UCL CENTRE FOR ETHICS AND LAW
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INDEPENDENT REVIEW OF LEGAL SERVICES REGULATION

Findings, Propositions and Consultation

LSR Interim Report | September 2019

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INDEPENDENT REVIEW OF LEGAL SERVICES REGULATION

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FINDINGS, PROPOSITIONS AND CONSULTATION

Stephen Mayson[1]

1. Introduction

The Centre for Ethics & Law in the Faculty of Laws at University College London is undertaking a fundamental review of the current regulatory framework for legal services in England & Wales. The terms of reference are in Appendix 1.

The independent review is exploring the longer-term and related issues raised by the Competition and Markets Authority (CMA) market study in 2016[2] and its recommendations. It therefore intends to assist government in its reflection and assessment of the current regulatory framework.

The Review's scope reflects the objectives and context included in the terms of reference, and includes: 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 is being undertaken independently and with no external funding.

The work of the Review is supported by input from the members of an Advisory Panel (see Appendix 2). Some of the published work and comments of Panel members are referred to and referenced in the working papers.[3] However, the content of this report is the work of the author, and should not be taken to have been endorsed or approved by members of the Panel, individually or collectively.

This is an interim report that sets out the Review's initial findings and conclusions about the current regulatory framework. It draws on the work of the five working papers, and reactions and responses to them. It also reflects meetings with more than 200 interested parties. These were mainly current and former regulators in the legal sector and beyond, and professional bodies (including some from outside England & Wales), but also include consumer bodies, unregulated providers and their representative bodies, senior judges, practitioners and in-house lawyers, academics, and Parliamentarians.

The report also sets out the issues that will need addressing in any future regulatory settlement. It does not presume that readers will be familiar with any of the five working papers and there may, therefore, be some overlap in content.

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1. The author is leading 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. He was Called to the Bar in 1977 and is a Bencher of Lincoln's Inn.
2. See Competition and Markets Authority (2016) 'Legal services market study'.
3. For details and copies of the working papers, see: https://www.ucl.ac.uk/ethics-law/publications/2018/sep/independent-review-legal-services-regulation.

In relation to thoughts about future approaches to regulation, this report offers some propositions that could form the foundations for conceiving a reformed regulatory framework. It then explores some of the further issues that would arise as a consequence of such reform. In part, therefore, this interim report is also presented as a consultation paper.

Responses to the consultation questions (collected on pages 85-88) are therefore welcome, and **the closing date for responses is 29 November 2019**.

The final report, with recommendations, is expected to be published early in 2020.

2. Executive summary

2.1 Introduction

I understand that readers of this report will naturally look at the issues raised from their own point of view. I can therefore acknowledge, and accept, that proposals will be judged by their anticipated effect on, say, consumers or the members of a particular legal profession. It is entirely possible that, from such a point of view, the need for change and the nature of it set out in this report might seem variously either less pressing or too faint-hearted.

I should therefore emphasise that I have not been looking at reform from any such perspective. I have tried to adopt a systemic view, and look at the regulatory framework and its effects as an interrelated whole. In reaching some conclusions, a 'dominant' or preferred view has been taken. This has usually been the result of seeking a balance between the public interest as the rationale for regulation, and the standpoint of a consumer or user of legal services (rather than that of a provider).

I have sought to identify and adopt an approach to regulatory reform that is principled rather than theoretical, and in which the central philosophy is permissive rather than prohibitive. It is inevitably in the nature of an interim report, though, that its contents are provisional and exploratory rather than definitive recommendations. I accept that further work needs to be done, and detail developed.

I wish to record my thanks to the members of the Advisory Panel and the 200 or so other interested parties who have been generous with their time, experience and insights during the investigatory phases of the Review. They have all contributed significantly to the conclusions and direction of the Review. Nevertheless, the content of this report sets out my views, and should not be taken to have been endorsed or approved by anyone else.

2.2 Summary of findings

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

In summary, the interim findings in this report are:

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

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

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

Finding 4: The link between the reserved activities and authorisation through professional titles creates inflexibility and constraints in the current regulatory framework. However, a shift from title-based regulation to activity-based regulation is not as straightforward as it might appear.

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

Finding 6: The nature of the separation and independence of regulatory functions from representative functions remains unsatisfactory. The current approach and requirements of regulation and the internal governance rules make the desirable cooperation and collaboration between regulatory and representative functions problematic to achieve.

Finding 7: In principle, regulators are the natural (and arguably better) guardians of consumers' interests, by determining and enforcing the minimum or basic requirements for legal services. Equally, the professional bodies are the natural (and arguably better) custodians of the higher standards and aspirations associated with a professional calling and vocation.

Finding 8: There is sufficient known or potential detriment to the interests of consumers and providers of legal services, and to society at large, arising from the shortcomings in the current regulatory framework to justify further reform.

Finding 9 and conclusion: The current regulatory structure provides an incomplete and limited framework for legal services regulation that will struggle in the near-term and beyond to meet the demands and expectations placed on it.

2.3 Summary of issues to be addressed

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

In summary, they are:

- inflexibility arising from statutory prescription;
- competing and possibly inappropriate regulatory objectives;
- a pivotal set of reserved legal activities that are anachronistic and do not necessarily include all activities that ought to be regulated;
- title-based authorisation that leads to additional burden and cost in relation to some activities being regulated that do not need to be (resulting in higher prices to consumers);
- the unsatisfactory nature of the separation of regulation and representation;
- the existence of unregulated providers who cannot be brought within the current regulatory framework (with an expectation that their numbers will increase);
- the prospect of LawTech[4], that will be capable of offering legal advice and services independently of any human or legally qualified interface or interaction, beyond the reach of the current framework;
- a regulatory gap that exposes consumers to potential harm when some activities are not regulated when they ought to be, and puts legally qualified practitioners at a competitive disadvantage;

4. For the purposes of this Review (see further, paragraph 5.6), 'LawTech' is understood as technology that provides self-service direct access to legal services for consumers. As such, it substitutes for a lawyer's input, and can be experienced by the consumer without the need for any human interaction in the delivery of the service.

- seemingly ever-increasing prices of private practice lawyers, reducing further the availability and affordability of legal services for many; this encourages either greater self-lawyering and litigants-in-person, or nudges increasing numbers of citizens into the world of unregulated providers or LawTech;
- consumer confusion, caused by the existence of both regulated and unregulated providers, and a profusion of differently regulated professional titles;
- inadequate or incomplete consumer protection, that is not consistent with a widespread consumer expectation that all legal services and those who provide them are subject to some form of regulation and protection; and
- as a result of all of these issues, the risk of low public confidence in legal services and their regulation.

2.4 Summary of propositions

One of the main purposes of this interim report is to test and consult on a number of propositions that are explored as potential solutions or improvements to address the findings and issues identified. These are offered in the context and expectation of longer-term reform of the regulatory framework for legal services.

In summary, the propositions are:

Proposition 1: Promoting and protecting the public interest should be the primary objective for the regulation of legal services.

Proposition 2: Consumer expectations and regulatory reality should be aligned by at least allowing access to the Legal Ombudsman for all consumers of legal services offered to the public.

Proposition 3: All legal services should be capable of falling within the regulatory framework, irrespective of who provides them.

Proposition 4: There should be an alternative or additional form of entry into regulation for those who do not hold a legal professional title.

Proposition 5: A future regulatory framework should allow the differential application of before-, during- and after-the-event regulation to reflect the importance or risk of any particular activity or circumstance.

Proposition 6: Professional title should no longer be the only route to personal authorisation, even in respect of those important or highest-risk activities for which before-the-event authorisation would continue to be required.

Proposition 7: The appropriate regulator should determine what qualification or assurance of (continuing) competence, experience and integrity would need to be demonstrated by any provider for particular legal services on a before-the-event basis, and the additional requirements that would be applied on a during-the-event or after-the-event basis to the relevant providers.

Proposition 8: The application of regulatory requirements could be supported by the existence of a public register of who is regulated and for what. Accordingly, voluntary registration and after-the-event regulation should be available to all providers of low-risk legal services; and before-the-event and during-the-event regulation and mandatory registration should apply to providers of higher-risk legal services.

Proposition 9: The current list of reserved activities should be reviewed. This process should identify clearly the public interest basis of the need for before-the-event authorisation. This need should be established by reference to public good or consumer protection and should be explicitly articulated, to confirm that the current reservation can continue to be justified. Other activities should also be reviewed against these same criteria to see whether prior authorisation should in the future be extended to them.

Proposition 10: The future primary focus of regulation should be the 'provider' of legal services, whether an individual, entity, title-holder, or technology.

Proposition 11: For the purposes of a future single register of providers of legal services, the registration should be in the name of the entity, partnership or individual subject to regulatory requirements or with which a client has terms of engagement; but before-the-event authorisation should only be granted to individuals.

There are a number of consequential questions that arise from these Propositions. These are explored in Section 5.

2.5 Benefits

The potential benefits of the propositions explored in this interim report could be that:

(a) It would be easier for consumers to check whether their provider or prospective provider is registered or not (including for higher-risk activities that attract further regulatory requirements and protection). This is a simpler starting point for consumers than the current complex mix of factors.

(b) A differentiated, or layered, approach to regulation would allow before-, during-, and after-the-event requirements to be applied to providers based on the risks of the services that they actually offer.

(c) Adopting such a risk-based approach could mean that more of the cost and burden of regulation would be self-selected and cumulative, depending on the commercial or operational choices that providers elect to make. As such, it would offer a more targeted and proportionate response to the public and consumer risks within the legal sector.

(d) This approach would enable those who are currently unable to enter the regulatory structure to choose to do so, for the benefit of their consumers. This could lead to an increase in regulated access, competition and innovation in legal services.

(e) This approach could also apply to those providers who are moved (or move themselves) outside the current regulatory framework, for instance by having been struck off, disbarred, or even simply retired. It would constrain their current option to set themselves up as an unregulated paid adviser in respect of non-reserved activities.

(f) A framework that is constructed around 'providers' of 'legal services' could apply to the providers of substitutive LawTech in ways that the current framework cannot.

An important question for this interim stage of the Review is whether such a longer-term alternative approach would sufficiently address the identified shortcomings of the current framework (cf. paragraph 2.3), and whether these projected benefits would be worthwhile.

Stephen Mayson
17 September 2019

3. Findings and issues

3.1 The Clementi reforms

Following the review of the regulation of legal services by Sir David Clementi in 2004[5], the Legal Services Act 2007 created a new framework for the regulation of legal services and those who provide them. It has five major features:

(1) It sets out eight regulatory objectives that regulators must promote. These include objectives that many would regard as unobjectionable, such as the public interest, the constitutional principle of the rule of law, and an independent and strong legal profession. It also articulates a set of professional principles.[6] It also has other objectives, such as promoting competition and consumer interests, improving access to justice, and increasing public understanding of citizens' rights and duties.

(2) The Act affirmed the six pre-existing 'reserved legal activities', which are legal services that can only be delivered by those who are appropriately qualified and authorised. These activities are: exercising rights of audience and rights to conduct litigation; preparing documents that relate principally to the transfer or registration of land and applications for probate; carrying out notarial functions; and administering oaths.

(3) It created the Legal Services Board (LSB) as an overarching regulator, with a lay chair and a lay majority, that currently oversees ten front-line regulators[7]. It also established the Office for Legal Complaints and the Legal Ombudsman to provide a single point of complaint resolution and redress for dissatisfied consumers of legal services, and the Legal Services Consumer Panel to represent the interests of consumers[8].

(4) It requires the independence of the regulation of professionals from the representation of them. In doing so, it led to the creation, for example, of the Bar Standards Board (BSB) and the Solicitors Regulation Authority (SRA) as the separate regulatory arms of the Bar Council and The Law Society. This separation has in practice been problematic and often unsatisfactory for all parties.

(5) The Act allows the participation in law firms of owners, managers or investors who are not legally qualified: these firms are 'licensed bodies'[9] (more usually called alternative business structures, or ABSs). This reform led to a very significant shift from a regulatory position before the Act under which law firms had to be wholly owned by qualified lawyers to one where they could be wholly owned by individuals who are not legally qualified. However, an ABS can only be given a licence to operate if it offers one or more of the reserved legal activities in (2) above. As at August 2019, there

5. See Clementi (2004) 'Review of the regulatory framework for legal services in England and Wales'.
6. The professional principles can be found in section 1(3) of the Legal Services Act 2007: that authorised persons should act with independence and integrity, comply with their duty to the court to act with independence in the interests of justice, maintain proper standards of work, act in the best interests of clients and keep their affairs confidential.
7. They are: Solicitors Regulation Authority, Bar Standards Board, CILEx Regulation (the regulatory body of the Chartered Institute of Legal Executives), Master of the Faculties, Council for Licensed Conveyancers, Intellectual Property Regulation Board, Costs Lawyers Standards Board, Institute of Chartered Accountants in England & Wales, Institute of Chartered Accountants in Scotland, and Association of Chartered Certified Accountants.
8. It would be right to emphasise here that in discharging its role, in practice the Panel has sought to provide balanced, independent advice to the LSB and to ensure that the front-line regulators take account of the consumer perspective, rather than to act primarily as an advocate of consumer interests.
9. These are regulated entities allowed to carry on reserved and non-reserved legal activities, with more than 10% of their ownership, management or control held by individuals who are not legally qualified.

appear to have been almost 2,000 ABS licences[10] issued by the relevant licensing authorities (although about 10% of those issued are no longer in effect).

In comparison to most other jurisdictions around the world, the 2007 regulatory framework for legal services in England & Wales is already one of the most liberal. Many would suggest that the Legal Services Act 2007 has led to the positive developments and outcomes intended by Sir David Clementi in 2004 and the then Department for Constitutional Affairs[11]. It is doubtful, though, that those intentions have been realised as quickly or as fully as their initiators would have wished.

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

3.2 Competition and consumerism

At the time of the Clementi Review, and often since, there has been an entrenched policy belief that a combination of competition and consumerism is beneficial, and that market forces will drive higher quality services and improved value for money. The evidence to show that this belief is well-founded is not incontrovertible – and, arguably, there is much evidence from the global financial crisis that even regulated markets can do significant harm to society and citizens.

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

The Competition & Markets Authority, as part of its market study in 2016, made a number of observations about legal services that are worth recording here as contextual information:

- There are some inherent characteristics of legal services that affect consumers' use and experience. These include: legal issues not always being clearly identifiable or defined; infrequent purchase; and needs arising at moments of vulnerability[12], distress, stress or time pressure (including occasions when participating in the legal system might not be a choice – such as crime and immigration).
- There is also asymmetry of information: this is inevitable, given the training and experience of providers of legal services compared to the majority of the consumers of those services. Consequently, this makes assessments of providers and quality of service difficult for consumers to form.
- Consequently, many individuals and small businesses do not characterise their problems as 'legal' and deal with them as such, or are not in a position or set of

10. As a generalisation, for the most part ABSs will carry on business of the sort that would have been done by solicitors' firms before the 2007 Act. As a point of comparison with ABS licences, therefore, the number of solicitors' firms has remained in the region of 10,000 for many years.
11. See Department for Constitutional Affairs (2005) *The Future of Legal Services: Putting Consumers First.*
12. The Solicitors Regulation Authority has recently made the point, rightly, that "even the most sophisticated and empowered clients can be vulnerable when they are dealing with critical, often life-changing and distressing circumstances": see SRA (2019) 'Assuring advocacy standards: consultation' (page 5), available at: https://www.sra.org.uk/sra/consultations/consultation-listing/advocacy. See further paragraph 4.5.3 below.

circumstances where the ‘normal rules’ of consumer engagement and choice can apply.

- Even when a problem is recognised as being legal, about two-thirds of individuals and three-quarters of small businesses tend to do nothing, or seek to resolve issues themselves or with only informal help from friends and family rather than seek formal advice.
- More particularly for small businesses, perceptions of risk deter them from seeking legal advice: high and uncertain costs, compounded by their open-ended nature; complexity, with associated fear and time commitment; the risk of escalation; difficulty in finding the right provider; and the perceived lack of practicality and business understanding of lawyers.
- The provision of legal services to individuals and small businesses is highly fragmented, with more than 7,000 law firms serving these types of consumers, ranging from sole practitioners to large national businesses. The Legal Services Board reports that concentration levels are low across all legal services areas, but particularly for residential conveyancing and family law. Such fragmentation makes it harder for those who might wish to seek legal advice to find their way to an appropriate provider.
- Intermediaries (such as estate agents, mortgage brokers and trade unions) can be very influential in linking consumers to providers, thus filling a potential lack of information and experience in seeking advice and representation – though the interests and incentives of these intermediaries may not always be aligned with those of the consumers.
- Although most legal services (that is, non-reserved activities) can be provided by either authorised or unauthorised providers, more than three-quarters of consumers will still obtain them from those who are authorised. For more than two-thirds of consumers, that provider will be a solicitor – and the proportion is even higher for conveyancing, and for will-writing, probate and estate management advice.
- Consumers and small businesses are generally not aware of the distinction or differences between authorised and unauthorised providers, and tend to believe that all providers are regulated in the provision of legal services. Consequently, they assume that they would be protected in some way if matters did not turn out as expected.
- While regulation does not appear to create significant barriers to entry to or exit from the market, regulatory costs might be felt more acutely and disproportionately by smaller firms and sole practitioners. This can deter their entry or delay their exit.
- However, some regulatory costs may be excessive in nature, and these costs are likely to be passed on to consumers in the form of higher prices. Consequently, the regulatory costs of the current framework are likely to be disproportionate to its objectives, and are based on burdensome and prescriptive rules that impose high compliance costs on providers.

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

While the market study focused primarily on what might be described as the ‘consumer market’ for legal services, it did identify issues and reach conclusions of relevance across the entire sector. This Review has also considered the clients and circumstances of commercial law firms (particularly in the context of international transactions, where international trade in legal services is worth some £4 billion a year) and of in-house legal teams.

To complete this initial assessment, I would add that Sir David Clementi finished in 2004 his work on which the 2007 Act is based. The current structure therefore pre-dates the global financial crisis, which has led to austerity, further changes to the funding of legal aid and the wider courts and justice system, and then to a rise in self-lawyering and litigants-in-person[13]. It also pre-dates a use of technology that has become more extensive and pervasive, as well as the rise of machine learning and artificial intelligence in law.

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

3.3 Consumer expectations and regulatory reality

The present regulatory framework can be represented as a triangle, made up of: the reserved legal activities (RLAs); during-the-event regulation (DTE, such as requirements for the handling of client money, professional indemnity insurance, continuing professional development); and after-the-event regulation (ATE, such as access to complaints handling by the Legal Ombudsman, the availability of compensation, and conduct and discipline proceedings). This is represented diagrammatically in *Figure 3.3*.

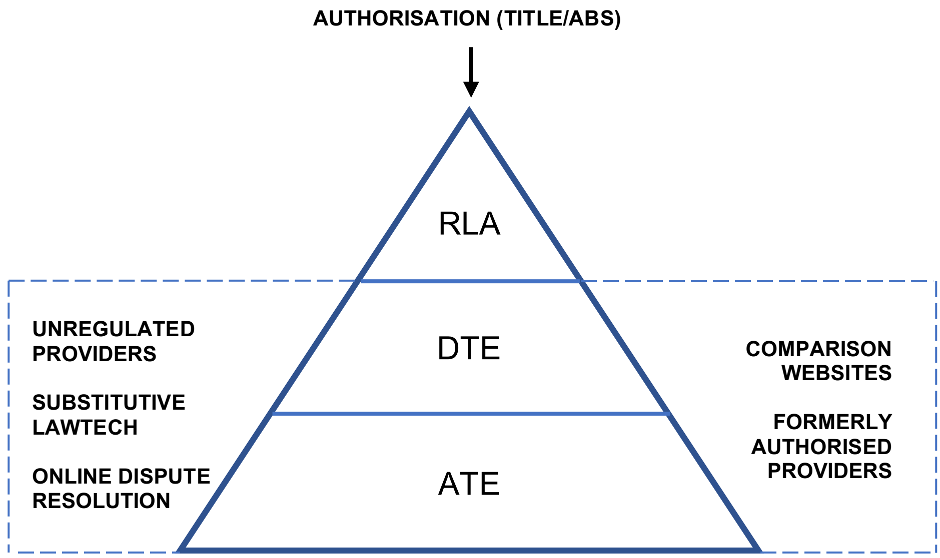

Figure 3.3: Representation of current regulatory framework

This presents a narrow ‘entry gate’ to regulation, in the sense that a combination of a reserved legal activity, combined with an authorisation to carry on such an activity (usually arising from a professional title), is required to enter the triangle. However, once through

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

that gate, the whole array of BTE, DTE and ATE tools is engaged, resulting in everything that the holder of a legal professional title does being subject to legal services regulation.

On the other hand, an individual or business wishing to offer only non-reserved legal activities, and not otherwise subject to legal services regulation, cannot gain admission to legal sector regulation. However much they might otherwise wish to subject themselves to regulatory obligations or offer the benefit of regulatory protection to their consumers, they cannot because they do not hold a professional title or a licence for an alternative business structure (ABS). They lie outside the triangle, legally able to carry on non-reserved legal activities, but not able to enter (or to be brought within it) – that is, they are both unregulated and unregulatable.

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

This complexity in the regulatory framework is not usually apparent to consumers (often even to those who might be regarded as 'sophisticated') and, in fact, completely undermines the general consumer assumption that all providers of legal services are regulated. Further, however transparent the market, it seems an unreasonable burden to expect consumers to navigate the complexities of reserved and non-reserved activities, or to understand which title-holders are authorised for which activities, and in what circumstances a complaint may or may not be made to the Legal Ombudsman.

Indeed, after 25 November 2019[14], the protections attaching to those who are described as 'solicitors' will vary depending on whether the individuals work in a regulated law firm, in an unregulated provider, or on their own account as a freelancer. This can only add to the complexity.

The circumstances described here do not in my view meet the Legal Services Consumer Panel's principles of the consumer interest[15] relating to information and redress, namely that "Consumers' rights are simple to understand and easy to find" and that "It is easy for consumers to understand their rights and routes to redress".

Therefore:

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

3.4 The reserved legal activities

The existing group of reserved legal activities has a difficult history.[16] Reservation creates barriers to entry, and these activities lack any consistent, risk-based justification for their different treatment. Combined with the need for authorisation for these activities arising only through holding a professional title or being given a licence for an alternative business structure (see footnote 9), the effect is to exclude from the regulated market those who wish to offer competitive but protected non-reserved services to the public.

The public interest case can be made for some form of prior authorisation for conducting legal activities that are of public importance, carry high risk (for the State or for citizens), or

14. See the new approach for the regulation of solicitors at https://www.sra.org.uk/newregs/.
15. See Legal Services Consumer Panel (2014) 'The consumer interest'.
16. See Mayson & Marley (2010) 'The regulation of legal services: reserved legal activities – history and rationale'.

on behalf of consumers who face a particular vulnerability. It is not clear, though, when the case is made, that the conclusion must be the reservation of the activity only to those who hold a full professional title.

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

Accordingly:

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

3.5 Differentiation of approach

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

If the role of reserved legal activities in forming the narrow gateway for admission to regulation can be re-thought, the path becomes clear for a more risk-based, segmented and differentiated use of the full range of regulatory tools.

Accordingly:

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

3.6 Professional titles

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

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

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

- are generally recognised by consumers and are assumed to assure competence, quality and protection;
- provide a potential short-cut for consumers in their search for possible providers of legal advice and representation;

- are subject to protection from mis-use and the deliberate misleading of consumers by those who do not hold the title;
- provide a signal of some competence and quality to employers; and
- offer benefits in international settings: in addition to similar brand recognition by international consumers and businesses, there are benefits of mutual recognition of qualifications and rights of establishment offered to title-holders by other jurisdictions.

The negative consequences are that titles:

- do not necessarily provide a clear indication to consumers of precisely what it is that an individual is regulated or competent to do: for example, solicitors who are authorised to conduct litigation might have spent their career in non-contentious practice, or they might not hold authorisation to exercise rights of audience in the higher courts; and chartered legal executives may or may not hold a civil, criminal or family certificate that allows them to practise in those areas;
- are not necessarily understood by consumers in terms of the protection or redress that they do or do not provide: this situation will be further complicated from late 2019 when solicitors who practise in regulated and unregulated organisations will be subject to different requirements and consequently to different levels of protection for clients (see footnote 14); and
- present or preserve barriers to entry to the regulated legal services sector in respect of non-reserved activities provided by those who do not wish (or cannot afford) to qualify for the award of a title.

In short, the 'signals' of title are not as clear for consumers as might be assumed. For those who are ascribing too much – or are mistaken because the strength of titles leads them to assume that all providers of legal services offer equivalent protection – trust and confidence in the wider structure of legal services is at risk. However, for the consumers who correctly ascribe value to those signals, it is important that their trust is not undermined.

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

For those who might otherwise offer a specialised service, but do not wish or cannot afford the full cost of gaining a professional title that would give them authorisation, the pragmatic need to acquire a title as the price of entry into the market is indeed a barrier.

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

> ***Finding 4:*** The link between the reserved activities and authorisation through professional titles creates inflexibility and constraints in the current regulatory framework. However, a shift from title-based regulation to activity-based regulation is not as straightforward as it might appear.

To be clear, I do not see professional titles disappearing (nor would I wish to see them doing so): on the contrary, there is a case to be made for some re-strengthening (see further paragraph 5.2.3).

3.7 Flexibility, cohesion and independence

3.7.1 Regulatory flexibility and the need for cohesion

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

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

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

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

Possibilities for those who might exercise judgement and decision-making powers are:

- Parliament
- government and ministers
- regulators
- representative interests (whether providers or consumers).

These possibilities are not mutually exclusive, and are raised again in paragraph 7, and will be considered in detail in the final report.

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

Perhaps, though, there is a further question that will flow from this will be of considerable interest and practical significance to some in the sector. Greater flexibility in the regulatory framework would almost certainly create a need for consistency in decision-making, coherence in the cumulative effect of those decisions, and coordination across the sector. Without them, the integrity of the regulatory framework, as well as public, consumer and provider confidence in it, could be threatened.

Consequently, the question will be: would a requirement for consistency, coherence and coordination across regulation within the legal services sector necessarily lead to a single, or at least a continuing oversight, regulator?

3.7.2 Regulatory independence

The question of the independence of regulation, regulators and the regulated community from government and state influence is important, and will be considered later in this report (see paragraphs 6.2(5) and 7.2.3). For now, this paragraph looks at independence as between regulators and those they regulate.

Most commentaries and assessments of the regulatory structure introduced by the Legal Services Act 2007 refer to the intended separation of regulatory and representative interests. The Act's focus on this was inevitable given the pre-existing arrangement of the self-regulation of the legal professions by bodies that both regulated and represented their members. By the time of the Clementi Review in 2004 (and probably long before), such an inherent conflict had become socially and politically unacceptable.

The ensuing quest to separate the regulatory functions of the ‘approved regulators’ has led to tension. It has become common to ascribe this tension to an incomplete separation. After all, the ‘approved regulator’ – which remains, formally, the professional body (such as the Law Society or the Bar Council) – is named in the Act, with no reference to the name of the regulatory bodies (respectively, the Solicitors Regulation Authority and the Bar Standards Board).

It was perhaps not surprising, then, that the professional bodies should continue to exert or claim some influence over their regulatory arms on the basis that ‘we are the body named in the Act with the ultimate statutory accountability’. Nor is it surprising, given that their members were also funding the regulatory arms through their practising fees, that the professional bodies should seek as approved regulators to rein in the activities and cost of their regulatory bodies.

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

The Legal Services Board’s internal governance rules (which seek to manage the separation and independence of the approved regulators in their regulatory and representative capacities) have also so far struggled to articulate fully and effectively the nature and appropriate parameters of these relationships[17].

In this sense, the nature of the separation and independence of regulatory functions from representative activities remains unsatisfactory. However, I now come to this conclusion with a different view about the reasons and consequences.

In LSR-3 (2019: paragraphs 3.3), I explored what I described as the ‘proper role’ of regulation. I sought to distinguish the role of regulation – as being to set the floor below which providers may not go in their provision of legal services – from the role of a profession (and perhaps legal services providers more generally) in aspiring to set the highest standards of competence and quality. In short, the former is entirely a matter for regulation, while the latter is not.

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

Where a professional title and the associated obligations are matters for a regulator, it is more likely that over time the regulatory standards and expectations applied will be lowered to a point closer to the regulatory ‘floor’ referred to above. This is because a regulator’s proper role is to impose the *minimum necessary* regulation in order to achieve the best outcomes at the most cost-efficient price for consumers.

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

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

17. The latest version of these rules was published on 24 July 2019 (see https://www.legalservicesboard.org.uk/wp-content/uploads/2019/07/IGR-2019.pdf). In my view, even this version continues the struggle.

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

Consequently, these practitioners will look to their professional body to represent their interests, resisting the regulator's perceived over-reach, the apparent failure to understand professional work and client relationships, and the imposition of what are seen as burdensome irrelevancies. Even so, conscientious practitioners will still seek to maintain professional standards at as high a level as possible (as will the firms and employing organisations within which they work).[18]

It is not hard to see that these positions could be mutually incompatible. Under the current structure, the professional bodies and their members will see supervision of standards being taken away from them, with a loss of control and decline in professional status following from that. The regulators will see a group of self-interested professionals seeking to retain or regain control so that they can continue to require standards that are unnecessarily high and expensive in a consumer market that has insufficient competition and innovation.

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

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

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

Accordingly:

> ***Finding 6:*** The nature of the separation and independence of regulatory functions from representative functions remains unsatisfactory. The current approach and requirements of regulation and the internal governance rules make the desirable cooperation and collaboration between regulatory and representative functions problematic to achieve.

3.7.3 Is greater separation of regulatory and representative functions desirable?

The regulators are right that professions have a tendency to raise standards of competence and quality above those necessary to protect consumers. It is also true that if all consumers are well served at all times, for all services, and with full protection, no-one will suffer from incompetence and poor quality. But this overlooks the potential variability of consumers' needs and preferences in different circumstances. And it also puts legal services beyond the financial reach (and sometimes comprehension) of a significant part of the population.

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

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

Equally, the professions (and professional bodies) are wrong if they do not accept the need for an arbiter of minimum standards and an independent assessment of whether those in a regulated market have met those standards. They must also accept that the views, expectations and experiences of consumers do not always match those of professionals. Sometimes, consumers will have a legitimate complaint and a right to redress when things – in their eyes – have not gone well.

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

As an analogy, we expect all new vehicles sold to us to have sound engineering and electrics, and to be roadworthy and safe. We are allowed to choose, beyond that minimum, what other features and benefits we wish (and can afford) to pay for. Different levels of expertise and quality can be applied by vehicle manufacturers to advanced features (such as self-parking, automatic distance control, keyless entry), the interior finish (wood, leather), the sound system, and so on. Sellers compete in an open market to persuade consumers that these differences are worth paying for.

Consequently:

> ***Finding 7:*** In principle, regulators are the natural (and arguably better) guardians of consumers' interests, by determining and enforcing the minimum or basic requirements for legal services. Equally, the professional bodies are the natural (and arguably better) custodians of the higher standards and aspirations associated with a professional calling and vocation.

3.8 Summary of issues that need to be addressed

What the findings of this interim report confirm is the nature and range of issues that in my view will need to be addressed in any future reform of the legal services regulatory framework.[19] They point to some significant shortcomings and challenges arising from the present structure for the regulation of legal services and those who provide them.

In summary, they are:

- inflexibility arising from statutory prescription;
- competing and possibly inappropriate regulatory objectives;
- a pivotal set of reserved legal activities that are anachronistic and do not necessarily include all activities that ought to be regulated;
- title-based authorisation that leads to additional burden and cost in relation to some activities being regulated that do not need to be (resulting in higher prices to consumers);
- the unsatisfactory nature of the separation of regulation and representation;
- the existence of unregulated providers who cannot be brought within the current regulatory framework (with an expectation that their numbers will increase);
- the prospect of LawTech (see paragraph 5.6), that will be capable of offering legal advice and services independently of any human or legally qualified interface or interaction, beyond the reach of the current framework;

19. See also LSR-0 (2019) 'Assessment of the current regulatory framework'.

- a regulatory gap that exposes consumers to potential harm when some activities are not regulated when they ought to be, and puts qualified practitioners at a competitive disadvantage;
- seemingly ever-increasing prices of private practice lawyers, reducing further the availability and affordability of legal services for many; this encourages either greater self-lawyering and litigants-in-person, or nudges increasing numbers of citizens into the world of unregulated providers or LawTech;
- consumer confusion, caused by the existence of both regulated and unregulated providers, and a profusion of differently regulated professional titles;
- inadequate or incomplete consumer protection, that is not consistent with a widespread consumer expectation that all legal services and those who provide them are subject to some form of regulation and protection; and
- as a result of all of these issues, the risk of low public confidence in legal services and their regulation.

3.9 Political risks

This Review is making no assumptions about the timing of legislative reform. Nevertheless, its work has been conducted on the basis that reform is a question of 'when' rather than 'if'. I shall therefore seek to offer (by the time of the final report) findings and recommendations that would represent a measured alternative approach for the future – for consideration whenever the timing for reform is judged to be right.

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

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

3.9.1 Where's the harm?

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

I shall not repeat them here (they are set out in paragraph 3.8), but the current structure either perpetuates or cannot address a number of shortcomings, challenges, harms, or detriment. These factors combine to exacerbate a growing crisis in access to justice and to legal services generally, by highlighting the effects of the regulatory gap, a reduction in available public funding, the increasing activities of unregulated providers, and the rise of LawTech.

It is common for the crisis in access to justice to be attributed mainly to changes in public funding. However, even if one were to accept the claim that cuts in funding for legal aid and court infrastructure are adding to the crisis, I do not subscribe to the view that this offers a complete or even substantial explanation of the crisis. When the cost of lawyers is beyond the reach of most citizens, questions must also be asked about the basis of that cost.

If the expense of qualification and regulation contributes to the costs of legal practice and the price to consumers (as it undoubtedly does), the ability of all citizens to access legal advice and representation is undermined. In turn, this can compromise the public interest in the rule of law and the effective enforcement of legal rights and duties.

I am not suggesting that the presence, absence, burden or cost of regulation explains the difference between the cost of legal services and the ability of citizens to afford them, such that changes in regulation would be justified for that reason alone. Equally, I am also not suggesting that greater public funding can reasonably be expected to make up the difference.

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

Accordingly:

> ***Finding 8:*** There is sufficient known or potential detriment to the interests of consumers and providers of legal services, and to society at large, arising from the shortcomings in the current regulatory framework to justify further reform.

I understand the assertion that the case for change might not be sufficiently compelling to subject practitioners to further regulatory reform at a time when there is continuing political and economic uncertainty. Let me therefore repeat the opening reminder above: this Review does not seek to make a case for immediate change, only for improvements when the time is judged to be right. The contention that change now would exacerbate other current factors or concerns is therefore based on a misassumption about timing.

3.9.2 Political appetite

In so many ways, the issue of political appetite for reform of legal services regulation rests on an assessment that it would be neither necessary nor appropriate for me to make. I therefore do not attempt to make it. However, I do wish to venture some observations that those who read this report might wish to take into account.

There are four themes that I would like to pick up on by way of background and context.

The first is the previous Lord Chancellor's speech to the Lord Mayor's Banquet 2019[20]. In it, David Gauke MP rightly emphasised the importance of the rule of law. In doing so, he echoed the primacy of the public interest (see paragraph 4.2). He referred to the principles of the rule of law, namely, equality under the law, access to justice, government being subject to the same law as anyone else, and a framework of law that is clear and certain.

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

Mr Gauke also suggested that there has been a regrettable deterioration in our public discourse that has contributed to a "growing distrust of our institutions – whether that be Parliament, the civil service, the mainstream media or the judiciary". As a consequence, a "dangerous gulf between the people and the institutions that serve them has emerged", while the reality is that the legal system and the judiciary "offer us the kind of confidence and predictability that underpins our success as a society".

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20. Available at: https://www.gov.uk/government/speeches/lord-mayors-banquet-2019-david-gaukes-speech?utm_source=01250f93-266f-4a02-a8f6-0f184cdad63e&utm_medium=email&utm_campaign=govuk-notifications&utm_content=immediate

The question of public confidence in legal services and their regulation is a matter of concern in this Review (cf. paragraphs 3.7.1, 3.8, 4.3.1, 5.9, 6.2 and 7.2.3).

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

> Our institutions have evolved over time to reflect the changing needs of our society. And that has not stopped. Our institutions are strong and effective because they continue to change organically as society demands, but not immediately in knee-jerk reactions to events in the news. Change comes with urgency sometimes, but must always be approached in a considered way to avoid negative unintended consequences….
>
> That view – that our institutions are not perfect, they must change to reflect society but they are beneficial and essential to our way of life – is under attack. Rather than recognising the challenges of a fast-changing society require sometimes complex responses, that we live in a world of trade-offs, that easy answers are usually false answers, we have seen the rise of the simplifiers. Those grappling with complex problems are not viewed as public servants but as engaged in a conspiracy to seek to frustrate the will of the public.

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

Second, the departmental plan of the Ministry of Justice for 2019-2022[21], includes objectives, for example, to promote the rule of law and the independence of legal services to provide a solid foundation for our status as a financial and legal global centre. It also seeks to ensure that the UK remains a highly attractive place to conduct legal business, focussing on developing the UK as a key LawTech market, and that the law remains fit for the future and ready to address legal issues arising from new technologies and changing societal trends.

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

Third, the Ministry's 'Legal Services are GREAT' campaign emphasises that the "sector is one of the UK's greatest exports and has supported trade and commerce around the world for generations". It contributes billions of pounds to the UK economy every year, and "is at the heart of the UK's future as a global, outward-looking, free-trading Britain". Again, these outcomes cannot be achieved, nor our position as a pre-eminent jurisdiction and the second-largest legal economy in the world maintained, without appropriate and effective regulation of legal services.

Fourth, in other related sectors, there is a current appetite to re-examine regulatory approaches and to consider new structures to strengthen the protections available to citizens for the risks arising from professional activities. For example, in July 2019, the Insolvency Service launched a call for evidence on a review of the regulation of insolvency practitioners.[22] A working group on the regulation of property agents was established by the Ministry of Housing, Communities and Local Government and has recently reported.[23] In the

21. See: https://www.gov.uk/government/publications/ministry-of-justice-single-departmental-plan/ministry-of-justice-single-departmental-plan--3.
22. See: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/816560/Call_for_Evidence_Final_Proofed_Versionrev.pdf.
23. See: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/818244/Regulation_of_Property_Agents_final_report.pdf.

regulation of health professions, the Government has also recognised the need to free regulatory bodies from the "constraints of prescriptive and bureaucratic legislation".[24]

While these developments do not necessarily signal any short-term intention to reform legal services regulation, they might nevertheless indicate that the door to regulatory reform is not inevitably closed.

3.10 Conclusion

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

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

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

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

As a consequence:

> ***Finding 9 and conclusion:*** The current regulatory structure provides an incomplete and limited framework for legal services regulation that will struggle in the near-term and beyond to meet the demands and expectations placed on it.

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

With this in mind, I shall now turn to how an alternative regulatory future might be conceived.

24. See: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/820566/Promoting_professionalism_reforming_regulation_consultation_reponse.pdf.

4. Thoughts about a new future for legal services regulation

4.1 Introduction and objectives

This Section of the interim report explores some thoughts and propositions for ways in which the findings and issues set out in Section 3 might be addressed in a new future for legal services regulation. Although the propositions are intended to be read as a coherent whole, elements might nevertheless also be considered independently.

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

(1) A rationale for the regulatory framework based on a regulatory objective of protecting and promoting the public interest.

(2) Addressing the regulatory gap.

(3) Replacing the current narrow gateway of entry into legal services regulation with broader scope.

(4) The ability to apply before-, during-, and after-the-event regulatory requirements independently of each other, in response to assessed risk in the services delivered.

(5) Future entry into the regulatory framework should not be restricted by reference to reserved legal activities or professional titles, and could therefore be open to all 'providers of legal services'.

(6) An appropriate balance between regulating legal services (activities) and those providers who continue to hold a professional qualification (titles).

At this stage, the propositions represent the foundations on which an alternative framework might be constructed. They are necessarily not fully worked up, and much further detail would therefore need to be thought through. Reactions and comments are therefore welcomed to help refine the ideas explored here. It may be that the further detail can be added in the preparation of the final report and recommendations.

I should emphasise that any reference to 'a regulator' or 'the regulator' in this and the following Section makes no judgement or comment about whether that expression should be taken as referring to a single regulator, to a specialist department of a single regulator, to a separate and distinct regulator, or to any of the current regulatory bodies.

4.2 Public interest foundations

The starting point is the stated rationale for any new regulatory framework. I suggested in Working Paper LSR-1 that the public interest should be the principal rationale for the regulation of legal services.[25] Through the course of this Review, no-one has taken issue with that. Accordingly:

> ***Proposition 1:*** Promoting and protecting the public interest should be the primary objective for the regulation of legal services.

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

(a) that the ***public good*** of the rule of law, the administration of justice, the international standing and economic contribution of our courts and legal services, and the wider interests of UK society are preserved and protected; and

25. See LSR-1 (2019) 'The rationale for legal services regulation'.

(b) that regulation secures the private benefit of appropriate ***consumer protection***, particularly where incompetent or inadequate legal services could result in irreversible, or imperfectly remedied, harm to citizens.

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

While protecting consumers is important, the first limb can protect society from the risks not just of ineffective legal representation[26] but also from the harmful effects and costs of, say, effective legal advisers and representatives who pursue specious litigation and outcomes on behalf of their clients.

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

4.3 Addressing the regulatory gap

4.3.1 The nature and consequences of the gap

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

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

The regulatory gap arises from the distinction between the reserved and other (non-reserved) legal activities, combined with authorisation and regulation flowing from a professional title. Because non-reserved legal activities do not require authorisation, someone who is not legally qualified can legitimately offer those services to the public without being subject to regulation (other than the general law and normal consumer protections).

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

This leads to two important consequences. First, public and consumer confidence in legal services could be undermined by any lack of competence, quality or service in unregulated legal services, and the absence of any protection in respect of them. [27]

Second, because of their assumption that all providers of legal services are subject to regulation, consumers might be less inclined to make proper enquiry of the expertise and

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

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

experience of providers before instructing them. Research suggests that consumers and small businesses do benefit from ‘shopping around’, but that only about a quarter actually do so.[28]

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

4.3.2 Closing the gap

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

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

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

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

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

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

4.3.3 Alignment: extend the reserved activities

The extension of reserved legal activities, as envisaged by section 24 of the Legal Services Act, is a rather blunt (and possibly disproportionate) instrument for achieving the regulation of additional legal activities. Indeed, given that only a ‘legal activity’ can presently be

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28. See Legal Services Consumer Panel (2019) *Tracker Survey: How consumers are choosing legal services*.

considered for reservation, the assumption must be that the extension of the regulatory net through reservation can necessarily only be achieved on a piecemeal, case-by-case, basis.

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

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

Consequently – and although I shall later advocate a review of the reserved activities (see paragraph 4.9.2) – I conclude that alignment through extending the reserved activities will not be a sufficiently flexible, timely or cost-effective way of resolving the challenges of the regulatory gap.

4.3.4 Alignment: public legal education

At the moment, there is a widespread consumer expectation that all legal services are in some way regulated and that there is protection or redress available to them as consumers. This seems to be founded on assumption or possibly even urban myth. Indeed, in this jurisdiction, it has never been the case that all legal services are regulated. Equally, though, it is almost certainly true that the distinction between reserved and non-reserved activities was not so apparent before the 2007 Act as it is now.

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

However, the nature of legal services, and of consumers, and the recognition and timing of need are such that this goal is not easily or cost-effectively achieved. If consumers do not always recognise that they have a legal need, even a full understanding of the regulatory landscape would not help if consumers did not consider themselves to be entering it.

Even such a full understanding would, under the current[29] arrangements, still require consumers to appreciate, for example:

- whether they are using – and possibly wishing to complain about – a solicitor, barrister, licensed conveyancer, legal executive (chartered or not), other title-holder, or unauthorised provider;
- whether their complaint is about service or professional conduct;
- whether indemnity insurance, a compensation fund, the Legal Ombudsman, a disciplinary tribunal, or an action for negligence offers the best route to the remedy they want.

It seems more than a little optimistic to expect public education to achieve this level of understanding across enough of the population even to meet most consumer needs most of the time. It is also highly unlikely that this understanding could ever exist for those members

29. The position is likely to become even more complex after 25 November 2019 when the Solicitors Regulation Authority's new regulations will draw a distinction between a solicitor who might be working in a law firm, in an unregulated business, or as an individual on a freelance or independent basis. The regulations and protections that flow from them will be different in each case, undermining the reliance that consumers might place on their understanding of instructing 'a solicitor'. See footnote 14.

of the public who suddenly find themselves, say, in a police cell, or facing deportation or eviction.

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

4.3.5 Alignment: increase the scope of regulation

The 2007 Act sought to encourage competition and innovation in the delivery of legal services, and generated the expectation that this would lead to better service, better value and fewer service complaints. In doing so, it created the possibility and prospect that perhaps as much as 80%[30] of legal services could be provided by those who cannot currently be regulated.

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

The point has already been made that the increasing cost of legal services is reducing the availability and affordability of legal services for many. While it is clear that the absolute cost of legal services has increased in recent years, it might be open to debate whether the relative cost of legal services has done so, and therefore whether cost is truly a contributing factor to unmet legal need. Nevertheless, whatever the drivers, there has also been a clear increase in self-lawyering and litigants-in-person, as well as more nudging of consumers into the world of unregulated providers or LawTech.

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

> ***Proposition 2:*** Consumer expectations and regulatory reality should be aligned by at least allowing access to the Legal Ombudsman for all consumers of legal services offered to the public.

Consequently:

> ***Proposition 3:*** All legal services should be capable of falling within the regulatory framework, irrespective of who provides them.

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

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

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

30. See LSR-0 (2019) 'Assessment of the current regulatory framework', paragraph 4.5.

I am acutely aware of the link between regulatory scope, activity and cost. I fully accept that even appropriate and proportionate regulation will have a cost, ultimately borne by consumers. Nevertheless, it might also be necessary to accept that 'right' regulation properly imposes that cost.

4.4 Widening the gateway to regulation

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

An alternative approach could be to allow entry at the bottom of the triangle, thus offering near-universal access to some form of after-the-event regulation, such as to the Legal Ombudsman. Consequently:

> ***Proposition 4:*** There should be an alternative or additional form of entry into regulation for those who do not hold a legal professional title.

Such an alternative would invert the current approach (see Figure 4.11 on page 47). The 2007 Act provides only a narrow point of entry to regulation but, once a provider is through that gate, the whole range of before-, during-, and after-the-event conditions then generally applies, almost irrespective of relative risk, focus of practice, or need for client protection. There can be little or no flexing of the burden or cost of regulatory requirements to reflect these factors.

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

An alternative approach, considered in more detail in paragraph 4.5, could instead start with a broader, and more inclusive, base that could subject all legal services to some form of regulatory cover. It could then add, on a risk basis, additional layers of regulatory obligation. Rather than the current 'all or nothing' style of being fully regulated or not regulated, providers could make more decisions for themselves about the extent to which they wished to offer the higher-risk services that would lead them into additional regulatory conditions.

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

4.5 A differentiated approach

4.5.1 Introduction

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

> ***Proposition 5:*** A future regulatory framework should allow the differential application of before-, during- and after-the-event regulation to reflect the importance or risk of any particular activity or circumstance.

Such an approach would not necessarily change the range of regulatory tools and interventions from those that are available now. It could, though, lead to their use in different circumstances and without the same dependencies or preconditions. Indeed, in many ways this approach affirms and adopts the regulatory tools and interventions that are already known and in use. The future difference would lie in coordinating and applying them in a more targeted, risk-based and proportionate manner.

In adopting such an approach, I would suggest that it would bring the regulatory framework more in line with the following view expressed in the Competition & Market Authority's market study (2016: paragraph 6.22):

> an optimal regulatory framework should not try to regulate all legal activities uniformly, but should have a targeted approach, where different activities are regulated differently according to the risk(s) they pose ….

The details of the different forms of BTE, DTE and ATE regulation are discussed in LSR-3 (2019: paragraph 8). It is initially tempting, as raised in LSR-3, to 'map' regulatory intervention along the lines of only ATE conditions for low-risk services, a mix of ATE and DTE conditions where there is intermediate risk, and the use of BTE, DTE and ATE regulation for the highest-risk services. However, in practice, the delineation is not so neat.

Dealing with complaints is clearly an after-the-event *process* (that is, after the event giving rise to the complaint). However, in making an assessment on the complaint, the Legal Ombudsman might wish to take into account, say, the provisions of a letter of engagement or of a code of conduct, or a provider's processes of checking for a conflict of interest. In terms of *timing*, a letter of engagement and conflict-checking will have been before the event (instruction) and a code will have applied during the event (delivery of the service).

In this report, therefore, the BTE, DTE and ATE labels are as much about the timing of their *application* by regulation as they are about the strict timing of their *origin*.

4.5.2 Application

For the purposes of this interim report and consultation, the working assumption is that all legal services (as defined) would be regarded as low risk *unless* they are separately defined and identified as either 'intermediate risk' or 'high risk' services requiring more targeted regulation.

As a consequence, entry into the triangle of regulation would be set with broader scope, that is, in relation to low-risk legal services and principally for ATE remedies (such as access to the Legal Ombudsman). This level would set the minimum conditions of regulatory intervention to which all regulated providers of legal services would be subject.

As well as access to a formal resolution and redress system, these minimum conditions could include disclosure and transparency obligations, a requirement to have indemnity insurance, and adherence to a code of conduct: this issue is picked up in paragraph 4.7.

There could then be additional powers to determine that certain legal activities carried higher risk (to the public good or to consumers). These activities could be subject to practice (usually DTE) conditions, as well as the lower-risk ATE requirements.

Practice conditions might include, for example: accreditation requirements to assure competence, and continuing professional development (CPD) obligations and re-accreditation to assure continuing competence[31]; obligations relating to the handling of

31. I am aware that some professional firms, as part of their own risk management, operate (in effect) an internal licensing system under which practitioners are not allowed to practise in certain designated areas unless they have been issued an appropriate and up-to-date licence to do so by the firm. There may even be additional licensing requirements *within* a designated area in respect of very highly specialised work.

clients' money, contributions to a compensation fund, undertakings, and appropriate management systems[32].

These conditions will also include non-sector requirements such as those relating to data protection, money-laundering, and proceeds of crime and bribery.

There could also be further additional powers to determine that certain legal activities carried a high innate degree of risk (again to the public good or to consumers). These highest-risk activities could then be subject to BTE regulation, as well as to DTE and ATE requirements. BTE conditions would require that providers have prior authorisation to carry on those highest-risk activities before they were allowed to offer their services to clients.

4.5.3 Differentiation, risk and vulnerability

I readily acknowledge the challenges of a risk-based approach to regulation, and that further – and detailed – work is necessary. At this stage of the Review, I am more concerned with principle and viability than with absolute detail. Nevertheless, I remain conscious of the eventual need for that detail.

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; and

(e) the relative vulnerability of the client, arising from the circumstances giving rise to the need for legal support.

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 4.9), it might well be that the approach to authorisation and risk will remain much as it is at present.

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.[33]

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

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32. On management systems, see the example of the Legal Services Commissioner for New South Wales: http://www.olsc.nsw.gov.au/Pages/lsc_practice_management/lsc_practice_management.aspx.
33. 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.

what is a 'simple' will or 'straightforward' domestic conveyance[34], and something more challenging.

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.[35]

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 Service Board's segmentation matrix, with a combination of legal service, type of client, and type of problem, could provide a starting point.[36]

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.

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.

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.[37] 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

34. Even an apparently 'straightforward' domestic conveyance or estate administration, while perhaps presenting low risk from a technical perspective can still be high risk to a client given that their life-savings or entitlement to assets could disappear if something goes wrong or fraud is involved.
35. 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.
36. See https://www.legalservicesboard.org.uk/research/reports/market-segmentation201.
37. The Legal Services Consumer Panel has provided a very helpful guide: see (2014) 'Recognising and responding to consumer vulnerability'.

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.[38]

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*'. So, too, does moving house and entering into other similar and significant financial and legal commitments.

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 quotation from the SRA consultation paper referred to in footnote 12 that "even the most sophisticated and empowered clients can be vulnerable when they are dealing with critical, often life-changing and distressing circumstances". This is one reason why an approach to regulation cannot readily be founded on differences between 'sophisticated' and 'vulnerable' clients[39].

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-laundering and managing conflicts of interest. Even those firms can face pressure from large or strategically important clients[40] to push the limits of the law or professional ethics.

Individual lawyers in law firms of any size or in in-house legal departments 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).[41]

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38. See Hazel Genn (2019) 'When law is good for your health: mitigating the social determinants of health through access to justice', *Current Legal Problems*.
39. 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'.
40. 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.
41. 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.

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.

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.

Finally on this subject, 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 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.

In the final analysis, it would be for a regulator to identify and set out its own approach to evidenced risk assessment, bearing in mind the range in sources of risk in legal practice.

4.5.4 A comparative approach

As I prepared this interim report and the approach it contains, 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.

4.5.5 Summary

The hypothesis of this alternative approach to regulation is that, in the future, authorisation and the application of BTE, DTE and ATE requirements would not be imposed *only* on those who hold one or other of the existing professional titles. Instead, all providers of legal services should be capable of entering the regulated domain for at least ATE regulation.

Beyond this, a risk-based approach could determine whether additional DTE and BTE requirements should be applied. At levels of higher risk, the requirement for and value of professional qualification and attainment might become even more relevant – although, again, the reach of regulation should not necessarily be restricted only to those who have a professional *title*.

In short:

> ***Proposition 6:*** Professional title should no longer be the only route to personal authorisation, even in respect of those important or highest-risk activities for which BTE authorisation would continue to be required.

Such an approach would be consistent with the observation of the Competition & Markets Authority in their market study (CMA 2016: paragraph 6.26) that the objective of regulation should be to ensure that consumers are protected primarily from the worst consequences of poor-quality delivery, rather than to remove all risks that consumers or society might potentially face.

This approach would not assume the disappearance of professional titles or of any need to regulate them, but would instead offer an *additional* route to authorisation to practise the reserved activities or legal services for which future BTE authorisation would be required.

The approach above outlines how those without professional titles might in future enter and position themselves within a risk-based framework of regulation. As a consequence:

> ***Proposition 7:*** The appropriate regulator should determine what qualification or assurance of (continuing) competence, experience and integrity would need to be demonstrated by any provider for particular legal services on a BTE basis, and the additional requirements that would be applied on a DTE or ATE basis to the relevant providers.

This would address ways in which the necessary assurance and compliance could be achieved for regulated providers. In principle, the same requirements should be applied to those who hold a professional title as to those who do not. To do otherwise would be to create an unlevel regulatory playing field.

However, those with a professional title would still be able to demonstrate and justify to a regulator, judges and consumers that their professional qualifications and experience made them more likely to deliver a better outcome. Consequently, there might be a defensible practical and competitive advantage arising from a title (see further paragraph 5.2).

The issue for a regulator would lie in assessing the comparability of the current competence of different providers, some coming from a professional background with a title and others who do not. From a regulatory perspective, the proposition should probably be that the regulator should base this assessment on the assurance that would be required for those providers who have *not* taken the title route.

Further, the regulator should be discouraged from setting requirements that are higher than necessary.[42] Once the necessary requirements are established, the regulator could then assess the comparative assurance provided by those who have qualified for the award of a professional title.

This approach recognises that there might once have been (and in many cases continues to be) a compelling need for lawyer advice and regulation, justifying the reservation of certain activities to those who are legally qualified. However, it also allows an alternative in relation to those activities or situations where such a monopoly has become inappropriate in the twenty-first century.

4.6 A revised definition of 'legal activity' or 'legal services'

4.6.1 The challenges of definition

If access to regulation were to be widened in the way suggested in paragraphs 4.3.5 and 4.4, the definition of the services or activities that fall within the scope of regulation will be central to the purpose and implementation of the framework.

The challenge of defining what might fall within the scope of sector-specific legal services regulation is not, I think, insurmountable. In general terms, it should apply to advice, assistance, representation and document preparation connected to legal rights and duties arising under the law of England & Wales.

The 2007 Act includes in section 12(3) a definition of 'legal activity' which in effect covers all forms of legal advice, assistance and representation, including both non-contentious and court-related activities, preparation of legal documents and notarisation, and the administration of oaths.[43] It is subject to the 'usual exceptions' to exclude judicial, quasi-judicial and mediation functions.

Such an approach to definition would probably suffice to capture all necessary services. However, it might be necessary to clarify, for the avoidance of doubt, that the provision of information only would not be included.[44] The writing and publishing of books, articles,

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42. There might even be a case for a new statutory duty on the regulator to apply only the minimum necessary regulatory requirements to address identified risk, in order to keep the burden and cost of regulation as low as possible.
43. The Legal Services (Scotland) Act 2010 is in substantially the same terms, although it refers to 'legal services' rather than 'legal activity'.
44. Even here, though, some modern caution might be necessary. For example, a website might provide free access to legal information, but might then offer links to sources of help that have been 'distorted' by inappropriate relationships with third-party providers.

blogs, off-the-shelf will-writing templates and similar, giving lectures, and so on have not usually been considered as the provision of regulated legal services.

There will, of course and as always, be some grey areas. For example, what individuals often need help with is simply completing official forms (whether applying for various registrations or benefits, or complying with other formal requirements, such as submitting tax forms or returns). I am aware that the United States has grappled with such issues in the context of what amounts to the 'unauthorised practice of law'. On-line templates and form-filling support is a related area as technology is increasingly brought to bear in supporting citizens looking for help in meeting their legal and other needs.

It would be unfortunate if such form-filling support was regarded as a legal service to be regulated. It seems to me unlikely that an assessment of benefit, risk and cost would justify such an outcome. On the question of a 'legal service' or 'the practice of law', it might be that one of the critical factors will be the extent to which legal advice is needed for the consumer to be able to make informed choices about how best to complete any particular form or template. If such advice is an intrinsic part of the service, it might well be regarded as legal service.

The exclusion of those exercising judicial and quasi-judicial functions from the scope of legal services regulation is understandable. They are carrying out an independent and neutral function on behalf of the state. However, I might question whether all alternative dispute resolution should be excluded. For example, mediation is not otherwise subject to formal regulation (though it might in some instances be required or overseen by a court), and online dispute resolution is likely to be a growing area of activity.

In such mediations, consumers are just as likely to be ill-informed and vulnerable as they are in relation to other legal services. This could cause particular challenges where mediation is compulsory and a participant might feel, in some sense, 'compelled' both in process and outcome. It is possible, too, that some mediators will have a strong focus on settlement and might be perceived by one of the parties to have become too directive or to have lost their neutrality. There could also be circumstances, for instance, where the previous actions of a cavalier mediator could result in even a successful party in litigation being disadvantaged on costs.

It might also be worth bearing in mind a further factor in relation to mediation. If a regulated advisor recommends that a client should undertake mediation, under the current structure, they are effectively removing a client from a regulated environment (legal services) into an unregulated one (mediation).

Accordingly, therefore, I wonder whether the 'usual' approach to defining legal services would benefit from further thought in relation to some activities or services that would not previously have been thought to fall within the definition. This could include alternative dispute resolution (particularly mediation and online resolution), and comparison websites[45].

It would follow from a different approach to the scope of regulation that a narrow range of reserved legal activities would no longer 'guard the entry gate' into regulation. The future scope of sector-specific regulation could be any and all legal services. Nevertheless, depending on the assessment of risk or potential detriment attaching to different legal services, the focus of regulation could be differentiated to offer greater protection or redress.

45. In relation to comparison websites (also known as 'digital comparison tools'), there is a question of whether sector-specific regulation should be applied on the basis of general principles across all markets: cf. Competition & Markets Authority market study in 2017 of such websites (available at: https://www.gov.uk/government/publications/digital-comparison-tools-summary-of-final-report/digital-comparison-tools-summary-of-final-report).

In other words, the *scope* of the definition of legal services could be broad (to protect consumers), while *focus* could be targeted (to place only proportionate regulatory burdens on providers).

4.6.2 Not quite activity-based regulation

One of the anticipated challenges of activity-based regulation is the assumed need to define each activity subject to regulation. This would appear to underlie the conclusion of the Roberton review of Scottish legal services regulation that although activity-based regulation "offers the chance to introduce more risk-based profiling", it can also lead to inflexibility and a tendency to "proliferate the number of regulators" (Roberton 2018: page 41).

The approach explored in this report would not require numerous definitions of separate legal activities. First, to bring legal services within the regulatory framework, the general definition of scope (as in paragraph 4.6.1) would suffice.

Second, to apply a requirement for BTE authorisation for high-risk activities, there would certainly need to be a definition of each activity. However, this is no different to the position now where reserved legal activities are defined separately. We might also be able to learn from the experience of those definitions to be more specific and nuanced for future BTE requirements.

Otherwise, definitions would only be necessary where the regulator felt that specific risks or circumstances justified the use of any other (mainly DTE) conditions. Even here, the focus of regulation might not be on what we would normally understand as a 'legal activity'. For example, the identified risk could apply to handling client money or other assets, to operating a comparison website[46], or relate to one or more forms of client vulnerability (as discussed in paragraph 4.5.3).

For these reasons, for the future I might prefer a definition (cf. paragraph 4.6.1) that refers to 'legal services' more generally rather than, as now, to 'legal activity'. The latter has tended to refer to something specifically legal in nature (such as advocacy or preparing a legally binding agreement) as opposed to a wider aspect of legal practice (such as handling client money or offering online services).

The future application of regulatory conditions might also be delineated not simply by activity or service, but by a combination of what is done (service) and a qualifier of 'to whom' (taking in client or market segment characteristics, such as vulnerability) ,or 'by whom' (taking in provider characteristics, such as individual or entity, or ownership structure), or 'how' (taking in processes, such as handling money or conflict-checking).

4.7 The minimum conditions attached to after-the-event regulation

Once regulatory scope has been determined through an appropriate definition of 'legal activity' or 'legal services', ATE regulation would effectively set the base level of regulatory intervention. Consequently, the minimum ATE conditions should include at least access to the Legal Ombudsman for unresolved service complaints.

There is a further question about whether this minimum level should also include, say, requirements for disclosure and transparency, terms of engagement, compliance with a code of conduct, or having a minimum level of indemnity insurance.

46. The risks here might be an undisclosed small comparison sample, undisclosed relationships between the website promoters and providers of legal services, or payments by providers for entry and preferment.

For reasons explored in paragraph 4.8, there could be strong public policy and consumer protection arguments in favour of leaving ATE conditions at a basic level. However, the need for, and objectives of, protection will have to determine how minimal such a basic level can be.

4.8 Mandatory and voluntary registration

4.8.1 The fear of over-regulation

An argument against extending regulation in some form (even only at ATE levels) could be that this would impose a regulatory burden on too many ‘new entrant’ providers and might discourage some from entering the market.

However, the reality of the current framework has, until only recently, applied the full range of reserved activity regulation, combined with DTE and ATE regulation, on all providers. This is because, as a matter of fact, the overwhelming majority of legal services were historically provided only by those who were legally qualified. If such universal coverage was acceptable until 2007, it is difficult to see why a similar, but risk-based and targeted, argument should not hold water in 2020.

Through the Review, I have been made aware of potential new providers who are being put off entering the market or investing in technological or other developments that could benefit consumers. At present, they are faced with an almost binary choice of having to operate with the full burden of the regulatory framework, or completely outside it.

It is not always appreciated that entrepreneurs and investors (especially those from outside the traditional sector) often welcome regulation and access to it because it provides more certain parameters for their decision-making and helps them to define and manage risk.

Alternatively, they might adopt some rather artificial arrangements that leave the new entrant outside the regulatory structure but hiving off or farming out the reserved activity elements to another provider within that structure. This makes the provision of a one-stop shop for consumers significantly less attractive – especially one that might also include elements that did not relate to law.

An alternative approach founded on potential entry for all providers of legal services, with only ATE regulation at the entry level, could still be either mandatory or voluntary. It seems to me that, where BTE or DTE conditions are considered necessary, then the mandatory application of regulatory requirements is appropriate and essential.

However, where the risks of the services in question, or to the consumers who use them, are not assessed to cross the necessary threshold, the policy choice of mandatory or voluntary submission to ATE conditions for low-risk legal services remains a valid one.

4.8.2 The risk of under-regulation

The argument against mandatory regulation of all providers would stem from the point above that this might be regarded as a policy step too far. It might also raise the likelihood of some providers who could otherwise be tempted to offer low-risk services choosing not to do so. Such an outcome would potentially restrict consumer choice and competition in areas of legal activity where the risks to consumers are not considered to be great.

In this sense, there could be a good case for keeping any mandatory requirements as limited, less burdensome and as low cost, as possible so as not to discourage too many potential new providers from entering the market.

On the other hand, elective participation in the regulatory structure would leave open the possibility that some providers who pose a risk to consumers would choose to operate as unregulated businesses. As now, the providers from whom consumers might need most protection could continue to represent a danger.

4.8.3 A public register of providers

These challenges might be resolved as follows:

(a) Any provider of legal services within the appropriate definitions could potentially fall within the regulatory coverage.

(b) Any provider of services for which BTE or DTE conditions apply *must* register as a provider of those services.

(c) The register of providers should be available publicly, and this register would also make clear the services for which any provider was authorised (where BTE authorisation is required) or regulated (where only DTE and ATE conditions were relevant).

(d) Any provider registered in respect of BTE or DTE services would also be subject to ATE regulation.

(e) Any provider not otherwise subject to sector-specific requirements would be *eligible* to register as a provider of legal services, and if they did so would then be subject to ATE regulation (that is, some form of redress or other minimum conditions would apply).

In this way, all registered providers could be subject to at least ATE regulation. Consumers would be able to consult a public register of providers as they contemplate using any particular source of advice and representation to help with their problem.

> ***Proposition 8:*** The application of regulatory requirements could be supported by the existence of a public register of who is regulated and for what. Accordingly, ATE regulation and voluntary registration should be available to all providers of low-risk legal services; and BTE and DTE regulation and mandatory registration should apply to providers of higher-risk legal services.

The current framework requires complex and varied public legal education to enable consumers to enquire effectively, and to understand who and what is regulated and the consequences of their choice. The benefit of a public register would be that a single point of enquiry could establish for them whether or not their prospective provider is registered, and for what.

For any registered provider, there would be some form of protection and redress available to their clients. It is probably the case that, at an initial stage, this is as much as a consumer might need to know.

Any provider who could be registered but chooses not to be would not appear on the public register. They would therefore run the risk of consumers instructing a registered provider in preference; or at least the consumer would know that no protection is available if they go to an unregistered provider (beyond that provided by general consumer law).

For low-risk activities requiring only ATE regulation, the cost of registration could be modest (and the possible regulatory infrastructure costs could also be spread over a greater number of providers than now).

For consumers, therefore, the choice might simply become, ‘Is this provider on the register or not?’. This would be a far easier task for consumer education. It would no longer be necessary for a consumer to understand the nature of the provider's qualifications or title, the reserved or non-reserved nature of the activities undertaken, the context of the business within which a practitioner is working, and to whom any complaint should be addressed if the relationship does not go as expected.

On balance, therefore, it is conceivable that registration could support an approach where a choice might remain for providers of low-risk legal activities who did not wish to submit to regulation. However, consumers would at least be better able to inform themselves about whether or not that presented a potential for any detriment to them.

It would allow those responsible businesses and individuals who are presently part of the unregulated and unregulatable part of the legal services sector to improve their offering to consumers. This could probably be achieved at relatively little cost to them. On the other hand, there could be great benefit in signalling to the market that it is no longer only legal professional titles that confer the possibility of regulatory protection and redress.

From a consumer education and protection perspective, there is also a question for the future about whether the adoption and use of all professional titles should be protected, or whether the current protections should continue alongside a public register and the generic use and protection of a description such as 'registered legal services provider'. It could then be an offence to claim to be registered when not.

4.9 A new approach to 'reserved legal activities'

4.9.1 The purpose of prior authorisation

An initial point to be made here is that prior authorisation should not be seen or understood as favouring the interests of a particular class of providers, such as those with a professional title. In principle, the consequence of what we currently characterise as reservation should be a need for a *provider* to be authorised or licensed.

With a move towards differentiated application of BTE, DTE and ATE conditions, BTE authorisation would be the equivalent of reservation. It then becomes an open question whether the services subject to BTE authorisation would or should still be described as 'reserved' or even fixed in statute.

Reservation might presently be seen in its *outcomes* to protect a certain set of interests – those of lawyers. But there is also a question about the interests intended to be protected by its *purpose*. Perhaps the easiest way to find a common rationale for the purpose of the current reserved activities is to connect them to some form of State interest.

Rights of audience, the conduct of litigation, the administration of oaths, and notarial activities are all based, in some form, on an individual's position as a state-appointed or state-recognised officer (such as barrister, solicitor, commissioner for oaths, and notary public). The state's interest is therefore clear.

In addition, the others also stem from a different form of state interest, either in the collection of taxation (stamp duty on property transactions, or taxes on death) or in the integrity of public registers (for land registration or grants of probate).

While all of these have incidental benefits of consumer protection, it is difficult to see in their history that this was the real purpose for reservation. Equally, however tempting it might be to think that state interest and public interest are the same, I do not believe that this would be the correct judgement.

I certainly would not argue that the proper collection of taxation is not in the public interest. However, there are other forms of taxation to which this logic could apply but for which the underlying transactions or events do not presently give rise to the reservation of that activity (such as the preparation and submission of tax returns) – and I think should not.

In short, it could be argued that the current reserved activities relate most closely to what, in terms of the public interest articulated earlier (in paragraph 4.2), would be justified by reference to the public good rather than to consumer protection. Consequently, a regulatory structure has been built around the public interest need to secure the highest levels of competence, skill and integrity – historically as demonstrated by, predominantly, barristers, solicitors and notaries.

The regulatory requirements for this protection of the public interest were then simply carried over to all other legal services, without reference to any further rationale for their regulation. It is time that these decisions were revisited.

Returning to the articulation of the public interest, therefore, I would now draw a distinction between the public interest and state interest – and suggest that state interest alone would not be sufficient for reservation or its future equivalent. I would also emphasise the distinction between the public good and consumer protection elements of the public interest. This could lead to the identification of additional activities or services under either of those limbs that are not presently within the parameters of reservation.

4.9.2 The future basis of prior authorisation

For the future, therefore, it might well be that some legal services should be subject to BTE conditions because they are of the highest and enduring public interest (either for reasons of public good or risk to consumers). But this might not be the current set of reserved legal activities.

As a consequence:

> ***Proposition 9:*** The current list of reserved activities should be reviewed. This process should identify clearly the public interest basis of the need for BTE authorisation. This need should be established by reference to public good or consumer protection and should be explicitly articulated, to confirm that the current reservation can continue to be justified. Other activities should also be reviewed against these same criteria to see whether prior authorisation should in the future be extended to them.

A revised approach might also lead to greater differentiation among services that are thought to require prior authorisation. For example, even if rights of audience were in principle to remain subject to BTE regulation, it need not follow that *all* rights of audience should require prior authorisation (in contrast, say, to some continuing form of DTE regulation).

It might be tempting to think that those who appear as advocates in the most senior courts should be regulated, and that perhaps those who appear in magistrates' courts and many tribunals would not need to be. However, the vulnerability of parties and the relative importance of the issues and consequences to them could suggest a greater need in tribunals and the lower courts.

Further, a recent interview with a Justice of the Supreme Court also suggests that, even with the current levels of authorisation, there are still issues that arise during cases in the highest court[47], suggesting that judges at these levels are more than capable of recognising and dealing with any shortcomings in advocates' ability or experience.

Under the 2007 Act, the reserved activities are set out in the statute. I can see that it would be potentially appealing in a reformed framework for those legal services that need to be subject to BTE authorisation to be similarly prescribed. Nevertheless, I would pose the question whether this might only be necessary for those services that are judged to require regulation for the public good.

This would probably apply, for example, to most rights of audience and the conduct of most litigation. To promote and protect the public good of the rule of law and the effective administration of justice, constitutionally it would be justifiable to 'enshrine' these requirements in an enabling Act of Parliament. (It would also be sensible, in my view, to give the judiciary more than consultation rights in relation to the establishment and oversight of those public good legal services.)

However, given the shifting nature of legal services and consumer protection concerns, it might be more of an open question whether those activities that are thought to warrant BTE authorisation under only the consumer protection limb of the public interest (as set out in paragraph 4.2) should be defined in statute.

While the public good authorisations might be seen as reflecting and protecting enduring elements of civil society, the purely consumer protection authorisations could result from rather more short-term or even transient developments in the sector. Having the flexibility to apply regulatory tools in a quicker, targeted way is more likely to meet these needs than statutory prescription.

Avoiding the need for statutory determination through reservation or its equivalent might allow, for example, regulation of will-writing and estate administration, or the drafting of costs bills, to be subject to regulatory conditions without the need for practitioners to undertake costly or burdensome BTE qualification and prior authorisation.

To be clear, it could still be open to the appropriate regulator to impose a DTE requirement that, for example, those who write wills or draft costs bills should hold some form of qualification or accreditation to demonstrate their competence for the activity or service in question. It is the requirement for prior authorisation that might not be imposed.

In the case of will-writing, for example (and without wishing to pre-judge any future decision on the matter), this might make the regulatory threshold easier to reach than it has been for reserved activity status or might be in the future for BTE authorisation.

In these terms, the regulatory structure could adopt a different approach to regulation for public good reasons as compared with regulation for consumer protection reasons. For instance, given the nature of the public interest engaged, regulation of public good legal services could require judicial involvement or oversight. This could assure the judges, the state and the general public that the underpinnings of our constitutional arrangements are appropriately overseen and protected.

It could even be that, in relation to these public good services – at least in the higher courts – the role of the traditional professions is maintained: barristers as advocates, and solicitors as officers of the court or advocates. This would still be subject to appropriate authorisation in respect of rights of audience and to conduct litigation (as envisaged in paragraph 4.5.5) but also with professional accountability for the conduct in the role ultimately to the judiciary.

Such an approach would not be necessary, or possibly even appropriate, in relation to other legal services where the primary need for regulation relates to consumer protection.

47. Lady Black of Derwent: "I'm surprised at how often a new point arises even in the Supreme Court." (In *Counsel*, August 2019, page 8)

Arguably, no judicial involvement is required, but more consumer or lay engagement is. These legal services could then be subject to different processes within the overall regulatory framework.

4.10 A focus on individuals, entities, titles or providers?

4.10.1 Complexity and artifice

As stated previously, the current framework requires a combination of reserved legal activity and authorisation in order to enter. Consequently, it applies a potentially complicated and confusing mix of regulatory attention to activities, individuals, entities and title-holders. I have no doubt that regulation must extend to both individuals and entities, but not necessarily for the same activities, and not necessarily in the same way.

Under the Legal Services Act, both individuals and alternative business structures (ABSs) can be authorised to carry on reserved legal activities. In relation to ABSs, this is an artifice to be able to bring entities that are not wholly owned or controlled by lawyers into regulatory reach. The reserved activities still have to be delivered by individuals who themselves hold the necessary personal authorisation.

Artifice or pragmatism aside, though, granting authorisation for a reserved activity to an entity does not make much sense. The reserved activities – as we have seen in paragraph 4.9 above – relate to very important or high-risk activities where the competence or integrity (or both) of those who carry them out should be assured. Both competence and integrity are inherently qualities that can only be demonstrated by human beings, not by legal or social constructs (or, increasingly, by technological ones).

4.10.2 A focus on 'providers'

Perhaps the more fundamental point here, though, is that under the alternative approach to regulation outlined in this Section, the access to regulation would no longer be through a restriction of reserved activity and authorisation. It could apply to any 'provider' of legal services, with layers of regulatory requirements being imposed based on the degree to which those providers wish to undertake higher-risk services.

> ***Proposition 10:*** The future primary focus of regulation should be the 'provider' of legal services, whether an individual, entity, title-holder, or technology.

Constructing an appropriate definition of 'provider' will require further work, but it would need to cover:

(a) those who are established to provide legal services as a business or professional activity (such as the activities of those practising law in private practice, whether as solicitors, barristers, notaries, chartered legal executives, licensed conveyancers, patent and trademark attorneys, costs lawyers, will-writing and probate companies, or immigration advisers);

(b) those who provide legal services in the ordinary course of or as part of a business or activity established for a different principal purpose (such as in-house legal departments, accountants and tax advisers);

(c) multidisciplinary providers, where legal services are part of a business or organisation for which the principal purpose is to provide a range of services, a number of which form part of the main or dominant strategy of the provider;

(d) those who provide legal services as a not-for-profit or pro bono activity (such as law centres, unpaid McKenzie Friends and similar); and

(e) those who provide legal advice, document preparation and dispute resolution though LawTech.

There would probably also need to be exemptions for advice and assistance provided:

- as self-representation (except in circumstances where self-representation would defeat the underlying rationale for regulation, such as notarial acts or the administration of oaths)
- by those in a blood or other defined familial, domestic or social circumstances (on the basis that this should not be considered 'provision' or as giving rise to the prospect of a formal adviser-client relationship leading to any reasonable expectation of regulation or redress);
- by those who are simply offering access to legal information (such as authors and publishers, and websites that do not venture into giving 'advice and assistance');
- by those for whom the legal services are incidental or ancillary to their main business or other activity (such as surveyors, and town planners): this would need careful consideration so as not to encourage inappropriate unbundling of some legal work from other activities;
- by those providers who are subject to specific regulatory arrangements that will otherwise offer sufficient protection of the public interest: this might apply, for instance, to claims management companies and insolvency practitioners (see further paragraph 5.5); and
- by those who are otherwise currently and appropriately exempt under Schedule 3 to the 2007 Act (such as Law Officers of the Crown).

It could be the case that an entity or organisation providing legal services might wish to include on the register both its own registration and that of any or all of the individuals who work within it. Indeed, it would almost certainly need to be the case that, if individuals require any form of BTE authorisation or are subject to other DTE requirements in order to carry on particular activities, they would need to be registered in their own right.

A question for consultation is therefore how a definition of 'provider' might be constructed and what it would need to be sure to include and exclude. It is perhaps worth emphasising here that I do not see that the existence or nature of a contractual relationship should be conclusive.

4.10.3 Individuals and entities have distinct characteristics

While the regulatory framework might adopt a broader approach to who falls within its scope, there is nevertheless still a difference between individuals and entities. Wherever specific skill or personal integrity is sought, arguably regulation should be focused on individuals. Where a more collective, or process-based, outcome is sought, it might be appropriate to allow either or both of individual and entity regulation.

A differentiated approach for the future, as outlined above, therefore presents a renewed opportunity for the distinction between individuals and entities to be recognised. In this way, BTE authorisation might only be available to individuals, and not to entities. This would be consistent, for example, with the notion of an individual being an officer of the court, whereas an entity cannot be; and, accordingly, undertakings can only be enforced against individuals.

Accordingly:

> ***Proposition 11:*** For the purposes of a future single register of providers of legal services, the registration should be in the name of the entity, partnership or individual

subject to regulatory requirements or with which a client has terms of engagement; but BTE authorisation should only be granted to individuals.

More generally, the regulator might address the question of application to individuals or entities, or both, for all DTE and ATE requirements, too. In doing so, regulation might also reflect an emerging, but important, distinction. Our historical regulatory framework has focused on what these days is often referred to as 'human capital'. This is the knowledge, skills and characteristics of economically productive individuals.

Increasingly, though, the legal services sector is populated by entities, technology and investment – all different forms of economically productive capital. It is arguable that too little regulatory attention has been given to these forms of organisational, physical, technological and financial capital. This is a further reason why greater flexibility could bring benefits in a reformed regulatory framework.

4.10.4 Fit and proper persons, and fitness to practise

Where the skills and integrity of an individual are critical to the continuing provision of legal services for which personal authorisation is required, it is only right that a regulator should assess whether that individual is a 'fit and proper person'. Consequently, as now, I would expect a regulator to set out its conditions and process for making such an assessment, both on an initial and continuing basis.

Such an assessment is not only about skills and competence, but also about character where, for example, clients, judges and the public at large are invited to attach some value or consequence to the integrity of the individual concerned. This emphasises, again, that legal services and those who provide them raise concerns beyond those normally associated with consumer engagement, consumer protection and economic regulation.

Adopting the same rationale, and as part of continuing monitoring, a regulator might also wish to review the regulated status and authorisation of those whose fitness to practise is uncertain. This might result from, say, physical or mental illness, alcohol or drug dependency, or pending criminal or disciplinary charges. There might be a corresponding duty of candour on a registered individual and entity within which they work to disclose such conditions.

Where fitness to practise is not beyond doubt, the regulator could have power to suspend or remove an individual's registration, or impose additional DTE conditions (such as supervision, or medical or similar certification) on the continuing right of the individual to work within the regulated sector.

4.10.5 The future of alternative business structures

The approach to authorisation, regulation and registration outlined in this Section would raise an interesting question about the continuing need for the concept of 'alternative' business structures.

ABSs are not, in fact, different or alternative *businesses*: they are still carrying on the business of providing legal services, in much the same way as other law firms. They might, though, be combining those legal services with other services and products. Nor are they alternative or different legal *structures*: they adopt the same organisational forms as other law firms, usually as companies, but also to a lesser extent as general or limited liability partnerships.

The only sense in which ABSs are 'alternative' is that their ownership, control or management is not wholly in the hands of those who are legally qualified. They are separately regulated and approved as 'entities', though entry into the regulatory framework still assumes authorisation for one or more reserved legal activities. Although the ABS is itself authorised for those activities, their delivery to clients must nonetheless be carried out by an individual who is personally and separately authorised for the relevant activity.

Under the approach to entity registration outlined above, legal services requiring BTE regulation would still only be carried on by individuals who were personally authorised and registered. Organisations could also be registered as providers of regulated legal services, but would not be given separate authorisation for BTE-regulated services.

As a consequence, there would be no need for separate recognition of ABSs: they would be registrable entities in the same way as other organisational providers of legal services. I would envisage that, as a transitional matter, existing ABSs could simply be transferred to the register of providers as entities.

As a result, there remains a question of whether there would be any continuing need for prior approval of 'non-lawyer managers' for entities. A regulator could adopt a variation of the fit and proper person requirements (cf. paragraph 4.10.4) to be applied to the owners and managers of all entities on the register. This might include a generic list of those who would not be regarded as fit and proper, such as those with a criminal record, who have been struck off or otherwise deprived of a professional title, have been disqualified as a company director, or similar.

It might also maintain for public inspection a 'barred' or 'prohibited' list of individuals and entities who have been removed from the register. Those persons could not then be a 'provider' of legal services or the owner, manager or employee, of a regulated entity.

4.11 Summary

The regulatory structure of the Legal Services Act 2007 generally imposes the full burden of regulation on all regulated providers, irrespective of the risks arising from their chosen areas of practice. It also excludes from regulation (and therefore deprives consumers of redress from) those who offer only low-risk services.

An alternative approach need not be seen necessarily only in terms of an increase in the scope of sector regulation. The position now is that in fact all legal services are within the scope of regulation if they are provided by someone who is already legally qualified and authorised to practise.

Unfortunately, the current structure will only admit those who are legally qualified. This is an unnecessary restriction that inhibits further access to legal advice and representation as well as to *regulated* innovation, competition and technological substitution.

A different approach to regulation could address these concerns and consequences, to the benefit of consumers and providers. Regulation – and its costs and burdens – could be targeted and distributed more appropriately to the risks of the activities actually undertaken by providers. In other words, while *scope* could be broader (to protect consumers), the *focus* of regulation could be targeted (to place only proportionate regulatory burdens on providers).

There could also be a public register of all providers of legal services falling within the structure, also disclosing (where relevant) the services for which BTE and DTE regulation is required and for which each provider is registered.

In summary, an alternative approach, as outlined here can be represented diagrammatically as in *Figure 4.11*:

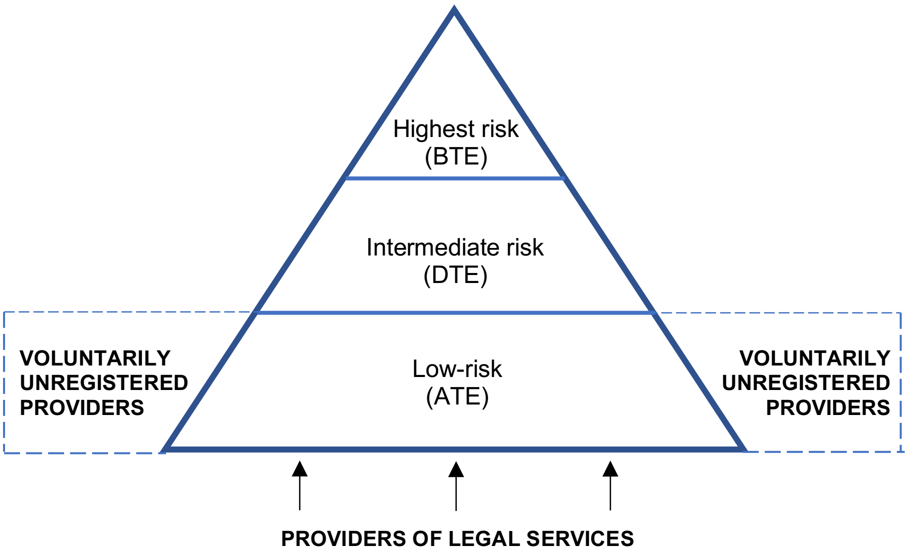

Figure 4.11: Representation of an alternative regulatory framework

There are a number of consequential issues that would need to be addressed in working through such a change in approach. These are considered separately in Section 5.

5. An alternative approach: some consequential issues

5.1 Introduction

Section 4 outlined the foundations of a longer-term alternative approach to legal services regulation under which all providers of legal services could potentially be registered and regulated. They could be subject to a risk-based framework that would apply different requirements for before-, during-, and after-the-event regulation, depending on the degree of assessed risk to the public interest in the services provided.

Such an approach would give rise to a number of consequential issues and questions that this Section will now address. Responses are invited to the consultation questions posed.

5.2 The future role of professional titles

5.2.1 A change of emphasis

The current narrow gateway of entry into the regulatory framework applies almost entirely to those who have secured a professional title (such as solicitor, barrister, chartered legal executive, licensed conveyancer, patent or trademark attorney, notary, chartered accountant, and so on). As such, it represents a barrier to entry for those who do not hold a professional title. Further, for those who do not wish to undertake the necessary process for qualification, or cannot afford it, this currently creates a permanent exclusion from the regulated market in their own right.

The alternative approach outlined in Section 4 could address the question of the barrier to entry by allowing those who do not wish to carry on higher-risk activities to enter the regulated sector by submitting themselves to at least ATE regulation. This would not replace professional titles as an entry route to regulation, but instead supplement them by providing an alternative route to entry for at least the lowest-risk legal activities.

I do not envisage that professional titles would or should disappear in the future, or that they should be merged (as in the recurrent issue of fusion of barristers and solicitors). Consequently, a professional title should continue to give some access to the regulated sector and assurance to consumers, as now. As such, the regulatory emphasis would change from titles being the only route for individual entry, to them being one of two – albeit perhaps still the principal basis in fact.

5.2.2 The continuing importance of professional titles

The centrality and importance of professional titles in the framework of the Legal Services Act 2007 cannot be denied. Nor can the recognition attached to those titles in the minds of many members of the public and in other jurisdictions.

However, there is a difference between recognition of the word (such as ‘solicitor’, ‘barrister’, ‘notary’) and an informed understanding of what is attached to it in terms of competence, licence and protection. For the vast majority of consumers, we have the recognition but not the understanding. This begs some fundamental questions about the true value of the titles as market signals or sources of assurance.

There are also other titles in the legal sector, some within the 2007 Act and some not, where even the recognition might be questionable. These include ‘licensed conveyancer’, ‘chartered legal executive’, ‘costs lawyer’, ‘will-writer’ and ‘paralegal’. And there are others within the Act that do not ordinarily signify any connection to legal services at all, such as ‘chartered accountant’ and ‘chartered certified accountant’.

Only some of these titles are protected by law, making it a specific offence to use them when not appropriately qualified.[48] For the others, there is only more generic protection arising from a wilful pretence or false implication to be entitled to carry on a regulated activity or taking or using a title the provider has not been awarded[49].

In addition to being protected from misuse, professional titles often confer advantages in other jurisdictions. For example, significant benefits are often conferred on legal professional titles in terms of mutual rights to establish a presence and to practise abroad.

Also, there are numerous references to professional titles in other legislation and statutory instruments not related to the regulation of legal services.

It will be important, therefore, that changes to the framework for the regulation of legal services do not inadvertently undermine or remove the current consequential benefits of, or references to, professional titles.

There is accordingly a patchwork of specific authorisations and benefits that do or do not attach to different titles and to individual holders of a title, and to the protections that are (or are not) available in respect of their misuse.

5.2.3 Titles as a continuing route to regulated practice

If title were no longer the only route to entry into the regulated sector, the way is opened for those who do not hold a title to enter the legal services market. However, it leaves hanging the question of how professional titles might continue to operate and confer any advantage on title-holders in any future regulatory arrangements.

It is likely that the holders of professional titles will have completed the necessary education and training to justify a regulator treating them as sufficiently competent and experienced for BTE authorisation or DTE accreditation purposes. However, there is a legitimate question about whether this should be automatic, and certainly about whether it should be permanent.

Just because an individual has qualified, for example, as a solicitor, they would not necessarily be as competent or experienced as, say, a barrister in advocacy before the superior courts or an experienced will-writer who has completed the requirements, say, for membership of the Society of Trust and Estate Practitioners (STEP).

In those circumstances, it would not be unreasonable for a regulator, on a risk-based assessment, to require a solicitor who wished to pursue either of those activities to secure a certificate for higher-rights advocacy (as now) or, say, STEP membership or equivalent for will-writing and estate administration.

In today's complex and fast-changing world, it is no longer credible or tenable to suggest that a degree or professional qualification earned several years ago has fully equipped a practitioner beyond whatever the 'Day 1' requirements happened to be at that time. It might therefore be acceptable for a title-holder to secure an initial authorisation or accreditation for any one or more of a range of possible services on first qualification.

While there are certainly pitfalls in driving towards early specialisation or over-specialisation, nevertheless the 'general practice' notion of broad regulatory authorisation is under

48. See: Solicitors Act 1974, section 21 (solicitor); Legal Services Act 2007, section 181 (barrister); Administration of Justice Act 1985, section 35 (licensed conveyancer); Copyright, Designs and Patents Act 1988, section 276 (patent attorney or patent agent); and Trade Marks Act 1994, section 84 (registered trade mark attorney or agent).
49. Legal Services Act 2007, section 17.

increasing pressure to maintain its credibility and effectiveness (in much the same way as general medical practice).

Consequently, it should legitimately be a matter for a regulator to determine whether any individual should also be subject to additional requirements for DTE accreditation or supervision, and the basis on which (as for all providers) any such authorisation or accreditation should be subject to any periodic revalidation.

As an example, the Solicitors Regulation Authority is currently considering its regulatory approach to solicitors exercising rights of audience in the higher courts. In its consultation paper[50], it refers to persistent concerns about the standards of solicitors' advocacy, particularly in criminal cases, about solicitors retaining work beyond their competence, and about advocacy training.

Perhaps more disturbingly, a thematic review of criminal advocacy[51] found that solicitors relied heavily on the number of years' post-qualification experience as a measure of competence and to justify undertaking little ongoing professional development.

It would also be a matter for a regulator to decide whether, and on what basis, an individual could maintain authorisation or accreditation for multiple services over a period of time. This decision should take account of the need for a practitioner to demonstrate continuing competence and experience of a sufficient level to reflect the risks associated with the service in question or with the types of client served.

In this way, the regulator and consumer could be assured that those who have a professional title, and those who do not, are subject to the same regulatory requirements, both initially and over time. On this basis, there is a question about whether there should be automatic or perpetual 'passporting' for any providers, whether title-holders or not.

Equally, there should be no competitive advantage for currently unregulated providers of non-reserved services, or corresponding disadvantage for title-holders bearing the full burden and cost of being over-regulated for lower-risk activities.

In summary, the issue posed by this paragraph is whether those who hold a professional title should, in regulatory terms, be any more privileged or disadvantaged than those who do not.

The continuing advantages of title would derive from two principal benefits. The first is the enduring familiarity and value that a profession could build and maintain in the recognition and market worth of the 'brand' meaning attached to its title. This is likely to remain very important in the 'public good' legal services relating to rights of audience and the conduct of litigation and the continuing value that the courts, judiciary, public at large and other jurisdictions attach to professional titles.

In this context, I would not wish the propositions in this interim report to be seen as an assault on the status of professional titles. One can accept that they represent a form of elitism, rightly earned on the basis of merit. The standing of the UK legal professions in the rest of the world, and the respect accorded to them and the justice system generally, attests to a legitimate meaning of 'elite'. It does, of course, require that the basis of that competence, quality and integrity be maintained at both the systemic and personal levels.

The proposition in the report is not, therefore, that professional titles should no longer confer any meaning in a future regulatory framework, but that they should not be the only route into it. It might well be that those with a title will be allowed by regulators to do more within the

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50. See SRA (2019) 'Assuring advocacy standards: consultation', available at: https://www.sra.org.uk/sra/consultations/consultation-listing/advocacy.
51. See SRA (2019) 'Criminal advocacy: thematic review', available at: https://www.sra.org.uk/globalassets/documents/sra/research/criminal-advocacy-thematic-review.pdf .

regulated sector than those without a title. On the other hand, those without a title would no longer be excluded from carrying on *any* regulated activity.[52]

The second benefit could be that, as referred to above, professional titles can confer significant benefits internationally in terms of mutual rights of establishment and practice in other jurisdictions. By not changing the fundamental nature or rights of title-holders, those benefits would not be lost. It would be for those other jurisdictions to decide whether or not to confer similar benefits on registered providers of legal services who did not hold a title.

Consequential question 1:
Do you agree that it should be a matter for a regulator to decide whether, and on what basis, an individual could be granted, and maintain, authorisation or accreditation for legal services over a period of time? In particular, do you agree that those who have a professional title, and those who do not, should be subject to the same regulatory requirements, both initially and over time in respect of the same legal services; and that there should be no automatic or perpetual 'passporting' for any providers, whether title-holders or not?

Consequential question 2:
Do you have a view on whether:

(a) a practitioner should be required to demonstrate continuing competence and experience of a sufficient level to reflect the risks associated with the service in question or with the types of client served;

(b) there should be any automatic or perpetual 'passporting' for title-holders and other regulated providers; and

(c) those who hold a professional title should be, in regulatory terms, any more privileged or disadvantaged than those who do not?

5.3 Regulatory independence

5.3.1 Balancing activity-based and title-based regulation

A possible consequence of the future approach outlined in Section 4 is that the regulator should focus on the necessary and minimum requirements for regulated legal services. This would adopt a risk-based assessment of the need for regulatory intervention, and would apply a range and mix of BTE, DTE and ATE obligations appropriate to the assessed risk.

The approach explored here could therefore go some way towards the shift away from titles towards more activity-based regulation as recommended by both the Competition & Markets Authority and the Legal Services Board. But it would not mean – as some might fear in such a shift – the replacement or disappearance of professional titles from the marketplace or the dilution of professional standards.

In this way, regulation (as properly understood) could focus on the minimum necessary requirements that need to be attached to various activities, services or circumstances, based on the assessed risk.

The award of titles, and the maintenance of any standards above or beyond the regulatory minimum, might then be the subject of a parallel approach.

52. I would also see this as a preferable alternative to establishing additional or limited titles in the way that the United States has done, for instance, in Utah ('licensed paralegal practitioner') and Washington state ('limited license legal technician').

5.3.2 Is self-regulation still legitimate?

A parallel approach could leave the 'guardianship' of professional titles as a separate matter from the specific regulation of the provision of legal services. In principle, the logical place for this could be with the relevant professional body. In other words, for reasons explored in paragraphs 3.6 and 3.7.2, the issue arises of whether the reduced role of self-regulation since the Legal Services Act 2007 might benefit from reassessment.

There is a sense in which both regulators and professional bodies could have something of a 'regulatory' function: regulators for the minimum standards, and professional bodies for the requirements sufficient to warrant and maintain membership of the profession.

The challenge is whether an approach to future regulation could effectively and satisfactorily combine the two. This paragraph accordingly explores three different options. In all options, a distinction is drawn, on the one hand, between the BTE, DTE and ATE regulation of services or activities and, on the other, the regulation of title.

It might be helpful to emphasise at this point that all options envisage that the regulation of services is a matter for the regulator. They also all envisage that particular titles would be conferred (and removed) by the relevant professional body.

5.3.3 Option 1: regulator responsibility for title

I questioned in LSR-3 (2019; paragraph 4.5) whether the Legal Services Act 2007 technically required the professional bodies to transfer the regulation of title to their regulatory bodies. Nevertheless, the practical point for now is that they have done so.

The first option would therefore recognise this position, and in substance preserve the current arrangements. As stated above, the assumption in this report is that the regulator would determine the regulatory conditions and consequences for any provider (whether holding a professional title or not) to deliver legal services.

Under this option, the regulator would also be determining the requirements for the award and removal of professional titles, and the regulatory arrangements for qualification, conduct and discipline (which in practice also includes the approval of providers of appropriate education and training).

This would require the current definitions of regulatory arrangements in section 21 of the 2007 Act to be clarified. In their present form, they refer only to the arrangements necessary for the authorisation of title-holders to carry on a reserved activity, not for the award of title.

At the moment, the Legal Services Board approves the regulatory arrangements of the approved regulators. This gives the Board oversight of the arrangements of those regulatory bodies of approved regulators that also have representative functions.

However, the current approach of title-by-title approval does have the potential to result in different regulatory requirements for one professional title as opposed to others. For example, the attainment of higher rights of audience by solicitors is not directly comparable to the attainment of equivalent rights by barristers.[53] Solicitors and licensed conveyancers also have different requirements for carrying on conveyancing practice.

In other words, the existence of multiple regulators can lead to multiple, varying regulatory requirements which an oversight regulator could address with uniform rules.

53. Note that the Solicitors Regulation Authority is, at the time of writing, conducting a consultation on revising its regulatory arrangements for higher courts advocacy: see https://www.sra.org.uk/sra/consultations/consultation-listing/advocacy.

There is also potential here for an alternative (Option 1A). Some of the current front-line regulatory bodies have been created by approved regulators that have representative functions. Their current legal structures sometimes have them as still institutionally connected, and various arrangements have to be made to secure their independence, funding and resourcing.

Under Option 1A, those regulatory bodies could become separate legal entities, accountable only to the overarching sector regulator (the Legal Services Board or its future equivalent). This overarching regulator could then establish a single, sector-wide set of regulatory requirements relating to title regulation, and then approve the specific arrangements for different titles where they are consistent with those sector-wide requirements.

In this way, there would be clear separation of regulatory and representative functions. The common regulatory requirements, consistently applied, would also be sufficient to justify the continuing statutory protection of professional titles. Indeed, it is arguable that all legal professional titles should then have the benefit of protection.

As such, Option 1A presents a simple, consistent approach to title regulation that would apply across the legal services sector.

Both Option 1 and 1A would, however, need to take account of alternative arrangements for non-legal professional titles (such as chartered accountants): see further paragraph 5.4.

It might also be possible under both forms of Option 1 for the regulator to approve title-holders for ‘packages’ of differentiated BTE, DTE and ATE regulation. For example, barristers might, by virtue of their title, be authorised for the exercise of some or all rights of audience as a BTE-regulated service. All associated DTE and ATE conditions could also be included (say, for assurance of continuing competence, adherence to a code of conduct, the need for professional indemnity insurance, and access to the Legal Ombudsman).

The ‘package’ for solicitors might not include any automatic BTE authorisations (such authorisation should be dependent on practice area and experience: see paragraph 5.2.3). But it could perhaps include general approval for all low-risk and intermediate-risk legal services (other than those for which specific additional requirements have been applied by the regulator, say, for will-writing, estate administration, or handling client money).

In this way, there could be some continuing recognition and benefit from a regulator-controlled title regime. However, it would reflect the particular circumstances and services actually offered by particular title-holders. It would impose regulation on those title-holders only in respect of the risks of the services undertaken, rather than universally or generically.

OPTION 1 AND 1A

Benefits	Disadvantages
Clear extension of the regulator's authority over title (1 and 1A) Regulator oversight of title, conduct and discipline (1 and 1A) Regulatory requirements for award and retention of title set by regulator (1 and 1A) Ability of regulator to approve title-holders for an appropriate 'package' of BTE, DTE and ATE regulation (1 and 1A) Statutory protection of title (1 and 1A) Approval of title regulation on a profession-by-profession basis (1) Approval of title regulation on a sector-wide basis (1A) Structural separation of regulatory body from professional body (1A)	Multiple regulators approving title with varying regulatory requirements (1) Risk of regulator failing to appreciate the practicalities of practice (1 and 1A) Profession's scope for raising standards beyond the regulatory minimum constrained by regulator (1 and 1A)

Table 5.3.3: Benefits and disadvantages of regulator responsibility for title

5.3.4 Option 2: professional body responsibility for title

Option 2 would take the opposite approach. While the regulator would remain responsible for the regulatory conditions and consequences for any provider to deliver all legal services, the conditions for the award, retention and regulation of title could be the responsibility of the professional body.

I recognise that some might see this option as a (possibly unwelcome) return to self-regulation. However, in the eyes of a significant number of professionals and other jurisdictions, the current framework can be seen as having eroded professional independence, standards and values (and a case can be made to that effect).

If a professional body wished to adopt higher standards of competence or service delivery than those required by the regulator, perhaps there should be nothing in principle to prevent them from doing so. After all, that might be said to be the principal mission of a professional body. In competitive terms, as suggested in paragraphs 3.7.2, 4.5.5 and 5.2.3, this might be a profession's route to maintaining a competitive advantage.

There would still be a clear separation of regulatory functions relating to services and the protection of the public interest. The regulator would be determining the conditions and requirements that title-holders (in common with all other providers) must comply with in order to be able to offer regulated legal services to the public. The representation of the interests of title-holders (including their interest in gaining and maintaining their title) would fall separately to the professional body.

It is likely that this option could see the re-integration of the current representative and regulatory bodies (where there is any current separation), leaving perhaps a single sector regulator for the regulation of services, whoever provides them.

There would, though, be a consequential point that arises in relation to what is, effectively, self-regulation of title. If no independent regulator has a say in the award and maintenance of title, arguably there might no longer be any justification for statutory protection of that title.

With independent self-regulation of title, the value of the title might lie in its ability to compete as a brand in the marketplace. The statutory or regulatory preferment of one kind of market competition (title) over alternatives (other providers) could be difficult to defend.

However, a contrary argument might be that some titles do still have a ‘public interest’ value in connection with the rule of law, administration of justice, and public or state reliance on the integrity of the acts of those title-holders. It is perhaps debateable whether these considerations point more powerfully towards statutory protection of title or ultimately away from independent self-regulation.

If the award and maintenance of title were to rest with a professional body rather than a regulator, the professional body might also wish to have its own assessment of whether an individual is a fit and proper person to warrant the title. These might become different judgements to those by a regulator about whether someone is a fit and proper person to carry on particular legal services.

For example, a title-holders who are found to have engaged in inappropriate (but not criminal) behaviour, say, with a junior member of staff or in a social setting, might not pose a significant regulatory risk in relation to their provision of legal advice and representation to clients (such provision might, in fact, be exemplary).

A regulator might therefore judge that no regulatory action would be necessary in order to protect clients or consumers, unless there is a view that the particular form of private conduct might otherwise be indicative of professional misconduct (such as perhaps bringing into question the “unquestionable integrity, probity and trustworthiness”[54] of a practitioner). Nevertheless, a professional body might reasonably come to the conclusion that such behaviour is not consistent with membership of their profession or brings that profession into disrepute. It might therefore decide to sanction the individual, or even to withdraw the relevant title. That could have important implications for a practitioner whose regulatory authorisation is based on holding a title.

Finally, there could be an understandable further concern under this option for those who hold or seek professional titles. Under the alternative approach that is explored in Section 4, it is possible over time that the effort and cost associated with acquiring a professional title might become a discretionary decision. With alternative routes available to regulated status and consumer protection, the numbers entering the traditional legal professions might decline, depending on the level and range of authorisations that are in practice given to those regulated providers who hold titles and those who do not.

Presumably, such qualification decisions would be based on the perceived competitive advantage and economic value as between having a professional title and status, or not. That is a challenge to which the professions would have to rise (and I am confident that they could do so). If they continued to demonstrate value and public benefit, they would survive and thrive.

54. These are the words of Sir Thomas Bingham, Master of the Rolls, in *Bolton* v. *The Law Society* [1993] EWCA Civ 32, where he also emphasised: “The reputation of the profession is more important than the fortunes of any individual member. Membership of a profession brings many benefits, but that is a part of the price.” However, I am not presently persuaded that either the SRA or the Law Society takes sufficient account of, or action in relation to, the private conduct of solicitors in assessing professional misconduct or bringing the profession into disrepute, and certainly not to the degree suggested by this quotation.

OPTION 2

Benefits	Disadvantages
Professional body oversight of title, conduct and discipline Potential for higher professional standards than the minimum required by regulation Clear separation of responsibilities as between regulator and professional body Clear ability of the professional body to promote representative interests Possibility of a single regulator for regulation of legal services (as opposed to title) Regulatory requirements for award and retention of title set by professional body Ability for title-holders to compete on quality and standards	Multiple and varying requirements for award and maintenance of title Debateable justification for the statutory protection of title Possible need to replace statutory and other references to specific title-holders (perhaps with 'registered legal services provider') Possibility that attraction of title might reduce when no longer a regulatory requirement for authorisation

Table 5.3.4: Benefits and disadvantages of professional body responsibility for title

5.3.5 Option 3: co-regulation of title

A third option might combine elements of the others. As before, the regulator would remain responsible for the regulatory conditions and consequences for any provider to deliver all legal services. The difference in Option 3 might be a form of explicit (defined) co-regulation under which legal services are regulated by a regulator and title regulation is split between the regulator and a relevant professional body.

This option might therefore see the regulator retaining regulatory control over setting the education and training requirements for title, and the approval of providers of such education and training. The regulator would also retain control over conduct and discipline. This degree of control would also be sufficient to remove any question about the continued statutory protection of the use of titles (and, as in Option 1, perhaps for all legal professional titles on a consistent basis).

Other aspects relating to title would be the province of the relevant professional body. As in the other options, although professional title would no longer be the only entry requirement for regulated activity, it could still count towards meeting the regulatory conditions that applied to regulated circumstances: see paragraph 5.2.3.

As with Option 2, it would be for title-holders (and their professional bodies) to persuade and demonstrate to consumers that choosing them will bring some personal benefit or value to those consumers, sufficient to justify paying any price premium that might attach to that choice.

Similarly, the pursuit of higher or more onerous professional standards than are required by the regulator would be a matter for the relevant profession. This could encourage the raising of professional standing and standards as were thought appropriate by that body and its members.

However, it would be important that a professional body could not impose mandatory additional requirements on title-holders. The attainment and manifestation of those higher qualifications or standards (where not required to meet BTE or DTE conditions imposed by the regulator in respect of particular legal services) would need to be based on voluntary accreditation.

In the same way that, say, the medical profession offers routes to further specialisation or Fellowship of a Royal College, so legal professional bodies could establish equivalent schemes for its members.

The decision to raise professional specialisation or standards in this way, with any associated costs, would therefore be voluntarily assumed by members of a particular profession. Such a decision would be moderated primarily by the extent to which members were prepared to bear the additional effort and cost associated with their decision. It would also need, on a commercial basis, to take account of the willingness of clients to recognise and pay any price premium attached to their choice of provider.

There might remain a risk that a professional body and its members might seek to impose barriers or burdens on membership that were contrary to regulatory objectives or requirements. For example, if something were permitted under the regulatory framework (such as multidisciplinary practice or external investment), but expressly prohibited by the rules of a particular profession, there would be a clear conflict between regulatory and professional rules.

In the context of co-regulation, the regulator might need powers to ‘call in’ the professional body’s rules of practice. The regulator might then require amendments or possibly, in an extreme or persistent case, have the power to take over the regulatory functions of the professional body.

As with Option 1, it might be possible for the regulator to approve title-holders for ‘packages’ of differentiated BTE, DTE and ATE regulation.

A benefit of co-regulation could be that the promotion and defence of high professional standards and values is less likely to be dismissed as self-interest or regarded as ‘prejudicing’ independent regulation.

If an approach to the voluntary assumption of standards higher than those required by regulation can be crafted in the context of co-regulation, it is not a reversion to an historic and discredited form of self-regulation. Instead, it might represent the preservation and promotion of outcomes that are valuable to the public interest, to the consumer interest, and to the provider[55] interest.

55. It might be seen as professional self-interest to promote higher standards as part of a bid, perhaps, to ‘crowd out’ those providers who are not professionally qualified. However, it is just as likely that new entrants and alternative providers who are not so qualified might be quite happy to see those who are choose to raise their standards and prices. In this way, the professionals would be creating further space and difference in the market, and this scope for price competition could be attractive to alternative providers and consumers.

OPTION 3

Benefits	Disadvantages
Clear extension of the regulator’s authority over title Regulator oversight of award and maintenance of title, conduct and discipline Regulatory requirements for education, award and retention of title, conduct and discipline set by regulator Professional body oversight of other aspects of title, including the potential for voluntarily higher professional standards than the minimum required by regulation Approval of title regulation on a profession-by-profession basis Clear separation of responsibilities as between regulator and professional body Clear ability of professional body to promote representative interests Possibility of a single regulator for regulation of legal services (as opposed to titles) Ability for title-holders to compete on higher quality and standards, and to seek such accreditation from whatever source they felt appropriate Ability for regulator to ‘call in’ and amend professional body rules relating title Ability of regulator to approve title-holders for an appropriate ‘package’ of BTE, DTE and ATE regulation Statutory protection of title	Reduced scope for approval of title regulation on a sector-wide basis Risk of tension between regulator and professional bodies on matters relating to title Perceived complexity in the regulatory arrangements for title Multiple and varying requirements for award and maintenance of titles, conduct and discipline Risk of a professional body seeking to impose unnecessary requirements or restrictions on title-holders

Table 5.3.5: Benefits and disadvantages of co-regulation of title

5.3.6 Summary

The three options represent different ways of combining the special requirements of regulating and supervising professional titles with those of activity-based regulation. There are benefits and disadvantages for each of them.

A comparative table showing the differences between the three options is on page 60.

This table summarises the options for regulating title, showing which organisation would be responsible for various activities. As a point of comparison, the table also includes activities that are currently include in section 51 of the Legal Services Act 2007 as ‘permitted purposes’. In the table, OR refers to an overarching regulator (the Legal Services Board or future equivalent); RB refers to the regulatory body of a current approved regulator (such as the SRA, BSB, CLC); PB refers to a professional body (such as the Law Society, Bar Council, Institute of Professional Willwriters); Y indicates yes; and N indicates no.

COMPARISON OF OPTIONS

	Option 1 (Regulator)	**Option 1A** (Regulatory Body)	**Option 2** (Profession)	**Option 3** (Co-regulation)
Responsibility for BTE, DTE & ATE regulation of providers of legal services	OR	OR	OR	OR
Approval of requirements for award and retention of title	OR	OR	PB	OR
Conferment/removal of title	PB	PB	PB	PB
Regulatory authorisation or accreditation of title-holders	OR	RB	OR	OR
Approval of education & training requirements for title	OR	RB	PB	OR
Approval of training providers for title	OR	RB	PB	OR
Maintaining professional standards	OR	RB	PB	OR
Voluntary accreditation to signal specialisation or seniority	PB	PB	PB	PB
Practical support and practice management	PB	PB	PB	PB
Law reform & legislative process	PB	PB	PB	PB
Provision of legal services to the public free of charge	PB	PB	PB	PB
Promotion of human rights and fundamental freedoms	PB	PB	PB	PB
Promotion of relationships between regulators & relevant national/international bodies, etc	OR/PB	RB/PB	OR/PB	OR/PB
Statutory protection of title	Y	Y	?	Y
Title regulation on sector-wide basis	Y	Y	N	Y

Table 5.3.6: Summary comparison of the options for regulating title

The objectives of all three options would be to:

- recognise a common regulatory minimum that applies to all providers of the same legal services, whether title-holders or not, set and overseen by the regulator;
- as such, allow providers both with and without titles to compete on equal terms *within* the framework of regulation;
- separate clearly (a) the requirements that should be imposed on (all) providers as matters of regulation from (b) those additional obligations that members of a profession are willing to assume and might be promoted by a professional body in what is currently regarded as a ‘representative’ capacity;

- leave the formal award and removal of title with the relevant professional body;
- allow the professions to pursue higher levels of competence, quality and service where they believe that doing so would be beneficial to all parties;
- prevent those levels becoming barriers to regulated entry for other providers or from creating market cost barriers to consumers;
- accept that the professions might legitimately wish to regain some sense of professional responsibility and aspiration;
- preserve the basis of mutual recognition of qualifications and rights of establishment in other jurisdictions[56];
- allow a regulator to recognise multiple routes to meeting required regulatory standards;
- allow professions and their members to compete on quality among themselves and with alternative providers, but again without excluding legitimate and regulated alternatives (who might not wish to compete on that basis) from emerging in the sector;
- as such, encourage competition amongst professional bodies and others who wish to provide the means to qualification, authorisation, accreditation, supervision, and regulatory compliance; and
- reduce the possibility of differences and inconsistency in *regulatory* standards applicable to providers or services operating in the same market segment, while allowing regulated providers to differentiate and compete on higher levels of standards and quality where they wish to do so.

Consequential question 3:

In relation to the future regulation of professional titles, do you have any preference for, or views about, Option 1 (regulator responsibility), Option 1A (regulator responsibility with legally separate title regulators), Option 2 (professional body responsibility), or Option 3 (co-regulation)?

Consequential question 4:
Do you have a view on whether the adoption and use of all professional titles should be protected; or the current protections should continue alongside a public register and the generic use of an expression such as 'registered legal services provider' (cf. paragraph 4.8.3)?

5.4 Areas of regulatory overlap

5.4.1 The issue

An approach to legal services regulation that seeks to address the regulatory gap by better aligning consumer expectation and regulatory coverage might nevertheless give rise to some challenges of regulatory overlap.

For example, at the moment, chartered accountants are regulated in respect of, say, the reserved probate activities under the Legal Services Act 2007. The Institute of Chartered Accountants in England & Wales (ICAEW) has separate arrangements in place to discharge

56. Indeed, by adopting a new approach to title regulation, it is possible that the position and recognition of professional titles could be strengthened and restored, after a period in which some foreign jurisdictions have perceived the independence of the legal professions in England & Wales to have been compromised by the Legal Services Act 2007.

its regulatory functions under the 2007 Act. But the same body under different arrangements also regulates chartered accountants in relation to audit and, for instance, the provision of tax advice.

It is likely that any definition of legal activity or services will be broad enough to apply to advice on tax law given by chartered accountants (and also, for instance, by a chartered tax adviser). Similarly, chartered surveyors and chartered town planners might also fall within that definition if they offer advice on property or planning law.

The definition would also cover immigration and insolvency practitioners, as well as some of the activities of claims management companies. All of these are already covered by other statutory frameworks (see further paragraph 5.5 below).

If a new entry point for regulation is any 'provider of legal services', then there would inevitably be an overlap with certain providers who offer advice and assistance that will fall within the definition of 'legal services'. The implications for this potential dual coverage will need further consideration.

5.4.2 A sector-wide approach?

This potential for regulatory overlap is not unique to legal services. However, it is perhaps more problematic for legal services regulation because so many aspects of public, commercial, social or personal activity are subject to or touched on by legal concepts and consequences.

This exacerbates the challenge for consumers' understanding of whether or not they face a legal issue and, if they do, what sources of advice and representation might be available to them. The more diverse those sources, the greater the potential for confusion and inconsistency.

Applying the same regulatory treatment across the sector, irrespective of the providers' background, would be consistent, for instance, with the recommendations of the working group on the regulation of property agents that "all those carrying out property agency work be regulated, even if it is not their largest or traditional core function".[57] It could, however, be subject to the exception suggested in paragraph 4.10.2 for legal services that are merely incidental or ancillary to the provider's principal activity.

This approach would ensure that clients of all providers could be satisfied that the validation of competence, and their expectations of service quality and redress, would be assessed relative to the same sector-wide standards. They would also be assured that they would have access to the minimum regulatory requirements that applied to the particular legal service provided. This might include ATE access to the Legal Ombudsman, and would extend to any other regulatory requirements that applied to that service.

5.4.3 Alternative regulatory arrangements

Where a non-legal profession has its own regulatory arrangements in place, it might be possible for the legal regulator to accept those arrangements as a satisfactory assurance that the provider was meeting the minimum requirements.

It is conceivable that the standards set by those providers' own professional or other oversight bodies might be higher than those set for legal services. This would place those

57. See: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/818244/Regulation_of_Property_Agents_final_report.pdf, paragraph 37.

who are not mainstream providers of legal services in much the same position as legally qualified title-holders relative to non-title-holders (as discussed in paragraph 5.3.4).

Consequently, the legal regulator should be able to accept the regulatory arrangements applying to a provider who is not legally qualified as a satisfactory assurance that the provider was meeting the necessary regulatory requirements. However, certain minimum ATE requirements of the legal service regulatory framework (such as access to the Legal Ombudsman) might apply to all providers in order to simplify the consumers' route to making complaints and initial claims for redress.[58]

In other words, the regulatory 'floor' in respect of legal services could be the same for all providers. Those who also hold a legal or non-legal title would then be free to compete in an open market on the basis of the standards or verifiable quality that they felt their membership of a professional or other body could give them, at whatever price premium their clients were willing to pay.

This approach could place the members of the accountancy bodies who are currently authorised for probate activities and within the framework of the Legal Services Act 2007 on the same footing as all other providers. It would also address the existing disparity in the regulatory arrangements that apply as between, say, the ICAEW and the Association of Chartered Certified Accountants, and the other approved regulators of reserved legal activities.

Consequential question 5:
Where providers who would not ordinarily be regarded as being within the legal sector are giving advice on matters of law that fall within the definition of legal services, in principle should the same regulatory requirements apply? Further, should certain minimum ATE requirements of the legal service regulatory framework (such as access to the Legal Ombudsman) apply in any event to all providers in order to simplify the consumers' route to making complaints and initial claims for redress?

5.4.4 Legal professional privilege

A further factor that might be brought into play here is the question of legal professional privilege. The public policy rationale for privilege is that clients should be encouraged to make full and frank disclosures to their legal advisers in order to seek complete and effective advice on their actual or potential legal situation.

The current position, in short, is that privilege is restricted to certain legal professions (namely, barristers, solicitors, and chartered legal executives) rather than to all those who actually give legal advice in a regulated professional capacity (which might then have included, say, chartered accountants): see the Supreme Court judgement in the *Prudential* case[59]. The Supreme Court in that case thought that any change to this position should be a matter for Parliament.

It seems to me that the present distinction is unfortunate, in that it unfairly disadvantages the clients of some regulated professionals and fails to reflect the broader intentions of the Legal

58. This might allow the Legal Ombudsman to carry out sector-wide, consistent, initial assessments of the nature and extent of a consumer's issue (such as a 'triage' function, in much the same way as the Complaints Gateway of the Insolvency Service), and then direct the handling of that issue to other appropriate parts of the regulatory infrastructure (including, perhaps, a non-legal regulator).
59. *R. (on the application of Prudential plc and another)* v. *Special Commissioner of Income Tax and another* [2013] UKSC 1.

Services Act 2007 that authorisation to carry on reserved legal activities should be extended beyond the traditional legal professions.

Extending privilege in the future to advice given by registered providers of legal services could give clients and the courts assurance that those on the register were subject to regulation and, therefore, to at least some minimum requirements and confidence for attaching privilege to their advice.

If this was thought to extend the policy too far, it might be that refinements could attach privilege, perhaps at least, to those providers subject to BTE authorisation and perhaps DTE regulatory conditions. I also acknowledge that, as with other aspects of title recognition, the issue of professional privilege has implications in other jurisdictions.

In any event, reform could offer the opportunity to review legal professional privilege and perhaps provide for an alternative that offered assurance other than membership of only certain legal professions. Those providers who are not presently within the scope of legal professional privilege might regard this as a desirable benefit in return for submitting to legal services regulation, either as an alternative or as an addition to their usual non-legal regulated status.

Consequential question 6:
Given the public policy objectives for legal professional privilege, and parity for clients, should privilege be extended to those providers who are registered within the legal services framework?

5.5 Co-existing regulation

5.5.1 Introduction

As we have seen, the underlying structure of legal services regulation, with its reliance on reserved activities connected to authorisation through professional title, has presented challenges in bringing within the scope of regulation other activities or providers that do not fit with the requirements of that narrow entry gate (cf. Section 4).

As a result, some legal activities have become the subject of 'parallel' regulatory frameworks, such as those for immigration, insolvency, and claims management (see LSR-2 2019: paragraphs 4.2.3, 4.3.3, and 4.3.4).

There are also instances of other forms of regulation that apply to certain activities of those who happen to provide legal services. These include requirements relating to data protection, money-laundering, and proceeds of crime and bribery.

5.5.2 Claims management

With the Legal Ombudsman's jurisdiction over claims management companies having been moved to the Financial Conduct Authority, the opportunity to retain the legal services elements of claims management companies within the scope of legal services regulation has probably disappeared.

On the basis that these activities are incidental or ancillary to claims management (cf. paragraph 4.10.2), such an outcome might not be too complicating for consumers to continue living with.

5.5.3 Insolvency practice

Insolvency practitioners are most likely to be accountants, subject to the regulatory oversight of the relevant chartered institute or association, although some might be solicitors. The latter would be subject to the framework for legal services regulation and the particular terms of the insolvency legislation. Chartered accountants will be subject to the regulation of their own professional bodies. The Insolvency Practitioners Association also has regulatory status and powers.

Insolvency practice clearly involves the application of law, and would undoubtedly fall within any definition of 'legal services'. It is a highly specialist area entailing significant potential risk to consumers, who might suffer detriment as creditors of insolvent organisations. Many voluntary liquidations have vulnerable consumers. However, the relative concentration of insolvency practitioners within the accounting professions, and the relative lack of consumer complaints about insolvency practitioners, suggests that seeking to subject all insolvency practitioners to legal services regulation might not be justified.

In any event, there is a call for evidence in relation to a review of the current regulatory landscape for insolvency practitioners[60] and I shall accordingly make no further comment on this subject.

5.5.4 Immigration advice and services

There is no doubt that immigration advice and services satisfy the public interest tests for regulation. Such regulation promotes the public good of bestowing citizenship, or declining or removing it, in accordance with the law. It also protects potentially highly vulnerable individuals from scams, and incompetent or inappropriate advice and services.

At present, immigration practitioners are regulated either by the appropriate regulator for their professional title (usually the Solicitors Regulation Authority for solicitors, the Bar Standards Board for barristers, or CILEx Regulation for chartered legal executive immigration practitioners), or by the Office of the Immigration Services Commissioner (OISC) for those who do not hold a professional title. There are, consequently, two different regulatory regimes for immigration practice.

Although regulated, immigration advice and services are not reserved legal activities (even those elements that involve making representations in civil proceedings before a court or tribunal). Accordingly, if carried out by solicitors, no special authorisation is required, and there are clear risks and dangers to consumers of non-specialists 'dabbling' in a potentially complex area of law with inherently vulnerable clients.

Further, the SRA changes taking effect later in 2019 will mean that these non-reserved activities could in future be carried on by a solicitor in an unregulated firm, with less protection than now for clients.

On the other hand, regulation under the OISC offers no ombudsman process. While consumer complaints are vital for the Commissioner's enforcement activities, there is no distinction between conduct and service issues, and disciplinary powers are very limited (typically restricted to an 'in or out' decision that cancels, or refuses renewal, of a practitioner's licence).

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60. See: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/816560/Call_for_Evidence_Final_Proofed_Versionrev.pdf.

OISC can also prosecute unregistered (and therefore otherwise unregulated) immigration advisers. Other regulators would rarely be persuaded to devote their resources to such prosecutions, even if an adviser were falsely holding themselves out as legally qualified.

Finally, OISC is an arm's length body of the Home Office (with whose interests the Commissioner's work might not be fully aligned). It is also established as a corporation sole, thus avoiding the regulatory and representative conflicts and tensions that arise elsewhere in the current legal services framework.

Without needing to undermine the UK-wide coherence of the current immigration framework, there could be a number benefits from the closer alignment or combination of legal services regulation and OISC powers. For example, the absence of ombudsman jurisdiction for OISC could perhaps be addressed by treating all immigration advisers as 'providers of legal services' under a future framework, allowing them to register and demonstrate to their consumers that competence, protection and redress are available.

In addition, OISC is already a specialist activity-based regulator. There is rightly a requirement for BTE authorisation, given the public importance and consumer risks inherent in immigration advice and services. Perhaps through adopting a form of co-regulation (cf. paragraph 5.3.5), OISC could provide the technical input to a legal services regulator on issues relevant to risk assessment and the authorisation and regulation of all immigration practitioners. In return, the legal services regulatory framework might offer to OISC the extension and flexibility of regulatory processes relating to redress, conduct and enforcement.

Consequential question 7:
Should immigration advice and services fall within the definition of legal services, with all immigration practitioners coming at least within ATE requirements for legal services?

5.5.5 Money-laundering

Since the beginning of 2018, the Office for Professional Body Anti-Money Laundering Supervision (OPBAS) has been responsible for overseeing the effectiveness of 22 professional bodies in meeting the standards required by the money-laundering regulations. These professional bodies include eight who are also approved regulators under the Legal Services Act.

OPBAS's powers relate to the professional bodies, and not to regulated individuals or entities. Nevertheless, the regulation of money-laundering adds a further veneer of co-existing regulation to legal services that any reformed framework would need to accommodate.

In some instances, for example, requirements for disclosure under anti-money-laundering obligations can be at odds with the duties of those regulated to provide legal services to maintain client confidentiality or respect legal professional privilege. Uncertainty in the application of these incompatible obligations can create serious concerns for practitioners.

Money-laundering requirements might in future be applied on a uniform and consistent sector-wide basis through DTE conditions and compliance. In those circumstances, the question of where responsibility for anti-money laundering supervision should lie would also need to be considered (for instance, with a single regulator (cf. paragraphs 5.3.3 and 7.2.2), with regulatory bodies, or with professional bodies). Such consideration could explore any potential for reducing the complexity of OPBAS's supervision.

5.6 The challenge of LawTech

5.6.1 The nature of LawTech

In this report, I am adopting the definition of 'LawTech' used by the Legal Services Consumer Panel in its May 2019 report on lawtech and consumers. In this meaning, it refers to what I have elsewhere described as 'substitutive' legal technology (cf. LSR-3 2019: paragraph 2.3.2). That is, LawTech provides self-service direct access to legal services for consumers. As such, it substitutes for a lawyer's input, and can be experienced by the consumer without the need for any human interaction in the delivery of the service.

The regulatory challenge in respect of LawTech arises from the possibility that consumers might choose to seek advice, assistance, document preparation or dispute resolution through the online provision of those services. At the time of engagement, it could be difficult or even impossible for a consumer to be sure whether or not any legally qualified or authorised regulated legal input has been used.

An additional challenge is that LawTech might not simply be the automation of human thought or processes but rather a completely different way of doing things. Disputes about 'smart contracts' will be litigated differently. Online dispute resolution is not a simple replication of traditional litigation. Machine learning is also likely to see patterns in data that human beings do not and could, consequently, draw conclusions that humans (whether clients, legal advisors, judges or society at large) might regard as wrong.

LawTech includes[61]: interactive websites; live chat or virtual assistants ('chatbots'); cloud data storage; identity-checking and electronic signing; apps to access updates or advice; document review and classification; document drafting and assembly; robotic process automation (usually of high-volume, repeatable tasks); predictive technology based on data mining and analytics; and smart contracts, blockchain and distributed ledger technology.

There might also be increasing numbers of instances where LawTech is not a choice, but a requirement through, say, state-mandated online dispute resolution or other services. For many citizens – and especially the 'digitally excluded' who have no access to technology or lack confidence in using it – this is, in itself, likely to lead to an associated demand for help.

Where an individual's freedom of action or personal assets might be determined by an algorithm, or where there is the potential for inconsistency or unconscious bias in supposedly independent and objective systems, the lack of regulation and of accountability or liability for the technology could be particularly challenging.

5.6.2 Regulatory responses to LawTech

Where LawTech is promoted, hosted or in some way intermediated by a regulated provider, there will be no difficulty in attaching accountability and liability to that provider for the consequences of the use of that technology.

In line with a general regulatory trend, Hook (2019: 53) suggests that this requires that "a responsible legal services provider should only use AI when they have an appropriate understanding of the data on which the software application has been trained, an appropriate knowledge of how the underlying algorithm or deep learning works (or the ability to obtain an ex-post explanation), and are deploying the software in an appropriate environment".

61. See Legal Services Board (2018) 'Technology and innovation in legal services', page 10.

However, this assumes that the relevant capability exists or can be developed – and even that the nature of the technology is such that an explanation is possible. Advances in artificial intelligence and machine learning could outstrip human cognition on both fronts.

The difficulties arise under the current framework when there is no such regulatory 'peg' for providers who are not already within that framework. As such, the risk of LawTech is that it could reduce the costs, and increase the likely provision, of currently unregulated legal services. In doing so, it would exacerbate the regulatory gap (cf. paragraph 3.3).

The alternative approach explored in Section 4 could allow for the possibility of LawTech falling within the definition of 'legal services' (cf. paragraph 4.6) and 'provider of legal services' (cf. paragraph 4.10.2). Unlike now, there need be no requirement for a reserved legal activity; and the definition of 'provider' could incorporate those who own, design, code, host, advise on, or promote the use of, the relevant LawTech application and its outputs.

Where the legal service (as defined) relates to the law of England & Wales, LawTech would need to be registered – albeit only voluntarily for low-risk activities subject only to ATE regulation. Where voluntary or mandatory registration takes place, the need for an individual or entity registrant would ensure that there would be an accountable person within the jurisdiction.

Depending on the nature of the legal services provided and the regulatory requirements attached to them, it could be left for a LawTech organisation to decide who would be the most appropriate registrant. However, any judgement about who the 'most appropriate registrant' must itself be subject to review by the regulator. First, whoever the registrant is, that person must be willing to be fully responsible to the regulator for all regulatory aspects, requirements and consequences. Second, the regulator should be able to suspend or remove a registrant, or place them on a prohibited list (cf. paragraph 4.10.5).

In this way, there could be at least access to the Legal Ombudsman and any other minimum requirements of ATE regulation. Based on assessed risk, a legal regulator could also impose additional requirements (such as a specific code of conduct or tech standard, insurance cover, or nomination of an accountable individual) or even BTE requirements if those were warranted.

Consequential question 8:
Should LawTech fall within a future definition of 'legal services', and a 'provider' of LawTech legal services capable being within the regulatory framework?

5.7 Law centres, law clinics and pro bono provision

5.7.1 Introduction

The world of law centres, law clinics and pro bono work is extensive and important, and is supported by LawWorks, the Law Centres Network, the Personal Support Unit (PSU), and Citizens Advice Bureaux. For example, LawWorks (the Solicitors pro Bono Group) supports a network of more than 250 independent advice clinics in England & Wales, responding to 60,000 enquiries a year (of which two-thirds result in advice).

This work is not a substitute for legal aid or for the funding of law centres and advice agencies. Yet it contributes hugely to the challenge of delivering access to justice for the vulnerable and reducing otherwise unmet legal need.

Interestingly, those most closely involved in the provision of not-for-profit and pro bono advice and services are also often the most adamant that, just because legal services might be delivered without payment, they should nevertheless offer the same assurances of competence, quality and consumer protection as those that are delivered at full price.[62]

There is no suggestion, therefore, that regulatory obligations should in some way be reduced or significantly modified. Equally, regulators suggest that not-for-profit providers rarely pose compliance problems for them.

Pro bono provision represents an area where the lack of flexibility in the 2007 Act has created some challenges. The precise scope of some of the reserved legal activities creates some uncertainty about when exactly an employed lawyer might act pro bono, while section 15(4) introduces unwelcome restrictions for in-house lawyers, and the 'special bodies' transitional provisions appear to have become rather permanent.

Certain types of advice can also bring pro bono provision into the reach of other regulators. For example, debt advice has to be licensed under the consumer credit advice rules of the Financial Conduct Authority. Immigration advice might also fall within the ambit of the Office of the Immigration Services Commissioner (although a variation on the current regime is suggested in paragraph 5.5.4). Complying with anti-money-laundering requirements can also make it difficult to help clients quickly.

There therefore does remain the question of how law centres and pro bono provision should best be recognised and accommodated within the regulatory framework. I propose to deal with this separately in relation to 'stand-alone' provision and to pro bono legal services offered from an otherwise regulated provider such as a law firm.

5.7.2 Law centres and independent not-for-profit provision

Where legal services are offered on a not-for-profit basis, the funding of such ventures is often precarious, and dependent on much personal and community goodwill. In those circumstances, the cost and burden of regulatory requirements will weigh heavily on the viability of the organisation. Operating within the current 'all or nothing' framework – especially where there are reserved legal activities involved – can have a disproportionate effect on the nature, extent and sustainability of provision.

Nonetheless, from the consumer or users' perspective, the same issues arise in relation to individual competence and integrity, and to organisational and process reliability and compliance. If the laudable goal of equivalence of treatment for paid and free provision is to be achieved, it is difficult to see why or how law centres and similar should be treated any differently – and probably with the same mix of individual and entity regulation as will apply more generally (see paragraph 4.10).

Section 4 explores an approach to regulation that could be risk-based and differentiated. In such a structure, both a law centre or law clinic and an individual volunteering lawyer could (as appropriate to circumstances) be registered. This could allow lawyers to treat their pro bono or clinic volunteering separately from their usual employment or practice.

LawWorks also reports that 40% of its network of clinics are supported by law schools. Again, the approach outlined in Section 4 could reduce the challenges (by allowing entity registration for the clinic, supported by individual registrations in respect of lecturer-supervisors and for services for which BTE or DTE regulation are required).

Hopefully, the aggregate burden and cost of regulation for not-for-profit provision in the future could be more sensitive to circumstances and, in some senses, more elective than it is under the 2007 Act. I envisage that entry-level registration for ATE purposes should not

62. See also the Joint Pro Bono Protocol for Legal Work at: https://www.lawworks.org.uk/why-pro-bono/what-pro-bono/pro-bono-protocol.

entail any great fee, and would therefore expect that entity registration would not present a cost barrier.

Consequential question 9:
Should a law centre or other similar organisation be a registered entity for regulatory purposes, and the body responsible for compliance with DTE and ATE requirements? If higher-risk activities are carried out for which BTE or DTE obligations exist for individuals, should the relevant individuals also be registered? If there are no such obligations, is it sufficient that individuals be otherwise covered by the entity registration?

5.7.3 In-house pro bono provision

Law firms and corporate legal departments are also major sources of pro bono advice and representation to citizens who could not otherwise afford legal services. The same sentiment exists about users not being in any way disadvantaged because they are not paying for the advice, whether in terms of competence, quality or protection.

In the terms of Section 4, pro bono provision could fall within the definition of 'legal services'. The firm or organisation from which the pro bono activities are carried out would almost certainly also be a 'provider'. This could allow specific pro bono regulation and requirements to be readily applied to such a unit without otherwise complex or inconvenient 'work-around' arrangements.

In the same sense in which the entity and individuals might need to be registered for 'stand-alone' provision (as in paragraph 5.7.2 above), so the pro bono activities within a law firm or other organisation might similarly be covered by the necessary registrations. In this way, the current requirement that pro bono services should not be seen to be connected to the employer's business would cease to be relevant or necessary.

Consequential question 10:
Should future regulation allow the pro bono activities of a law firm or legal department to be registered as a distinct unit (treating it for regulatory and registration purposes as a separate 'entity')?

5.8 In-house lawyers

5.8.1 The growth and challenges of in-house provision of legal services

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

Analysis of the legal services market shows that a significant and increasing volume of lawyers (about 20%) and legal services are now in in-house settings. There is little doubt that a tension is inherent in this relationship when the client for legal services is also the adviser's employer, and the usual notion of 'independent' legal advice is often stretched.

Equally, those advisers who are professionally qualified would typically prefer to maintain their professional independence, ethics and standards and not bow to any organisational or commercial pressures to modify their advice to make it more palatable to their internal clients.

In these circumstances, it is arguable that those with professional obligations might benefit from further regulatory support (see also the discussion of 'inverse vulnerability' in paragraph

4.5.3). This could strengthen their position when dealing with internal 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.[63] 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.

5.8.2 Separate registration?

The question of whether or not to establish an in-house legal department is ultimately resolved by the relevant organisation's policy and preferences. However, the current regulatory distinction between, say, employed solicitors in law firms who are regulated for the provision of legal services to the public (including, in the present context, a business or other organisation), and in-house solicitors whose role is to advise that business or organisation directly as their employer, seems to me to be problematic.

While the individual solicitors are personally regulated in both situations (and therefore will be held accountable to the same professional standards without distinguishing their practising environments), only the law firm in the first could be subject to entity regulation. Consequently, solicitors in the first could, if need be, be protected by the regulator from unwarranted pressure.

In-house solicitors in the second situation are part of organisations whose purpose and practice does not include delivering legal services to the public. Those organisations cannot, therefore, be subject to entity regulation, and solicitors in them could not be protected by the regulator.

To my mind, this distinction is unfortunate if the role of regulation is conceived to protect both the client and the providers. It is also questionable to justify the distinction on the basis that the position of an in-house lawyer is akin to client self-representation, which attracts no regulation. This might be a plausible argument if an agent of an organisation, as an officer or employee of it without any legal qualification, purported to advise or represent the organisation.

However, once the organisation engages a regulated provider of legal services, whether as an independent contractor or as an employee, it becomes more than arguable that the usual 'lawyer-client' obligations should arise, irrespective of the employed status of the latter and the inherent conflict in advising the organisation that pays the salary every month.

Accordingly, for those organisations that recognise and wish to secure their position through strong, independent and effective legal advice, albeit employed and delivered internally, there could be a case for an in-house legal function being registered as a separate regulated unit or 'entity' (even if not legally constituted as such). In this way, the legal department's

63. For a discussion about best practice, see Moorhead et al. (2019) 'In-house lawyers and non-executive directors'.

delivery of internal legal services could be subject to the same regulatory obligations as any other registered provider.

Individuals within such a registered in-house unit might also need to be registered personally if they carry on activities for which BTE authorisation would otherwise be required. This would emphasise their position as regulated advisers and, if relevant, as officers of the court.

Where an organisation chooses not to maintain a registered in-house unit, it might be taken to be acknowledging that it did not wish its internal legal team to carry on the activities normally expected of 'independent' in-house lawyers. Alternatively, it might be that such provision should be characterised as only incidental or ancillary to the organisation's activities (cf. paragraph 4.10.2).

A consequence of this might be that, even if the appropriate members of its internal team were personally registered and authorised, the in-house department would be a less attractive environment for carrying on regulated legal activities. It could be that legal professional privilege would, as a matter of practice, become more difficult to attach to communications between the organisation and an in-house lawyer. In short, the organisation in these circumstances might feel compelled to instruct external providers for more of its legal needs.

Lawyers and others who wished to be part of an in-house team would therefore know before applying whether or not they would be joining a fully regulated legal department where their input as a qualified, independent and regulated individual is likely to be valued and respected as such. They would also know, in those circumstances, whether they would be better placed and supported to resist any improper pressure from their employer.

Consequential question 11:
Should an in-house legal department be capable, for regulatory purposes, of being registered as a distinct entity or unit, so that the department's delivery of legal services could be subject to the same regulatory obligations as any other registered provider? Should individuals within such a registered in-house unit also be registered personally if they carry on activities for which BTE authorisation would otherwise be required?

If an in-house department was not registered, should it be allowed to carry on legal services for which BTE authorisation or other regulatory conditions would otherwise be required (except where an individual is appropriately registered and authorised)?

The provision of pro bono (or even paid-for) advice and representation by members of an in-house legal team to clients outside the organisation could in future be treated as discussed in paragraph 5.7.3 above. The case for distinct 'entity' treatment in these circumstances might, though, be stronger.

5.9 Who should make the decisions about regulatory scope or conditions?

Section 4 envisages a future in which the need for regulatory flexibility (or at least the avoidance of too much statutory inflexibility) would leave more decisions and actions to be taken within – but not prescribed by – the regulatory framework. This raises the question of where such decision-taking should most appropriately lie.

It might be, as now in effect, that activities subject to BTE authorisation would continue to be decided by Parliament and set out in statute. In that case, as suggested in paragraph 4.9.2, I would hope that there would be a review of the current reserved activities.

Alternatively, it might be that a need for greater flexibility – to reflect changing circumstances and assessments of relative risk – suggests that the decisions could be made by a regulator.

Such an option would require further development of the appropriate process, which might include some form of Parliamentary approval even if an activity were not identified in statute.

Further, as also discussed in paragraph 4.9.2, a distinction between public good and consumer protection authorisations might suggest a role for the judiciary in relation to the former to ensure that the appropriate recognition and protection of matters of constitutional importance and public confidence are taken into account.

Similarly, at a lower threshold of risk, though still one at a higher level than would be appropriate for only ATE conditions, the determination of activities for which DTE conditions were considered appropriate, and the setting of those conditions, would also require a suitable and credible decision-making body.

It would seem both unwieldy and unnecessary for these more frequent and market-related decisions to lie with either Parliament or the government: changing circumstances and risk profiles suggest that flexibility and timeliness would be required if the framework were to remain attuned to regulatory need and risk. Again, therefore, an appropriate and credible decision-maker and process would need to be found.

Consequential question 12:
Do you have a view on whether future decisions about the legal services subject to before-the-event authorisation need to be decided by Parliament and set out in statute, or can greater flexibility be left to a regulator? Would the same be the case for during-the-event regulation?

Whatever the outcome on regulatory decision-making, there is also the consequential issue of overall accountability within the regulatory structure (see paragraph 7.2.3).

6. Concluding thoughts

6.1 Summary

To reiterate, while this Review will make a case for the reform of legal services regulation, it does not do so other than in the context that, *at some point*, the timing and need for reform will be compelling.

This interim report therefore explores the possibility of an alternative approach that would extend regulatory reach to all legal services, at least at an after-the-event level for the lowest-risk activities. It would do this in preference to a current framework that limits access to regulation to those holders of a professional title who are authorised for one or more of the narrow and dated range of reserved legal activities.

6.2 How the propositions are intended to address the issues identified

I set out in paragraph 3.8 those shortcomings and challenges arising from the present structure for the regulation of legal services and those who provide them that I believe any regulatory reform should seek to address. This paragraph therefore explains how the alternatives explored in this interim report could deal with them.

(1) Inflexibility arising from statutory prescription

Significant concerns arise under the current arrangements because of the inflexibility of the statutory framework and the prescription that it contains. This makes both day-to-day operation and change to reflect evolving circumstances challenging. This in turn runs the risk of undermining the confidence of the regulators, the regulated, and those for whose benefit regulation is intended.

The proposition of this interim report and consultation is that a more flexible, risk-adjusted approach to legal services regulation could be achieved. It could be constructed on a less rigid statutory framework. This could extend the reach of regulation and consumer protection, as well as preserve (and even enhance) the standing of those providers who hold a professional title.

With less statutory prescription, the ability of regulation to reflect more quickly and appropriately developments in the domestic and international markets for legal services can be secured. Changes in the risks attached to those developments, and to other social and technological changes, could also be addressed.

Further, the power to use the full range of BTE, DTE and ATE regulatory tools, as appropriate and either independently of each other or in combination, should reduce the current pressure on the legislative and institutional infrastructure of regulation.

Finally, a more flexible structure offers more ‘breathing space’ to allow professional and organisational cultures to work on doing the right things. This in turn can lead to greater emphasis on an ‘ethical infrastructure’ and to more buy-in among the regulated community, with less box-ticking compliance.

(2) Competing and possibly inappropriate regulatory objectives

The adoption of a single objective to promote and protect the public interest (as explained in paragraph 4.2) would remove competition amongst objectives and focus regulatory attention on its overriding mission.

(3) A pivotal set of reserved legal activities that are anachronistic and do not necessarily include all activities that ought to be regulated

Universal access to a form of ATE regulation, such as the Legal Ombudsman, for all legal services would ensure that regulation of some kind could attach to all legal services, irrespective of how or by whom they are provided. A review of the current reserved activities could also ensure for the future that a different, and more modern, targeted and risk-focused, set of legal activities were subject to BTE and DTE regulation.

(4) Title-based authorisation that results in additional burden and cost in relation to some activities being regulated that do not need to be (resulting in higher prices to consumers)

A differentiated approach to regulation, that is capable of applying BTE, DTE and ATE regulation as appropriate to risk, would result in regulation being applied to a broader group of providers than primarily only those who hold a professional title. This would also mean that regulation was applied in proportion and method to the risks actually arising from a provider's practice.

In these ways, the cost of regulation could be distributed more appropriately and, for the lowest-risk legal activities, should not be disproportionate to the risks and consumer protections arising.

(5) The unsatisfactory nature of the separation of regulation and representation

The tension of regulatory independence has been a continuing theme throughout the genesis and implementation of the Legal Services Act 2007. Revisiting this important component of regulation is necessary.

With a clearer separation of regulation from professional titles, as explored in this report, the question of the separation of regulatory and representative functions arises in a different context.

Those activities that require BTE, DTE and ATE regulation should be matters for an independent regulator. The professional bodies would be interested parties in the same way that consumer and other representative interests would be. There would therefore be separation of regulatory and representative interests.

In relation to the award and guardianship of professional titles, the purpose should be to raise and maintain the protection and 'brand value' of those titles and their standing in the domestic and international marketplaces. Some challenges remain in this area, and this report has explored different options for securing clearer separation of regulatory and professional interests.

The present arrangement under which appointments to the Legal Services Board, as well as certain designated decisions, are made or approved by the Ministry of Justice, gives rise to understandable perceptions from international observers and consumers that the regulatory structure in England & Wales is a creature of government and therefore that lawyers are not truly independent from the state.

Such perceptions are important in the context of the rule of law, given that independent legal challenge of government may be required to ensure that government itself acts within the law. It is also important in the context of distinguishing between regulatory decisions that are wrong (that is, beyond the powers or remit of a regulator), unpopular (as judged, correctly or not, in 'the court of public opinion' or by the media), or politically inconvenient (when the scope for improper political or ministerial influence or interference might be strongest).

For the future, having a new regulator report directly to Parliament is worth considering. This is the position, for example, in health regulation, with the Professional Standards

Authority for Health and Social Care, laying an annual report before Parliament. For legal services, the 'natural' Parliamentary home might be the Justice Select Committee.

(6) The existence of unregulated providers who cannot be brought within the current regulatory framework (with an expectation that their numbers will increase)

All providers could in future fall within the regulatory structure, whether holding a professional title or not. Depending on the relative risk of the portfolio of legal services they wish to offer, a differentiated approach to regulation would apply BTE, DTE and ATE regulation appropriate to that risk.

(7) The prospect of LawTech, capable of offering legal advice and services independently of any human or legally qualified interface or interaction, is beyond the reach of the current framework

The ability to treat LawTech as offered by a 'provider of legal services' could bring all forms of legal technology into the regulatory framework, whether or not it is provided by an individual or entity already subject to regulation.

(8) A regulatory gap that exposes consumers to potential harm when some activities are not regulated when they ought to be, and puts qualified practitioners at a competitive disadvantage

Opening up the regulatory framework to all providers of legal services would close the regulatory gap. Applying regulation on identical or equivalent terms to all providers would also ensure no continuing advantage to the providers of non-reserved services who are not legally qualified, and no continuing disadvantage to title-holders who are currently regulated for all legal services they provide.

(9) Ever-increasing prices of private practice lawyers will reduce further the availability and affordability of legal services for many; this encourages either greater self-lawyering and litigants in person, or nudges increasing numbers of citizens into the world of unregulated providers or LawTech

While regulation can add to the costs of legal services for consumers, a more targeted and proportionate approach to regulation should ensure that those costs fall where they are most appropriate to the risks involved and the consumer protections offered. Beyond that, pricing will be for the market and competition. Encouraging or requiring the regulation of all providers would also reduce the risk (or increase the transparency) of consumers straying into less competent, unregulated or unprotected provision of legal services.

(10) Consumer confusion, caused by the existence of both regulated and unregulated providers, and a profusion of differently regulated professional titles

With the potential exception of voluntarily unregistered providers of the lowest-risk legal services, Section 4 suggests a future where there would be no distinction between regulated and unregulated provision. While professional titles might or might not continue to be differently supervised, the underlying requirements for regulation according to high, intermediate or low risk would ensure that there was no regulatory distinction in relation to the provider of the legal services provided.

(11) Inadequate or incomplete consumer protection, that is not consistent with a widespread consumer expectation that all legal services and those who provide them are subject to some form of regulation and protection

With the closing of the regulatory gap, and access to some minimum form of after-the-event protection, all consumers of all legal services could be protected, supported by a single enquiry of a public register that their chosen or prospective provider has submitted to at least the minimum ATE jurisdiction.

(12) The risk of low public confidence in legal services and their regulation

The combination of factors above should drive higher public confidence than is capable under the current framework.

6.3 Benefits

As a summary, it is worth recording in one place the potential benefits of the alternative approach explored in this interim report:

(a) It would be easier for consumers to check whether their provider or prospective provider is registered or not (including for higher-risk activities that attract further BTE and DTE regulatory requirements and protection). This is a simpler starting point for consumers than the current complex mix of factors.

(b) A differentiated, or layered, approach to regulation would allow BTE, DTE and ATE interventions to be applied to providers based on the risks of the services that they actually offer.

(c) Adopting such a risk-based approach would mean that more of the cost and burden of regulation could be self-selected and cumulative, depending on the commercial or operational choices that providers elect to make. As such, it would offer a more targeted and proportionate response to the public and consumer risks within the legal sector.

(d) This approach would enable those who are currently unable to enter the regulatory structure to choose to do so, for the benefit of their consumers. This could lead to an increase in regulated access, competition and innovation in legal services.

(e) This approach could also apply to those providers who are moved (or move themselves) outside the current regulatory framework, for instance by having been struck off, disbarred, or even simply retired. It would constrain their current option to set themselves up as an unregulated paid adviser in respect of non-reserved activities.[64]

(f) A framework that is constructed around 'providers' of 'legal services' could apply to the providers of substitutive LawTech in ways that the current framework cannot.

An important question for this interim stage of the Review is whether such a longer-term alternative approach would sufficiently address the identified shortcomings of the current framework (cf. paragraph 6.2), and whether these projected benefits would be worthwhile.

Consequential question 13:
Do you consider that a longer-term alternative approach would sufficiently address the identified shortcomings of the current framework, and that the potential benefits would be worthwhile?

6.4 A shorter-term reform?

Finally, two principal conclusions of this interim report drive longer-term concerns about the fairness and sustainability of the current framework. They are: (1) the exclusion of those who do not hold a professional title from authorisation under the 2007 Act; and (2) the

64. The constraint of reserved or non-reserved activities might not always be observed, for example, by former regulated practitioners setting themselves up as paid McKenzie Friends and being given permission by a judge to address the court, or prepare documents in connection with litigation. However, in those circumstances, there would still be some judicial oversight of the work undertaken; and it is clear that the practitioner would owe a duty of care to the litigant (*Wright* v. *Troy Lucas & Rusz* [2019] EWHC 1098).

related inability of consumers to access even minimal sector-specific redress in relation to non-reserved legal services carried on by providers who are not otherwise authorised.

This interim report has outlined a longer-term alternative that could remedy these, and other, challenges. However, with relatively minor amendments to the Act, these two current concerns could be addressed in the shorter term.

First, the repeal of section 63(2) and (3) could allow the Legal Services Board to become an approved regulator in respect of the authorisation of those providers who do not hold a professional title or qualification. This could lead, for example, to currently unregulated will-writers, paralegals or professional McKenzie Friends gaining authorisation (on qualification terms to be decided by the Board) and so enter the regulated sector.

Inevitably, this would require changes to the Board's current operational structure and resources. If shorter-term reform were to be attractive, therefore, the implications of these changes – as well as the associated costs and where they would fall – would need to be considered.

Second, section 128 could be replaced to allow the Legal Ombudsman to gain jurisdiction in respect of complaints made against any provider of a legal activity as defined in the Act, including those who do not offer reserved activities.

These changes would leave the current provisions and practice in place for those title-holders and ABSs already within the regulated sector. They could, however, offer a 'test bed' for limited entry of others into the regulatory framework. This would provide some experience and evidence of levels of demand from those who are presently excluded; and it would extend redress to consumers beyond the present parameters.

Consequential question 14:
Would you support:

(a) the short-term repeal of section 63(2) and (3) of the Legal Services Act 2007 to allow the Legal Services Board to become an approved regulator; and

(b) the short-term replacement of section 128 of the Act to allow the Legal Ombudsman to gain jurisdiction in respect of complaints made against any provider of a legal activity, including those who do not offer reserved activities?

7. To be continued …

7.1 Next steps

With its purpose of taking stock and thinking about future possibilities, this interim report is inevitably somewhat tentative and incomplete. I am interested to hear and gauge reactions to the propositions either through responses to the Consultation Questions (see pages 85-88) or in any other form that would better suit respondents.

After the closing date for responses, I shall revise, re-visit or complete the propositions, and develop a set of recommendations for the final report.

7.2 Still to come

Necessarily, there are still some aspects of regulatory form that are either as yet matters of finer detail or substantially dependent on the prior issues explored earlier in this report. The following are perhaps some of the more contentious, on which any views in advance of the final report and recommendations would be welcome.

7.2.1 A fuller role for the Legal Ombudsman?

The alternative approach to regulation explored in this interim report envisages an expanded jurisdiction and role for the Legal Ombudsman. This would allow complaints and concerns to be raised across a broader range of legal services and those who provide them than is currently possible.

In LSR-4 (2019: paragraph 8.3), I also explore some ideas not so much for expanded jurisdiction as for additional functions. These include the power to receive concerns and any unresolved disputes between clients and providers, as well as formal complaints, and from all stakeholders rather than just disaffected clients. They could also include ‘own-initiative’ thematic reviews of issues.

There is also the question of the Legal Ombudsman acting as a form of ‘triage’ for all issues raised by stakeholders. This could avoid the confusing distinction for consumers between ’service’ and ‘conduct’ complaints, and their different treatment and remedies. As a single point of entry, the Legal Ombudsman could classify all enquires as complaints or matters of concern, as unresolved service disputes to be pursued by the Ombudsman, as conduct matters to be referred to the appropriate regulator or professional body, as triggers for further investigation or a thematic review, and so on.

A reconceived role could also allow the Legal Ombudsman to adopt a range of techniques for resolution, including a people-intensive, hand-holding role where appropriate, but also extending to mediation and e-mediation.

A fuller role would take the Legal Ombudsman beyond its current remit as, essentially, a complaints-handler, and would need a different approach compared to current practice. It would become less transactional and more systemic. The resourcing and funding consequences of any such change would also need to be examined. It would be a newly conceived role rather than an incremental development of its current remit.

7.2.2 Single or multiple regulators?

LSR-4 (2019: paragraph 4) also explores the issues surrounding single or multiple regulators of legal services, and any need for oversight regulation.

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

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

A more focused role for regulation, of the sort explored in Section 4, arguably offers an opportunity for rationalisation in the number and functions of current regulators. Depending on the nature and extent of change, there might be a different configuration of regulatory staff as between regulators (focused on regulation), and professional bodies (focused on professional titles, higher standards and market competition): cf. paragraph 5.3.

7.2.3 Accountability to Parliament?

Where the rule of law, and a public interest objective to protect and promote it, requires an independent legal profession (or, as I might prefer, independent legal advice and representation), independence from government is essential if public confidence in the administration of justice and in legal services is to be achieved.

This can be done if regulators and practitioners are manifestly free from political influence or interference. As LSR-4 (2019: paragraph 5.1) sets out, there might be merit in further consideration of the future legal services regulator(s) laying an annual report before Parliament, reporting to the Justice Select Committee or being scrutinised by the National Audit Office.

7.2.4 The 'permitted purposes'

The Legal Services Act continues the pre-2007 approach of requiring practitioners to maintain an annual practising certificate and to pay a fee for that privilege. The practising certificate fee (PCF) must be approved by the LSB, and covers a range of regulatory costs.

The Act requires that an approved regulator may only apply amounts raised by the PCF for one or more of the 'permitted purposes' (section 51(2)). Some of those permitted purposes are carried out by the regulatory bodies and, in circumstances where there is a representative arm of an approved regulator, some of the permitted purposes are carried out as a representative function.

As a result, some elements of the PCF raised by a regulatory body are paid over to a representative body. For example, the following activities, which are permitted purposes under section 51, might well be carried out in representative capacities:

- (a) accreditation, education and training of practitioners and students;
- (b) maintaining and raising professional standards;
- (c) participation in law reform and the legislative process;
- (d) the provision to the public of *pro bono* reserved legal services;
- (e) promotion of the protection by law of human rights and fundamental freedoms;

(f) promotion of relations with national and international bodies, governments or the legal professions of other jurisdictions.

Many of these functions can rightly be regarded as public interest activities. Some could even be thought to be more challenging for regulators (and possibly even inappropriate: cf. LSR-0 2019: paragraph 4.2). This could apply to participation in law reform, the provision of pro bono advice and representation, and the promotion of human rights protection.

Understandably, professional bodies might be concerned at the loss of funding through the PCF if the effect of full separation of regulatory and representative functions resulted in the removal of permitted purposes funding. However, a case could be made for preserving compulsory funding for such important public interest activities.

While the correlation between the PCF communities (such as solicitors) and the funding recipient (currently the Law Society) might be disrupted by full separation, that should not prevent a future framework empowering a regulator (including a single or oversight regulator) from raising funding through a PCF (or future equivalent) for these important public interest purposes.

The distribution of those funds might in future be based on a transparent process for securing that they are expended by those organisations (including current professional bodies) that are assessed to be able to apply them most effectively and cost-efficiently. Some of the activities carried out (as will be apparent from the list from section 51 above) are not in-year or one-off activities. They will require planning and sustainability over time, such that assured continuity of funding will be critical, and this would also need to be addressed.

In summary, therefore, I do not see it as a necessary consequence of any further separation of regulatory and representative functions that professional bodies would lose all of their permitted purposes PCF funding.

Consultation Questions

The following questions are offered for consultation responses. Please feel free only to address those questions that are of particular interest or concern to you or your organisation. For each question you choose to answer, please explain the Background (if relevant) and the reasons for your response.

The Propositions

1. Do you agree with Proposition 1 that promoting and protecting the public interest (as outlined in paragraph 4.2) should be the primary objective for the regulation of legal services?
2. Do you agree with Proposition 2 (paragraph 4.3.5) that consumer expectations and regulatory reality should be aligned by at least allowing access to the Legal Ombudsman for all consumers of legal services offered to the public?
3. Do you agree with Proposition 3 (paragraph 4.3.5) that all legal services should be capable of falling within the regulatory framework, irrespective of who provides them?
4. Do you agree with Proposition 4 (paragraph 4.4) that there should be an alternative or additional form of entry into regulation for those who do not hold a professional title?
5. Do you agree with Proposition 5 (paragraph 4.5.1) that a future regulatory framework should allow the differential application of before-, during- and after-the-event regulation to reflect the importance or risk of any particular activity or circumstance?
6. Do you agree with Proposition 6 (paragraph 4.5.5) that professional title should no longer be the only route to personal authorisation, even in respect of those important or highest-risk activities for which BTE authorisation would continue to be required?
7. Do you agree with Proposition 7 (paragraph 4.5.5) that the appropriate regulator should determine what qualification or assurance of (continuing) competence, experience and integrity would need to be demonstrated by any provider for particular legal services on a BTE basis, and the additional requirements that would be applied on a DTE or ATE basis to the relevant providers?
8. Do you have a view on (paragraph 4.6) a revised definition of ‘legal activity’ or ‘legal services’?
9. Do you have a view on (paragraph 4.7) what should be the minimum conditions attached to after-the-event regulation?
10. Do you agree with Proposition 8 (paragraph 4.8.3) that the application of regulatory requirements could be supported by the existence of a public register of who is regulated and for what, such that:
    (a) ATE regulation and *voluntary* registration should extend to all providers of low-risk legal services; and
    (b) BTE and DTE regulation and *mandatory* registration should apply to providers of higher-risk legal services?
11. Do you agree with Proposition 9 (paragraph 4.9.2) that:
    (a) the current list of reserved activities should be reviewed to identify clearly the public interest basis of the continuing need for prior authorisation by reference to public good or consumer protection;

(b) other activities should also be reviewed against these same criteria to see whether prior authorisation should in the future be extended to them (and do you have any suggestions for what those activities might reasonably be)?

12. Do you agree with Proposition 10 (paragraph 4.10.2):

    (a) that the future primary focus of regulation should be the ‘provider’ of legal services, whether an individual, entity, title-holder, or technology; and

    (b) if so, how might a definition of ‘provider’ be constructed, and what would it need to include and exclude?

13. Do you agree with Proposition 11 (paragraph 4.10.3) that:

    (a) for the purposes of a future single register of providers of legal services, the registration should be in the name of the entity, partnership or individual subject to regulatory requirements or with which a client has terms of engagement; and

    (b) BTE authorisation should only be granted to individuals?

14. Do you have a view on whether there should be a continuing need for separate registration of alternative business structures or prior approval of ‘non-lawyer managers’ for ABSs? (Paragraph 4.10.5)

The consequential questions

1. Do you agree that it should be a matter for a regulator to decide whether, and on what basis, an individual could be granted, and maintain, authorisation or accreditation for legal services over a period of time? In particular, do you agree that those who have a professional title, and those who do not, should be subject to the same regulatory requirements, both initially and over time in respect of the same legal services; and that there should be no automatic or perpetual ‘passporting’ for any providers, whether title-holders or not? (Paragraph 5.2)

2. Do you have a view on whether (paragraph 5.2.3):

    (a) a practitioner should be required to demonstrate continuing competence and experience of a sufficient level to reflect the risks associated with the service in question or with the types of client served;

    (b) there should be any automatic or perpetual ‘passporting’ for title-holders and other regulated providers; and

    (c) those who hold a professional title should be, in regulatory terms, any more privileged or disadvantaged than those who do not?

3. In relation to the future regulation of professional titles, do you have any preference for, or views about, Option 1 (regulator responsibility), Option 1A (regulator responsibility with legally separate title regulators), Option 2 (professional body responsibility), or Option 3 (co-regulation)? (Paragraph 5.3)

4. Do you have a view on whether: the adoption and use of all professional titles should be protected (paragraph 5.3); or the current protections should continue alongside a public register and the generic use of an expression such as ‘registered legal services provider’? (Paragraph 4.8.3)

5. Where providers who would not ordinarily be regarded as being within the legal sector are giving advice on matters of law that fall within the definition of legal services, in principle should the same regulatory requirements apply? Further, should certain minimum ATE requirements of the legal service regulatory framework (such as access

to the Legal Ombudsman) apply in any event to all providers in order to simplify the consumers' route to making complaints and initial claims for redress? (Paragraph 5.4.3)

6. Given the public policy objectives for legal professional privilege, and parity for clients, should privilege be extended to those providers who are registered within the legal services framework? (Paragraph 5.4.4)

7. Should immigration advice and services fall within the definition of legal services, with all immigration practitioners coming at least within ATE requirements for legal services? (Paragraph 5.5.4)

8. Should LawTech fall within a future definition of 'legal services', and a 'provider' of LawTech legal services capable being within the regulatory framework? (Paragraph 5.6)

9. Should a law centre or other similar organisation be a registered entity for regulatory purposes, and the body responsible for compliance with DTE and ATE requirements? If higher-risk activities are carried out for which BTE or DTE obligations exist for individuals, should the relevant individuals also be registered? If there are no such obligations, is it sufficient that individuals be otherwise covered by the entity registration? (Paragraph 5.7.2)

10. Should future regulation allow the pro bono activities of a law firm or legal department to be registered as a distinct unit (treating it for regulatory and registration purposes as a separate 'entity')? (Paragraph 5.7.3)

11. Should an in-house legal department be capable, for regulatory purposes, of being registered as a distinct entity or unit, so that the department's delivery of legal services could be subject to the same regulatory obligations as any other registered provider? Should individuals within such a registered in-house unit also be registered personally if they carry on activities for which BTE authorisation would otherwise be required? (Paragraph 5.8)

12. If an in-house department was not registered, should it be allowed to carry on legal services for which BTE authorisation or other regulatory conditions would otherwise be required (except where an individual is appropriately registered and authorised)? (Paragraph 5.8)

13. Do you have a view on whether future decisions about the legal services subject to before-the-event authorisation need to be decided by Parliament and set out in statute, or can greater flexibility be left to a regulator? Would the same be the case for during-the-event regulation? (Paragraph 5.9)

14. Do you consider that (paragraph 6.3):
    (a) a longer-term alternative approach would sufficiently address the identified shortcomings of the current framework; and
    (b) the potential benefits would be worthwhile?

15. Would you support (paragraph 6.4):
    (a) the short-term repeal of section 63(2) and (3) of the Legal Services Act 2007 to allow the Legal Services Board to become an approved regulator; and
    (b) the short-term replacement of section 128 of the Act to allow the Legal Ombudsman to gain jurisdiction in respect of complaints made against any provider of a legal activity, including those who do not offer reserved activities?

16. Do you have a preliminary view on whether there should be an expanded role for the Legal Ombudsman? (Paragraph 7.2.1)
17. Do you have a preliminary view on whether a requirement for consistency, coherence and coordination across regulation within the legal services sector would or should necessarily lead to a single, or at least a continuing oversight, regulator? (Paragraph 7.2.2)?
18. Do you have a preliminary view on whether a future legal services regulator should be directly accountable to Parliament? (Paragraph 7.2.3)
19. Do you have any views about the future of 'permitted purposes' funding and collection? (Paragraph 7.2.4)

Please send any written responses and submissions to Professor Stephen Mayson at **s.mayson@ucl.ac.uk**.

The closing date is **29 November 2019**.

We *do not* intend to publish any responses to the consultation, but may wish to record the identity of respondents and refer to a submission in the final report. Accordingly, if you wish the fact or substance (or any part) of your response to be kept confidential, please identify this explicitly in your submission or a covering note.

References

Clementi, D. (2004) *Review of the regulatory framework for legal services in England and Wales*; available at: http://webarchive.nationalarchives.gov.uk/+/http://www.legal-services-review.org.uk/content/report/index.htm

Competition and Markets Authority (2016) *Legal services market study*; available at: https://assets.publishing.service.gov.uk/media/5887374d40f0b6593700001a/legal-services-market-study-final-report.pdf

Department for Constitutional Affairs (2005) *The Future of Legal Services: Putting Consumers First*, Cm 6679 (London, The Stationery Office)

Hook, A. (2019) 'The use and regulation of technology in the legal sector beyond England & Wales'; available at: https://www.legalservicesboard.org.uk/wp-content/uploads/2019/07/International-AH-Report-VfP-4-Jul-2019.pdf

Legal Services Board (2018) 'Technology and innovation in legal services; available at: https://research.legalservicesboard.org.uk/wp-content/media/Innovation-survey-2018-report-FINAL-2.pdf

Legal Services Consumer Panel (2014) 'Recognising and responding to consumer vulnerability'; available at: https://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/Guide%20to%20consumer%20vulnerability%202014%20final.pdf

Legal Services Consumer Panel (2019) 'Lawtech and consumers'; available at: https://www.legalservicesconsumerpanel.org.uk/wp-content/uploads/2019/06/LSCP-Technology-Paper-2019.pdf

Legal Services Consumer Panel (2019) *Tracker Survey: How consumers are choosing legal services*; available at: https://www.legalservicesconsumerpanel.org.uk/wp-content/uploads/2019/07/2019-07-25-How-consumers-are-choosing-2019-FINAL.pdf

LSR-0 (2019) 'Assessment of the current regulatory framework'; IRLSR Working Paper available at: https://www.ucl.ac.uk/ethics-law/publications/2018/sep/independent-review-legal-services-regulation

LSR-1 (2019) 'The rationale for legal services regulation'; IRLSR Working Paper available at: https://www.ucl.ac.uk/ethics-law/publications/2018/sep/independent-review-legal-services-regulation

LSR-2 (2019) 'The scope of legal services regulation'; IRLSR Working Paper available at: https://www.ucl.ac.uk/ethics-law/publications/2018/sep/independent-review-legal-services-regulation

LSR-3 (2019) 'The focus of legal services regulation'; IRLSR Working Paper available at: https://www.ucl.ac.uk/ethics-law/publications/2018/sep/independent-review-legal-services-regulation

LSR-4 (2019) 'The structure of legal services regulation'; IRLSR Working Paper available at: https://www.ucl.ac.uk/ethics-law/publications/2018/sep/independent-review-legal-services-regulation

Mayson, S. & Marley, O. (2010) 'The regulation of legal services: reserved legal activities – history and rationale'; available at: https://stephenmayson.files.wordpress.com/2013/08/mayson-marley-2010-reserved-legal-activities-history-and-rationale.pdf

Moorhead, R., Clark, T., Brener, A., Gilbert, P. and Vaughan, S. (2019) 'In-house lawyers and non-executive directors: a discussion about best practice'; available from: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3410929

Roberton, E. (2018) ‘Fit for the Future: Report of the Independent Review of Legal Services Regulation in Scotland’; available at: https://www2.gov.scot/Resource/0054/00542583.pdf

Utah Work Group on Regulatory Reform (2019) ‘Narrowing the access-to-justice gap by reimagining regulation’; available at: https://www.utahbar.org/wp-content/uploads/2019/08/FINAL-Task-Force-Report.pdf

Appendix 1: Terms of reference

A. Purpose and timing

The Centre for Ethics & Law in the Faculty of Laws at University College London is undertaking a fundamental review of the current regulatory framework for legal services in England & Wales.

This independent review is intended to explore the longer-term and related issues raised by the Competition and Markets Authority (CMA) market study in 2016 and its recommendations[65], and therefore to assist government in its reflection and assessment of the current regulatory framework.

In the context of the outcome of the EU Referendum and the UK's impending exit from the European Union, it is even more important that the regulatory framework for legal services is fit for the future. The democratic intention that is central to 'taking back control' presumes full confidence in our domestic rule of law and legal institutions, as well as maintaining our performance and competitive position in the global economy. This in turn requires that the supporting regulatory structure for legal services is as robust as it can be – which is in question given the CMA's conclusion that the current regulatory framework is unlikely to be sustainable in the future.

The review will aim to present its conclusions to the Ministry of Justice by the end of 2019, and the final report will be published.

B. Review objectives

The provision of effective and properly regulated legal services is critical to maintaining the rule of law, and the effective and efficient administration of justice. It is also necessary to sustaining the UK's position and reputation as a world-leading jurisdiction for the governing law of international transactions and for the resolution of disputes. The review's objectives will therefore be to consider how the regulatory framework can best:

- promote and preserve the public interest in the rule of law and the administration of justice;
- maintain the attractiveness of the law of England & Wales for the governance of relationships and transactions and of our courts in the resolution of disputes;
- enhance the global competitiveness of our lawyers and other providers of legal services;
- reflect and respond flexibly to fast-changing market conditions being driven by innovation and advances in technology;
- protect and promote consumers' interests, particularly in access to effective, ethical, innovative and affordable legal services and to justice; and
- lead the world in proportionate, risk-based and cost-effective regulation of legal services, consistent with the better regulation principles.

C. Context

A review of legal services regulation was carried out in 2003-4 by Sir David Clementi. It led to the Legal Services Act 2007 and a new framework for the regulation of legal services (including the introduction of the Legal Services Board (LSB) as an oversight regulator, of the Office for Legal Complaints, of the separation of regulatory and representative activities of professional bodies, and of alternative business structures). In the years since the Clementi Review, the impact of the global financial crisis has been felt, the use of technology has become more extensive and pervasive, and the experience of regulators and of regulation has developed considerably. The world that existed in 2004 does not exist in the same way now, and the inherent tensions in the 2007 Act have become increasingly apparent.

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65. Available at: https://www.gov.uk/cma-cases/legal-services-market-study.

In July 2014, the then Secretary of State for Justice called a Ministerial Summit of legal services regulators, as a result of which the regulators were invited to consolidate their collective strategic view of the difficulties they were experiencing under the Legal Services Act 2007 and related legislation and to identify possible legislative options for creating a regulatory framework that would better support an effective, diverse and healthy legal services sector. Cross-regulator discussions ('the Legislative Options Review') were then chaired by Professor Stephen Mayson of UCL, and the regulators' views were published and submitted to Ministers in July 2015.[66] The LSB subsequently developed and published its own more detailed views on the options.[67]

Shortly before the Legislative Options Review report was published, the (new) Secretary of State said in an appearance before the Justice Select Committee that there would be a review of the Legal Services Act within the lifetime of that Parliament. Later that year, in November 2015, HM Treasury announced in its competition plan that the government would consult in spring 2016 on making legal service regulators independent from their representative bodies.

Then in January 2016, the Competition and Markets Authority launched a market study into the supply of legal services in England and Wales. Its work took a year, and its final report was published in December 2016.[1] The principal conclusion from the review was that the legal services sector is not working well for individual consumers and small businesses, largely because those consumers lack the experience and information they need to understand their needs, to make informed choices, and to engage confidently with providers of legal services.

The CMA also concluded that these issues are likely to increase over time and *make the current regulatory framework unsustainable in the long run* (especially since some aspects of that framework do not meet the better regulation principles). The CMA also concluded that "the majority of issues cannot be addressed by tweaking the current framework but would be better addressed through legislative and/or structural changes by the government" (page 213), and therefore recommended that government undertook a review of the current regulatory framework.[68]

During the period of the CMA market study, and before the government was able to respond to the CMA's recommendations, both the EU Referendum and a General Election took place. As a consequence, the political backdrop changed considerably and, not surprisingly, when the government responded to the CMA in December 2017, it did not feel able to commit to the formal review recommended by the CMA. It did, however, agree that it would "continue to reflect on the potential need for such a review".

D. The Review and its scope

The review will take as its starting point the issues and options identified in the Legislative Options Review, along with the findings of the CMA market study (which also set out the principles that it thought should guide a review, along with its assessment of the current framework against those principles). The review's scope will therefore reflect the objectives and context included in these terms of reference, and will include: regulatory objectives; the scope of regulation and reserved legal activities; regulatory structure, governance and the independence of legal services providers from both government and representative interests; the focus of regulation on one or more of activities, providers, entities or professions; and the extent to which

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66. See: http://www.legalservicesboard.org.uk/news_publications/LSB_news/PDF/2015/20150727_The_Case_For_Change_Legislative_Options_Beyond_The_Legal_Services_Act_2007.html.

67. See: http://www.legalservicesboard.org.uk/news_publications/LSB_News/PDF/2016/20160909LSB_Vision_For_Legislative_Reform.pdf.

68. It is important to emphasise that this conclusion was reached in the context of alternatives to a fundamental review of the regulatory framework having been taken into account. The regulators, as part of their work following the Ministerial Summit in 2014, developed a number of proposals for short-term implementation: see http://www.legalservicesboard.org.uk/what_we_do/Ministerial_Summit_2014_Follow_Up.htm). The CMA market study also put forward some short-term recommendations, most of which are also being taken forward. Nevertheless, the CMA's conclusion was that these various measures would not be sufficient in the longer term to address all of the identified shortcomings in the current framework.

the legitimate interests of government, judges, consumers, professions, and providers should or might be incorporated into the regulatory framework. (Further detail is included in the Annex.)

The review will be led by Professor Stephen Mayson, an honorary professor in the Faculty of Laws, and the chairman of the Legislative Options Review. This project is being undertaken independently and with no external funding, and Professor Mayson has agreed to participate without payment.

Professor Mayson will be supported by an Advisory Panel whose members will advise on the direction of the review and on specific issues, and will help to scrutinise and challenge emerging conclusions and recommendations. The Advisory Panel will include one or more members in each of the following categories: academic specialist in regulation and professional ethics; specialist in legal services regulation; economist; retired judge; individual with experience of representing consumers' interests and of the business world; individual with experience of acting as a regulator; and Parliamentarian or expert in constitutional governance and accountability.

E. Stakeholder engagement

The review will seek to engage with a wide range of stakeholders, including the Competition & Markets Authority, the Legal Services Board, approved regulators, front-line regulators, representative bodies, consumers, the judiciary, practitioners, and providers of legal education and training.

ANNEX: DETAILED SCOPE

The Review will consider and, where appropriate, make recommendations on the following issues identified by the Legislative Options Review 2015:

1. Regulatory objectives

The review will consider the number, nature and presentation of any regulatory objectives. It will examine the case for a different set of objectives, and whether or not there should be an overarching objective or an explicit hierarchy of objectives.

2. Scope of regulation

The review will consider what should fall within the scope of sector-specific regulation, and how that could best be addressed. The rationale for (and of the current) reserved legal activities will be considered as part of a broader consideration of scope, including whether there should be:

- regulation of all 'legal services' and providers
- limited (or no) sector-specific regulation
- regulation targeted by reference to the regulatory objectives
- regulation targeted by reference to the assessed risks of certain activities or providers, or to certain consumers (based, perhaps, on vulnerability, asymmetry of relationship, or the potential consequences of incompetent or inadequate advice or representation).

From the conclusions that emerge, consideration will then be given to the continuing need for, and approach to, reserved legal activities, as well as to how regulation might appropriately be applied before the event (such as authorisation), during the event (such as codes of conduct or indemnity insurance), and after the event (such as complaints and disciplinary processes, and the role of an ombudsman).

The review will also consider how a future framework might best incorporate flexibility to adapt to market changes and emerging perceptions or assessments of risk, including the processes for adding or removing regulation to reflect those changes in circumstances or assessed risk (bearing in mind the importance of an assessment of relative costs and benefits as part of any proposal to add or remove regulation).

3. Focus of regulation

The review will consider whether regulation should primarily be focused on one or other (or both) of the legal activities or the providers (individuals, professions, organisations) who carry them out. As recommended by the CMA, the future role of professions and professional title in regulation will be explored, along with the implications for consumer protection and professional bodies.

4. Regulatory governance and independence

Being mindful of international perceptions and professional concerns, the review will consider how the independence of legal services regulation from both government and representative interests might best be assured. It will explore appropriate forms of governance and independence that should flow as appropriate from the regulatory objectives, and the scope and focus of regulation.

5. Structure

By reference to the conclusions on regulatory objectives, scope, focus and governance, the review will consider the ways in which the regulatory framework for legal services might then best be structured. This will address issues relating to:

- the number of regulatory bodies
- regulatory bodies focused on regulated activities or regulated persons
- the desirability of a single regulator (with or without specialist sub-units to focus on either activities or providers, or a combination)
- the need for or desirability of an oversight regulator.

6. Representation of interests

The review will consider the extent to which the interests of, for example, government, judges, consumers, professions, and providers might appropriately and legitimately be incorporated into a future regulatory framework, either through structural requirements or representation, or through obligations to consult or seek approval.

The review will also bear in mind the key features of any alternative regulatory framework suggested by the CMA in its market study recommendations (at pages 215-217):

- Clear objective: legal services regulation should focus on outcomes for consumers and society as a whole, taking account of the balance between wider public interests and consumer protection and competition.

- Independence: [we believe strongly in the principle and importance of independence of regulators. This is because insufficient independence may compromise their effectiveness in meeting their objectives].

- Flexibility: this could be achieved by replacing (or supplementing) the current reserved legal activities (which are defined in primary legislation and thus require substantial time and resource to be varied) by a provision that allows the regulator to direct regulation at areas which it considers pose the highest risk to consumers.

- Targeted and proportionate regulation: this may have the following implications:

  (i) Providers that are currently unauthorised would come into the regulatory net, if they undertake activities considered as risky. By contrast, the regulatory burden on solicitors and others might be lower than currently for lower risk activities. This would allow providers to compete on a level playing field and allow lower cost unauthorised providers to compete where the authorisation of titles is not necessary.
  (ii) Some of the activities that are currently reserved may cease to be reserved. Furthermore, reservation may be replaced with other type of regulation, if this would better match regulation with risk.
  (iii) Access to redress mechanisms, such as the [Legal Ombudsman], could be extended more widely for the services that fall within the scope of regulation. In other words,

access to redress would depend on the risk of detriment faced by the consumer (or the public interest), and not on the professional title of the provider. More targeted access to redress is likely to reduce the 'regulatory gaps' that consumers currently face in certain area of law.

(iv) Low-risk activities would not be subject to sector-specific regulation and would not give access to specific forms of redress. However, consumers would be able to rely on private and public enforcement of general consumer law, and alternatives to regulation such as voluntary schemes, where available.

- Fewer regulators: over time, there is a case for consolidation of regulators. A framework with fewer regulators may allow for better prioritisation over risk factors as these risk factors relate more to the relevant types of consumer, activity and legal services rather than types of provider. However, we also consider that the appropriate structure should ultimately depend on the preferred regulatory approach, rather than structure being something that should be considered in isolation.
- Role of title: we consider that, in a more competitive legal sector, with appropriately scoped risk-based regulation, title might cease to be subject to statutory regulation. Instead, relevant professions could be responsible for the title. However, in the short to medium term, it would be preferable that titles continue to remain subject to regulation. This is because … professional titles play an important role in the current market: the majority of legal services are provided by authorised legal providers, mainly solicitors.

The CMA also identified a number of practical questions that any review would need to consider (page 217), including:

(a) Assessing risk: the review needs to identify how to assess and identify risk across many legal services areas, and how to define the scope of regulation on the basis of this risk assessment.

(b) Implementing flexibility: the review needs to identify what legislative changes should be implemented to achieve flexibility of the regulatory framework.

(c) Effective prioritisation: the review should ensure that the new framework allows regulators to prioritise effectively regulatory changes.

(d) Evidentiary standards: the review should set an appropriate evidentiary threshold for making changes to regulation, by ensuring that it strikes the right balance between the need to ensure that changes are made only when there is evidence of a change in the risk factor and the need for flexibility in the framework.

(e) Impact on the wider market: the review needs to consider how changes to the framework are likely to impact the legal services sector outside of the scope of this market study (i.e. criminal legal services and legal services other than to small businesses and consumers).

(f) Regulatory structure: the review needs to identify whether the current structure is appropriate under the new framework, particularly in relation to its ability to deliver risk-based regulation.

(g) Transition costs: the review should determine the most effective way to transition between the current and the new framework models without introducing excessive regulation, creating uncertainty for businesses or chilling current liberalising initiatives.

This review will accordingly also seek to address these questions.

Appendix 2: Advisory Panel

To reflect the purpose, context and scope of the Review, as set out in the terms of reference (see Appendix 1), the Advisory Panel has the following membership.

Alan Brener, Council Member of the Chartered Institute of Bankers in Scotland

Carol Brennan, Chair of the Scottish Legal Complaints Commission Consumer Panel

George Bull, Senior Tax Partner and former head of the Professional Practices Group, RSM

Alison Carr, Lay Member of the Royal College of Veterinary Surgeons (RCVS) Veterinary Nurses Council, and former Registrar and Chief Executive of the Architects Registration Board

Elisabeth Davies, Chair of the Appointments Committee of the General Pharmaceutical Council, and former chair of the Legal Services Consumer Panel

Dr Edward Donelan, former senior advisor on regulatory governance, OECD, and former Parliamentary Counsel in the Republic of Ireland

Dame Janet Gaymer QC, former Commissioner for Public Appointments

Tahlia Gordon, Secretary-General of the Australian Section of the International Commission of Jurists, and former Executive Director of the Legal Profession Advisory Council, Sydney

John Gould, solicitor and senior partner, Russell-Cooke LLP; editor of *The Law of Legal Services* (2015, Jordan Publishing)

Rt Hon Dominic Grieve QC MP, Chair of the All-Party Parliamentary Group on the Rule of Law, and former Attorney-General for England & Wales

Professor Gillian Hadfield, Professor of Law and of Strategic Management, University of Toronto; author of *Rules for a Flat World: Why Humans Invented Law and How to Reinvent It for a Complex Global Economy* (2017, Oxford University Press)

Alison Hook, co-founder of Hook Tangaza, and former Head of International, The Law Society of England & Wales

Steve Mark AM, former Legal Services Commissioner for New South Wales

Paul McFadden, Deputy Ombudsman for Northern Ireland, Deputy Commissioner for Local Government Standards, and Judicial Appointments Ombudsman for Northern Ireland

Iain Miller, solicitor and partner, Kingsley Napley; general editor of *Cordery on Legal Services* (Lexis Nexis)

Professor Richard Moorhead, Head of the Law School, University of Exeter

Michael Napier CBE QC, former President of the Law Society, former Board member of the Legal Services Board, and Attorney-General's pro bono envoy (2001-15)

Rt Hon Lord Neuberger of Abbotsbury, former President of the Supreme Court

Professor Neil Rickman, Professor of Economics, University of Surrey

Patricia Robertson QC, former Vice Chair of the Bar Standards Board

Professor Colin Scott, Professor of EU Regulation & Governance, Vice President for Equality, Diversity and Inclusion and Principal, UCD College of Social Sciences and Law at University College Dublin

Professor Noel Semple, Associate Professor, University of Windsor, Ontario; author of *Legal Services Regulation at the Crossroads* (2015, Edward Elgar)

Professor Frank Stephen, Emeritus Professor of Regulation, University of Manchester; author of *Lawyers, Markets and Regulation* (2013, Edward Elgar)

Jenifer Swallow, General Counsel & Company Secretary, including former leadership roles at TransferWise and Yahoo

Andrew Walker QC, former Chairman of the Bar Council

A member of the Panel should not also have a current membership of or employment with any governing or regulatory body that is within the scope of the Review.