, albeit often with some challenges to their financial stability.

4.6 Unauthorised providers

As the Review's working papers have demonstrated, the structure of legal services regulation at the moment leaves a gap for 'unauthorised providers' quite legitimately to offer non-reserved legal services to the public, with little or no scope for bringing them within the scope of the statutory framework.

I should emphasise that the label 'unauthorised' is not used in any pejorative sense, or in a way that might be taken to imply that such providers are giving less competent advice, or service of a lower quality. To the contrary: the LSB's research into will-writing showed, for example, that there was little difference in technical competence as between authorised and unauthorised providers (cf. LSR-0 2020: paragraph 4.5 and footnote 53).

The CMA also found only marginal and not statistically significant differences in relation to clarity of information given by providers, including about costs (CMA 2016: paragraphs 4.37-4.38).

4.6.1 The nature and role of unauthorised providers

The CMA market study specifically addressed the challenges to regulation of unauthorised providers (2016: paragraphs 2.38-2.41):

> 2.38 Unauthorised provision of legal services encompasses a wide range of provider types, including advice services such as Citizens Advice, legal helplines associated with insurance products, document providers that enable consumers to draft their own legal papers and paid-for services such as will writers, McKenzie Friends and HR companies.
>
> 2.39 Unauthorised providers appear to play an important role as a starting point for consumers seeking assistance in navigating the market or potentially as a source of free advice. For example, the LSB and Law Society's recent survey of consumer legal needs found that Citizens Advice was the most commonly known source of advice (known by 81% of respondents). In some cases, these advice organisations also provide legal help. In the CMA's consumer survey, the only or main legal services provider for 5% of respondents was an advisory service or legal advice centre. A very small number of respondents used charities and council advice services as their only or main provider.

2.40 In addition to advisory services and legal advice centres, other types of unauthorised providers used by respondents to our individual consumer survey included financial providers/financial advisers (4%), insurance companies (4%), trade unions (2%) and legal helplines (1%).

2.41 The focus of our market study has been on paid-for legal services. In this area, the use of for-profit unauthorised providers whose main focus is to provide legal services appears to be much more limited across most areas of law. In our individual consumer survey, we found that around 4% of respondents had used these kinds of providers as their only or main provider. Similarly, the LSB found that for-profit unauthorised providers account for around 3% of all legal problems where assistance was sought. In certain legal services areas, unauthorised providers account for a greater share of supply. For example, the LSB found that around 7% to 9% of purchased wills originate from unauthorised providers and that online divorce providers account for 10% to 13% of total divorces. By contrast, 4% to 5% of employment services and 2% of conveyancing services (involving DIY and automated providers) are provided by paid-for unauthorised providers.[39]

The current position results in a deliberate exclusion of unauthorised providers from the regulatory framework and any possibility of participating in it on a voluntary basis. For as long as the framework remains based on authorisation derived predominantly from title, this position will continue. A shift away from this, to regulation of activities, individuals, entities or providers (as discussed in paragraphs 3 and 5-7 above), could extend the regulatory reach to bring presently unauthorised suppliers into regulation.

Where regulation is applied on a more targeted, and risk-based, assessment of the need for regulatory intervention, such an extension would not necessarily represent a wholesale regulatory annexation of presently unregulated activities. Even more so if the form of intervention – as discussed in paragraphs 4.2 to 4.4 above – is also structured to reflect the appropriate before-, during- and after-the-event focus.

It seems likely that, for example, some providers of legal services relating to, say, immigration and employment might be offering their services to the public, and might be straying knowingly or unknowingly into the carrying on of reserved activities as well as non-reserved activities. If the relevant regulator (perhaps the Office of the Immigration Services Commissioner or the Claims Management Regulator) only acts in response to specific complaints, these instances might go undetected or unaddressed.

A different approach to the regulation of higher-risk legal activities might improve consumer protection without inevitably removing sources of cost-effective help from the market or unwittingly turning a blind eye to regulatory breaches.

However, regulatory intervention comes at a cost, and is possibly a disadvantage to currently authorised providers relative to unauthorised providers. However, the answer to this might not be to bring those who are presently unauthorised within the regulatory framework. As the CMA wrote (2016: paragraph 5.46):

> We recognise that, in a more competitive market for legal services characterised by consumers being better able to shop around and drive competition, these differences in regulatory costs may start to put solicitors at a disadvantage in comparison to unauthorised providers. However, … we believe that the better approach to tackling this issue in the short term is to take further steps to reduce regulatory costs on solicitors, rather than to impose regulatory costs on currently unauthorised providers.

39. Further details can be found at: LSB (2016) Mapping of for profit unregulated legal services providers, and Economic Insight (2016) Unregulated legal service providers: Understanding supply-side characteristics (a report for the LSB). Later data is also available from YouGov (2020).

4.6.2 McKenzie Friends

The position of McKenzie Friends in the current framework creates different views and challenges. The CMA market study referred to this type of support as follows (CMA 2016: footnote 96):

> Litigants in person may use a 'McKenzie Friend'[40] who can provide moral support, take notes, help with case papers and quietly give advice on any aspect of the conduct of the case. McKenzie Friends have no independent right to act as advocates (ie they have no rights of audience) or to carry on the conduct of litigation. A judge may grant such rights on a case-by-case basis, but only in exceptional circumstances. Traditionally, this lay support has been provided on a voluntary basis by a family member or friend, although for some time there have been a small number of people who charge a fee for this service. However, the majority of McKenzie Friends act on a non-fee charging basis. See the Courts and Tribunals Judiciary Practice Guidance (2010), McKenzie Friends: Civil and Family Courts.

The exercise of the judicial discretion referred to by the CMA would seem, at one level, to drive a coach and horses through the provisions of the Legal Services Act for prior authorisation in respect of the reserved activities of exercising a right of audience and conducting litigation.

On the other hand, a refusal to exercise that discretion could leave a vulnerable, unrepresented litigant with no support at all and place a judge in a potentially very difficult or even compromising situation. In circumstances where there has been a marked increase in self-representation and lack of representation, 'some help is better than no help' is a compelling refrain.

Nevertheless, the following comments are instructive (Assy, 2011; and see also Barton, 2001):

> Although judges often stress that [litigants-in-person] are entitled to no special allowances and should expect to be held to the same rules as lawyers, putting this principle into practice has proved too difficult for many of them. Understandably, judges tend to apply a more lenient approach to [litigants-in-person] and tolerate their breaches of the rules, which in turn increases the inefficiency of the proceedings…. To force represented litigants to bear the extra costs and delays resulting from actions taken to assist [litigants-in-person] is to force them to subsidise the self-represented, which is arbitrary…. Justice for the self-represented, if achievable, must not translate into injustice for others…. When a litigant in person lacks the skills and expertise to conduct her case competently, and when her self-representation threatens to impose a disproportionate burden on court resources, the court should be entitled to require the litigant to obtain legal representation as a prerequisite for proceeding with the case.

The question here is whether such legal representation should legitimately come from a McKenzie Friend, particularly if it is undertaken on a fee-paying basis.

The CMA report adds (CMA 2016: paragraphs 4.74 and 4.75):

> Certain representative bodies have expressed concerns in relation to the services provided by fee-charging 'McKenzie Friends'. Furthermore, the Judicial Executive Board is currently considering the approach that courts should take in relation to McKenzie Friends and whether there should be a prohibition on fee recovery by fee-charging McKenzie Friends.
>
> The evidence that we have reviewed is mixed but does not suggest that there are significant quality issues relating to the use of McKenzie Friends. We also note that there may only be as few as 40 to 50 fee-charging McKenzie Friends currently active in the legal services sector and, as a result, we have not examined this any further.

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40. The CMA notes that the Legal Services Consumer Panel has classified McKenzie Friends into four types: (i) the family member or friend who gives one-off assistance; (ii) volunteer McKenzie Friends attached to an institution/charity; (iii) fee-charging McKenzie Friends offering the conventional limited service understood by this role; and (iv) fee-charging McKenzie Friends offering a wider range of services including general legal advice and speaking on behalf of clients in court.

The Judicial Executive Board has recently concluded its examination of McKenzie Friends. Its conclusion has already been recorded in LSR-2 (2020: paragraph 4.2.1) but bears repetition in the current context (Judicial Executive Board 2019: page 3):

> It is for the government to consider appropriate steps to be taken to enable [litigants in person] to secure effective access to legal assistance, legal advice and, where necessary, representation.
>
> The role of the judiciary is to apply the law concerning the provision of legal assistance, the right to conduct litigation and rights of audience according to the law established by the Legal Services Act 2007, the common law and precedent.
>
> 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.

As with unauthorised providers (cf. paragraph 4.6.1 above), it might be that an approach to the regulation of advocacy and litigation focused on the assessed risks to the public and consumer interests in these legal activities, and appropriate forms of targeted intervention, might lead to a different approach to regulation and supervision.

Again, this could improve the assured quality of representation and consumer protection without removing sources of cost-effective help from the market or adopting a pragmatic judicial 'work-around' to the current requirement of authorisation.

4.7 In-house and employed lawyers

An increasing number of lawyers work 'in-house' for corporate, government, local government and other institutional employers. Analysis of the legal services market shows that a significant and increasing volume of lawyers (about 20%) and legal services are now in in-house settings (Law Society 2019). Their position is slightly different to those in private practice, since their client is usually their employer.[41]

For the most part, professional regulation was created and developed with private practice in mind. As a result, the regulatory provisions for in-house lawyers have sometimes needed to be 'moulded' to reflect a different client relationship or work setting, or 'grafted on' to the main structure.

A Review provides an opportunity to reflect on whether the regulatory provisions that apply to in-house lawyers could be better crafted, bearing in mind the many different contexts in which in-house lawyers now work.[42]

Most of the organisations that maintain in-house legal departments will not regard 'legal services' as their main activity. However, the principal activity of the in-house legal team will certainly be the provision of legal services to their employer.

There is little doubt that a tension is inherent in this relationship when the client for legal services is also the adviser's employer, and the usual notion of 'independent' legal advice is often stretched. This is well expressed by Gillers (2013: page 385):

> A dilemma arises if a company's lawyers discover that officers, perhaps top officers, perhaps those with whom they work, are either causing the organization to act unlawfully towards others or violating their legal duties to the organization for personal gain. Since the officers are not the lawyers' clients, we should expect lawyers to take steps to protect the company, which has no legitimate interest in violating the law or in becoming the victim of management illegality. But

41. Details can be found, for example, for solicitors at: https://www.sra.org.uk/solicitors/standards-regulations-resources/; and for barristers at: http://handbook.barstandardsboard.org.uk/handbook/part-3/#2589.
42. See Oxera (2014), Legal Services Board (2015b), Moorhead et al (2016) and Moorhead et al (2018).

> lawyers will be reluctant to antagonize corporate officers because their jobs, assignments, or retentions depend on their good will. Yet their duty is to protect their client.

In some ways, similar pressures can be brought to bear, or felt, by employed lawyers within private practice firms. Expectations, for example, that clients will be mollified, or that internal targets for hours worked or bills delivered will be met, can lead to questionable actions or perverse incentives.

We might wish (and expect) that those advisers who are professionally qualified should typically prefer to maintain their professional independence, ethics and standards and not bow to any organisational or commercial pressures to modify their advice to make it more palatable to their employers or internal clients. However, as Kouchaki explains (2013: page 32):

> Some researchers have conceptualized 'organizational professionalism' in contrast to 'occupational professionalism.' Essentially, they argue that the demands of organizations can restrict the standards of professionalism [and] that dedication to particular organizational norms and procedures can take attention from broader professional values and principles. Indeed, professionals can find themselves in conflict between professions and their employer organization. The organizational professionalism may support and encourage different evaluative and normative standards compared to occupational professional … and thus influence individuals' behaviour differently.

In these circumstances, it is arguable that those with professional obligations might benefit from further regulatory support (see also the discussion of 'inverse vulnerability' in paragraph 3.6). This could strengthen their position when dealing with clients, and provide an independent benchmark or standard against which to justify their professional advice. In principle, they should not be at risk of dismissal or disadvantage simply for observing their professional obligations.

Further, effective corporate governance should ensure that in-house lawyers are able to function effectively and are supported in doing so.[43] This might entail express conditions in their employment contract, and a direct reporting line to the Board (or to the chairman or a senior independent non-executive director).

These are not simply private or commercial matters. As we have seen recently, corporate failures can lead to consumer and societal detriment, and in-house lawyers have to be able to sound alarm bells without the chilling effect of potential reprisal. The public interest in effective and fearless legal representation is engaged in much the same way as it is with private practice.

4.8 Rules versus outcomes

The LSB has developed and published five regulatory standards that it expects approved regulators to meet[44], of which outcomes focused regulation (OFR) forms part. The CMA regards this as the best approach (CMA 2016: paragraph 5.43): "on balance, we believe that OFR represents the best method for ensuring that regulatory rules are appropriately flexible so as to reflect changes in the market over time".

The LSB has elaborated on the standards and OFR as follows (LSB 2017: paragraph 1.2):

> 5. The standards are outcomes-focused. We do not generally prescribe how the regulators should demonstrate they meet the standards. We recognise this will vary across the regulators

43. For a discussion about best practice, see Moorhead et al. (2019) 'In-house lawyers and non-executive directors'.
44. See: https://www.legalservicesboard.org.uk/Projects/developing_regulatory_standards/Regulatory_Standards_Action_Plans_2015_16.htm.

> and performance against some outcomes may need to be assessed within the context of the specific regulator. However, there are some instances where we have described what we consider equates to required performance, for example, the use of the civil standard of proof in the enforcement process.

The focus on OFR is now therefore clearly established within the current framework. It is not, however, without concerns or critics. OFR is frequently cited as a reason for lack of clarity for firms in what will be considered by the regulator to constitute compliance with its outcomes.

Such uncertainty can lead to an increased regulatory burden and cost on firms, as well as inhibiting more innovative approaches to the provision of legal services and perhaps deterring new providers from entering the market.

The CMA recognised these concerns. It referred to SRA research (CMA 2016: paragraph 5.39):

> A review of OFR conducted by the SRA in 2013 suggested that it had been responsible for an increase in regulatory costs and a Law Society survey around the same time found that 60% of firms surveyed believed that the cost of compliance had risen since the introduction OFR. However, the SRA's OFR review also found that 85% of firms would continue to undertake the same administrative practices even if all regulatory requirements by the SRA were lifted.

Nevertheless, as stated above, the CMA supports OFR, adding (CMA 2016: paragraph 6.55):

> we believe that the current issues are likely to relate to the implementation and the design of the current regulation (particularly the link between the design of the outcomes and the regulatory principles) rather than an inherent problem with OFR. Moreover, a more effective OFR could be achieved by defining a clear overall primary objective for legal services regulation.

(The question of regulatory objectives was addressed in LSR-0 2020: paragraph 4.2, and arises again in LSR-5 2020: paragraph 9.)

It remains to be considered during this Review whether a more differentiated approach to regulatory intervention, based on targeted scope and the use of a combination of before-, during- and after-the-event regulation, as discussed earlier in this paper, might provide a better foundation for OFR.

5. Conclusions

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

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

This paper has sought to explore the nature of risk in legal services, as well as the available forms of regulatory intervention. In particular, it has looked at before-, during-, and after-the-event regulatory tools that are available and how they might be used to offer a more flexible way of providing targeted, proportionate and cost-effective intervention.

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