

---

SM

**STEPHEN MAYSON**

*An independent mind*

---

# **Review of Legal Services Regulatory Framework**

**Response to Call for Evidence**

**Professor Stephen Mayson**

**September 2013**

## Contents

---

### Section 1. Introduction

|     |                             |   |
|-----|-----------------------------|---|
| 1.1 | The nature of this response | 4 |
| 1.2 | Summary                     | 4 |

### Section 2. Concerns with the current regulatory framework

|     |  |    |
|-----|--|----|
| 2.1 | Introduction                                       | 7  |
| 2.2 | The centrality of reserved legal activities        | 7  |
| 2.3 | The complexity of regulatory focus                 | 8  |
| 2.4 | The ‘missionary zeal’ of regulators                | 8  |
| 2.5 | Over-emphasis on market, competition and consumers | 9  |
| 2.6 | Inadequately resourced regulators                  | 10 |

### Section 3. Objectives for legal services regulation

|     |   |    |
|-----|---|----|
| 3.1 | The Legal Services Act’s regulatory objectives                                      | 12 |
| 3.2 | Overriding objective to regulate in the public interest                             | 12 |
| 3.3 | Primary objectives  | 13 |
|     | 3.3.1 Supporting the constitutional principle of the rule of law                    | 13 |
|     | 3.3.2 Protecting and supporting the proper and effective administration of justice  | 14 |
|     | 3.3.3 Protecting and supporting access to justice                                   | 14 |
|     | 3.3.4 Encouraging independent, strong and effective legal advice and representation | 15 |
| 3.4 | Subordinate objectives  | 16 |
|     | 3.4.1 Promoting and maintaining adherence to the professional principles            | 16 |
|     | 3.4.2 Enabling competition in the provision of legal services                       | 17 |
| 3.5 | The relationship between overriding, primary and subordinate objectives             | 18 |
| 3.6 | Some original regulatory objectives no longer required?                             | 19 |
|     | 3.6.1 Protecting and promoting the interests of consumers                           | 19 |
|     | 3.6.2 Increasing public understanding of the citizen’s legal rights and duties      | 20 |
|     | 3.6.3 Encouraging a diverse legal profession  | 22 |
| 3.7 | A new statement of regulatory objectives  | 23 |

## Contents *(continued)*

### Section 4. Principles underpinning further reform

|       |   |    |
|-------|---|----|
| 4.1   | Timing and extent of further reform                     | 25 |
| 4.2   | Regulatory objectives and principles for reform         | 25 |
| 4.3   | Principles for further reform                           | 25 |
| 4.3.1 | Achieving the regulatory objectives                     | 25 |
| 4.3.2 | Separating regulatory and representative functions      | 26 |
| 4.3.3 | Matching public expectation and the scope of regulation | 27 |
| 4.3.4 | Generating confidence in justice and legal services     | 28 |
| 4.3.5 | Effectiveness of the regulatory framework               | 29 |

### Section 5. The scope and nature of legal services regulation

|       |   |    |
|-------|---|----|
| 5.1   | The extent of further reform                                  | 30 |
| 5.2   | Current reserved legal activities as a fundamental flaw       | 30 |
| 5.3   | Other approaches to regulation                                | 30 |
| 5.4   | Using alternatives to regulation                              | 31 |
| 5.4.1 | Self-regulation   | 31 |
| 5.4.2 | Information and education                                     | 32 |
| 5.4.3 | Co-regulation   | 32 |
| 5.4.4 | Economic instruments or incentives                            | 32 |
| 5.4.5 | No new intervention   | 33 |
| 5.5   | Redesigning the scope and nature of legal services regulation | 33 |
| 5.5.1 | The principles for legal services regulation                  | 34 |
| 5.5.2 | The nature and consequences of regulation                     | 39 |
| 5.5.3 | Conclusion  | 40 |

### Section 6. A new approach to legal services regulation

|       |   |    |
|-------|---|----|
| 6.1   | Foundations of regulation   | 42 |
| 6.2   | What should be regulated: potential public good reservations          | 42 |
| 6.2.1 | Activities connected to the administration of justice and due process | 43 |
| 6.2.2 | Notarial activities   | 46 |
| 6.2.3 | Immigration advice and services                                       | 47 |
| 6.2.4 | Public law advice and services  | 49 |
| 6.2.5 | Property-related activities   | 49 |

**Contents (continued)**

|       |   |    |
|-------|---|----|
| 6.3   | What should be regulated: potential consumer protection reservations  | 53 |
| 6.3.1 | Will writing  | 54 |
| 6.3.2 | Probate and the administration of estates                             | 55 |
| 6.3.3 | Insolvency practice   | 56 |
| 6.3.4 | Claims management services  | 57 |
| 6.4   | What should be regulated: regulation of non-reserved legal activities | 58 |
| 6.5   | Who should be regulated   | 60 |
| 6.6   | How they should be regulated  | 60 |
| 6.7   | By whom they should be regulated                                      | 60 |
| 6.8   | Summary   | 62 |
|       | <br>  |    |
|       | Bibliography  | 63 |

## Section 1. Introduction

---

### 1.1 The nature of this response

This paper responds to the initial call for evidence issued to stakeholders by the Ministry of Justice on 5 June 2013 in relation to a review of the regulatory framework for legal services.

I submit this response in a personal capacity; all views expressed here are my own and should therefore not be attributed to or associated with any organisation with which I am connected.

### 1.2 Summary

I identify in Section 2 a number of concerns with the current regulatory framework for legal services. After setting out these concerns, the paper considers in Sections 3 and 4 the objectives and principles that might guide the future ‘architecture’ of the regulation of legal services. It then addresses in Section 5 the current and potential future scope and nature of legal services regulation, and concludes in Section 6 with some thoughts about a new approach to regulation covering what should be regulated, who should be regulated, how they should be regulated, and by whom they should be regulated.

My principal conclusions are as follows.

#### *1.2.1 Concerns with the current regulatory framework*

Section 2: The current framework raises concerns in relation to -

- the centrality of illogical reserved legal activities
- the complexity of regulatory focus (on activities, individuals, entities and titles) and multiple regulators
- the ‘missionary zeal’ of regulators
- over-emphasis on market, competition and consumers
- inadequately resourced regulators.

#### *1.2.2 Objectives for legal services regulation*

Section 3: For the future, there should be a hierarchy of regulatory objectives -

- an overriding objective of protecting and promoting the public interest
- the overriding objective would be supported by primary objectives (such as supporting the rule of law; protecting and supporting access to justice and the proper and effective

administration of justice; and encouraging independent, strong and effective legal advice and representation)

- the overriding and primary objectives would be further supported by subordinate regulatory objectives (such as promoting and maintaining adherence to the professional principles, and enabling competition in the provision of legal services)
- the need for certain of the current regulatory objectives might be questioned: protecting and promoting the interests of consumers (its functions and intentions are covered by other objectives); increasing public understanding of the citizen's legal rights and duties (too broad and a multi-agency responsibility); and encouraging a diverse legal profession (too narrow and unnecessary if anti-discrimination laws are applied).

### ***1.2.3 Principles to underpin further reform***

Section 4: Any further reform should be driven by the need to -

- achieve the regulatory objectives
- fully separate regulatory and representative functions
- match public expectations and the scope of regulation
- generate confidence in justice and legal services
- achieve an effective regulatory framework which results in simple, appropriate, proportionate, cost-effective and responsive regulation.

### ***1.2.4 The scope and nature of future legal services regulation***

Section 5: Future foundations of legal services regulation should be based on -

- regulation only where it is in the public interest *and either* the alternatives to regulation are less effective *or* regulation provides additional protection
- a more coherent set of reserved legal activities
- addressing the current regulatory gap whereby non-reserved legal services provided by non-authorised persons cannot be subject to direct regulation.

### ***1.2.5 A new approach to legal services regulation***

Section 6: A new approach to regulation could be founded on -

- an investigation of a revised set of reserved legal activities based on the need to secure public good or consumer protection (including legal activities connected to the administration of

justice and due process, notarial activities, immigration advice and services, public law advice and services, conveyancing, intellectual property activities, will writing, probate and estate administration, insolvency practice, and claims management services)

- the regulation of all other 'legal activities', with access to the Legal Ombudsman
- the regulation of all providers of legal services, whether authorised or not
- one regulator only for each of the reserved legal activities
- a reassessment of how best to achieve consistency of policy and implementation, and improved cost-efficiency, across the regulation of legal services.

## Section 2. Concerns with the current regulatory framework

---

### 2.1 Introduction

The substance of the current regulatory framework for legal services in England and Wales derives from the Legal Services Act 2007, itself the result of a review by Sir David Clementi as recently as 2004 and still not fully implemented.

This Section addresses a number of concerns that arise about the policy, structure and implementation of this framework.

### 2.2 The centrality of reserved legal activities

Given the structure of the Legal Services Act, the nature and scope of the reserved legal activities is central to the structure and implementation of its provisions. These activities affect, for instance, the designation of approved regulators and licensing authorities, the authorisation of approved persons, the issue of licences to alternative business structures, the approval of Heads of Legal Practice, and the extent of the Legal Ombudsman's jurisdiction. Unfortunately, there appears to be no policy rationale that supports the choice of this group of legal activities, taken as a whole, for such a crucial role<sup>1</sup>.

The difficulty with the current statutory structure lies not so much with what it covers but with what it does not. There is a widespread misconception (including among some lawyers), as well as an expectation that all legal services are regulated. The current regulation of non-reserved activities is an incidental effect where those activities are provided by a person authorised to deliver one or more of the reserved activities. Such regulation is a consequence of the approved regulators' wish to regulate all of the professional activities of those who fall within their reach, but direct regulation of them is not an intention of the Act.

The 'regulatory gap' that arises when non-reserved activities are legitimately provided by those who are not – and do not need to be – authorised persons creates the largest threat to the Act's intentions. In seeking to encourage competition and innovation in the delivery of legal services, and in the expectation that this would lead to better service, better value and fewer service complaints, the Act has also created the possibility and prospect of some 80%<sup>2</sup> of legal services being provided by those who could not currently be regulated. Absent the development of voluntary jurisdiction (which, by definition, will probably exclude the providers in respect of whom there are regulatory or consumer concerns), the Legal Ombudsman's jurisdiction is similarly hampered.

---

<sup>1</sup> See Legal Services Institute (2010) *Reserved legal activities: history and rationale*: available at <http://stephenmayson.files.wordpress.com/2013/08/mayson-marley-2010-reserved-legal-activities-history-and-rationale.pdf>, and Legal Services Institute (2011) *The regulation of legal services: what is the case for reservation?*: available at <http://stephenmayson.files.wordpress.com/2013/08/mayson-marley-2011-what-is-the-case-for-reservation.pdf>.

<sup>2</sup> This percentage estimate is admittedly based on anecdotal rather than empirical evidence, but is nevertheless consistent across conversations with lawyers and law firms irrespective of nature of practice, size, and geography. Even in firms that specialise in, for example, conveyancing, wills and probate, or litigation, the nature of the reserved legal activity in each case is so narrowly drawn that the percentage of work conducted that is in fact reserved remains at about the 20% level.

The extension of reserved legal activities, as envisaged by section 24, 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 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.

### 2.3 The complexity of regulatory focus

An inevitable consequence of the centrality of the reserved legal activities described in paragraph 2.2 above is that the fundamental approach of the Legal Services Act is thus activity-based. However, some of the real force of regulation in relation to certain (non-reserved) *activities* can only be achieved through a combination of regulating authorised persons – whether *individuals* or *entities* – as well as protected *titles*<sup>3</sup>. The Act's structure does not therefore do much to address the 'regulatory maze' identified by the Clementi Review: if anything, it replaces it with a regulatory patchwork.

Such a multi-focused approach leads to varied approaches to regulation resulting from multiple approved (front-line) regulators applying different requirements for the award of professional titles or authorisation to conduct the same reserved legal activities. Arguably, the biggest drawback of the current framework is not the *oversight* role of the Legal Services Board but the *overlapping* roles of the approved regulators.

There is thus an absence of underlying coherence and consistency to the regulation of legal services<sup>4</sup> which adds complexity and potential confusion to the regulatory framework. Given the importance of law and legal services to the public interest<sup>5</sup>, this is regrettable. Although the approved regulators claim to be regulating in the public interest, I believe that it would be more accurate to observe that they are more inclined to justify their preferred approach *by reference to* the public interest rather than truly to be regulating *in* and for the public interest.

### 2.4 The 'missionary zeal' of regulators

The Legal Services Act sets out its eight regulatory objectives in section 1. I shall address the continuing nature and relative importance of these objectives in Section 3 below. These objectives were stated at the time not to be in any order of priority, or to be interpreted or applied in such a way that some would have supremacy over the others<sup>6</sup>. However, it appears that this presumed parity of objectives is not in fact being adopted in practice.

The Legal Services Board regularly (and, in my view, inappropriately) privileges one regulatory objective over the others, by suggesting that it regulates 'in the interests of consumers'. For example, on its website, and in its business plan for 2013-14, the Board states that its goal is to "reform and

<sup>3</sup> Given the Act's focus on reserved legal activities and authorised persons, it is strange that only some professional titles are protected rather than all the titles of those who are authorised to deliver reserved legal activities.

<sup>4</sup> Cf. footnote 2.

<sup>5</sup> Cf. Mayson (2013) *Legal services regulation and 'the public interest'*: available at <http://stephenmayson.files.wordpress.com/2013/08/mayson-2013-legal-services-regulation-and-the-public-interest.pdf>.

<sup>6</sup> See Hansard Official Report, HL Deb 9 January 2007 c. 129, Baroness Ashton of Upholland: "The Joint Committee recommended that the Explanatory Notes should make it explicit that the objectives were not listed in order of importance. We agreed with that, and the Explanatory Notes reflect it."

modernise the legal services marketplace in the interests of consumers”. If the notion of prioritising the regulatory objectives remains unacceptable, then the LSB should be (and should declare itself to be) regulating consistently with *all* the regulatory objectives rather than stating that its goal favours one of them.

It is possible that LSB and other regulators might wish to pray in aid paragraph 28 of the Explanatory Notes to the Legal Services Act, which states: “The Act does not rank these objectives and principles in order of importance. The Legal Services Board, the Office for Legal Complaints and the approved regulators will be best placed to consider how competing objectives are to be balanced in a particular instance.” In that case, however, I would wish to refer to the view expressed by Sir David Clementi in his final report that (2004: 28): “In a regulatory body the public interest should have primacy”. I strongly believe that the consumer interest and the public interest are by no means the same, and therefore share Sir David’s view that if any of the regulatory objectives is to be privileged over the others then it should be ‘protecting and promoting the public interest’<sup>7</sup>.

Further, as reflected in the quotation above, the LSB also pursues a goal of ‘reforming and modernising’ and, as part of that, often expresses a positive mission to increase competition in the marketplace. While I certainly wish to see (and support) reform, modernisation and competition in the legal services market, I am uncomfortable with the idea that an oversight regulator should be setting these as its goals. It seems to me that the regulatory oversight is discharged by *enabling* the changes in regulation that the Act envisages (such as the separation of regulation and representation, the creation of the Legal Ombudsman and a better approach to complaints handling, and the licensing of alternative business structures).

Of course, these statutory changes and their consequential regulatory frameworks need to be implemented, and it is the LSB’s role to oversee this implementation. In this sense, the LSB should certainly oversee the changes in regulation that *permit* and *encourage* modernisation and competition. I do not, however, see that the *Act requires* modernisation and competition<sup>8</sup> such that these things become goals of the regulator in their own right. Whether or not modernisation and competition actually follow from regulatory reforms must, to my mind, be the outcome of independent actors (whether firms and individuals) choosing to take advantage of the reforms rather than the specific mission of an oversight or front-line regulator.

## 2.5 Over-emphasis on market, competition and consumers

By the time of Sir David Clementi’s review of the regulatory framework in 2003-4, law firms were 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 marketplace was internally competitive, it was relatively closed and therefore under-developed compared to other markets for professional services.

The co-existence of regulatory and representative functions in the same professional bodies was also out-dated and indefensible. Further, in spite of internal competition, the legal professions (and solicitors in particular) tended not to deal with clients’ complaints quickly or effectively.

<sup>7</sup> See further Mayson (2013).

<sup>8</sup> Section 1(1)(e) refers to ‘promoting’ competition, not (as with access to justice in section 1(1)(c)) ‘improving’ or (as with citizens’ understanding in section 1(1)(g)) ‘increasing’: as such, the Act focuses on intent rather than achievement. I also interpret ‘promoting’ in its enabling sense rather than its proselytising or marketing sense.

The Clementi Review and the subsequent Legal Services Act were therefore right to address the perception that legal services were not operating as a proper marketplace, and that the interests of clients and consumers were being neglected. Perhaps not surprisingly, therefore, the White Paper that preceded the Legal Services Bill was entitled ‘Putting Consumers First’ and contained much of the rhetoric of consumerism, competition and markets. Indeed, a good deal of the resistance to these reforms exhibited by the legal professions took issue with this emphasis.

Having spent the majority of my professional and academic career encouraging lawyers to regard their endeavours as a business (albeit a regulated one), and to persuade them that commercial, efficient and profit-seeking activities are not inherently antithetical to professional ethics and values, I have consistently welcomed and supported the broad thrust of the Clementi reforms.

However, my concern now is that the pendulum has swung too far in favour of competition and consumerism, and to the detriment of a broader balance in the legal services market. This shift has also been detrimental to some of the fundamental objectives for the legal infrastructure of the country and the regulatory framework required to underpin it. I explore these fundamental objectives in Section 3 below.

For the time being, as examples of this point, I refer back to paragraph 2.4 above and the expressed ‘mission’ of the LSB to regulate in the interests of consumers, and to reform, modernise and increase competition; to the recent discussions about introducing price-competitive tendering into legal aid contracting; and to the Bar seeking to compete head-on with solicitors through increasing direct client access and in offering litigation as well as advocacy services.

In all of this, there is a discourse and underlying philosophy that competition and consumerism is beneficial, and that market forces will drive higher quality services and improved value for money. There is no evidence that this will always be the case – and, arguably, much evidence from the global financial crisis that even regulated markets can do significant harm to society and citizens.

Despite all this, perhaps the greatest danger to clients and consumers of legal services of this shift to markets, competition and consumerism lies far less in what regulators and the regulated communities do and substantially more in the provision of non-reserved legal services by those individuals and entities that are not – and cannot be – regulated because of the ‘regulatory gap’ referred to in paragraph 2.2 above. This can give rise to conflicting public expectations that market forces will drive competition and innovation to benefit consumers, but that in any event all legal services are regulated and subject to redress if anything goes wrong.

In conclusion, therefore, advancing competition and consumer interests might unleash market forces that achieve some ‘public interest’ benefits (such as easier and more widespread access to better, perhaps cheaper, legal services). But if those benefits are achieved at the expense of other public interest objectives (such as the democratic fabric of society where some citizens are excluded from participation, or are denied access to legal services because of greater imbalances of power and resources resulting from competition), then one should arguably conclude that those ‘public interest benefits’ are not, in fact, truly *in* ‘the public interest’.

## 2.6 Inadequately resourced regulators

Before the Legal Services Act, front-line regulators focused their attention on the training, admission, and discipline of individuals, and they therefore had little or no experience of regulating entities.

They also operated on a rules-based approach, and monitoring and enforcement focused on failure to comply with those rules.

There has now been a shift to outcomes-focused regulation, with a consequent emphasis on risk. Although the SRA, for example, claims to operate a risk-based approach to regulation generally and to ABS licensing in particular, it is questionable that it has either the numbers of staff or the expertise or experience to make meaningful risk-based assessments. The consequences are that the regulatory process is slower and less responsive than it needs to be, and that the approach is in fact risk-averse rather than risk-based and proportionate to the risk. As the largest regulator of legal services, the SRA has not so far demonstrated that scale necessarily lead to efficient or cost-effective regulation.

Further, the different histories, size and scope of the current approved regulators leads 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 client and consumers, cost-inefficiencies in the provision of regulation (with costs borne differently by the regulated community and, ultimately, the fee-paying clients). The relationships of the approved regulators among themselves, and with the Legal Services Board, is – at best – often uncomfortable.

The need for this multiplicity of front-line regulators, and for an oversight regulator, would bear revisiting given the potential inconsistencies, confusion, inefficiencies and costs involved.

## Section 3. Objectives for legal services regulation

---

### 3.1 The Legal Services Act's regulatory objectives

Based on the recommendations in Sir David Clementi's review, the Legal Services Act established eight objectives for the regulation of legal services (section 1). In principle, those objectives seem to me to remain valid, but I believe that they could benefit from some refinement.

### 3.2 Overriding objective to regulate in the public interest

In paragraph 2.4 above, I have already expressed the view that protecting and promoting the public interest should take primacy in any regulatory objectives. I have previously<sup>9</sup> articulated a meaning of 'the public interest' in the context of legal services regulation, which is:

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

On this definition, the public interest has two principal dimensions: the fabric of society itself; and the legitimate participation of citizens in society. The fabric of society is maintained by fundamental issues such as national defence and security; public order, the rule of law, and the administration of justice; protection of the natural environment; effective government; and a sound economy (including the free movement of people and capital). Participation is then secured and encouraged by personal and public health, education, and welfare (including shelter and nurturing of children and dependants); access to justice; the protection of physical safety, human rights, personal autonomy<sup>10</sup> and freedom of expression<sup>11</sup>, and equality; and reliable personal, public and commercial relationships. Just as the public interest should take account of future citizens, so participation must protect minority or weaker interests as well as promoting the activities of the majority.

The view taken by citizens of what is regarded by them as fundamental will change over time; and of course whether something is for the collective benefit or good of society (in the sense of a continuing political community) is itself a matter of judgement. Indeed, it is entirely possible that no one person or institution will be fully aware, at any given time, of all the factors that contribute to the fundamentals of society and citizens' participation in it. Nevertheless, governments, judges and regulators are, arguably, elected or appointed as the transitory arbiters of that judgement – provided that they are taking a sufficiently broad and balanced view of their remit, as elaborated here. And provided also that they are sufficiently accountable for their judgements and actions.

---

<sup>9</sup> See Mayson (2013) Legal services regulation and 'the public interest': available at <http://stephenmayson.files.wordpress.com/2013/08/mayson-2013-legal-services-regulation-and-the-public-interest.pdf>.

<sup>10</sup> Meaning that "individuals must have a sphere in which they can exercise individual choices without interference from others (including the state)": Leveson, 2012: 73.

<sup>11</sup> The Leveson report refers to freedom of expression as "an aspect of a broader public interest in the autonomy, integrity and dignity of individuals [which] is a dimension to the public interest which has a very ancient history in the UK and a special place in public imagination. It underlies the iconic status of habeus corpus as an early guarantee of personal liberty, and it underlies the special importance of freedom from interference in home life: 'an Englishman's home is his castle.'" (2012: 73).

Applying the notion of the public interest articulated above, the regulation of legal services would be protecting and promoting the public interest when it:

- (1) positively upholds those elements of legal services that protect, preserve or promote the democratic fabric of society; and
- (2) protects or enhances, or removes or reduces impediments to, the ability of citizens, on an equal basis, to exercise their claims to civil, political or social freedoms and participation.

To my mind, this would primarily involve supporting the constitutional principle of the rule of law (including the administration of justice); improving access to justice; and encouraging independent, strong and effective legal advice and representation. In my view, the administration of justice is necessary to maintaining the rule of law and securing access to justice<sup>12</sup>, and is therefore a public interest objective in its own right. These are all specifically ‘legal’ outcomes of the regulatory objectives, and are founded on a view of the law as an abstract set of rules and a system for upholding them.

However, beyond this, society also needs to encourage reliability and stability in social relationships (which are central to good social order and commerce). I would therefore go further and suggest that the public interest should also extend to promoting and protecting the UK and its justice system as a legal forum, as well as to advancing the commercial interests of ‘UK plc’.

On the basis of this analysis, I would therefore now propose for consideration that the regulatory objectives for legal services should, as an expression of policy, be divided into an overriding objective of ‘protecting and promoting the public interest’, along with other primary and subordinate objectives intended to support it.

### 3.3 Primary objectives

The rule of law is key to the security and well-being of society, and access to justice is a necessary platform to being able to assert one’s rights in accordance with the rule of law. Maintaining the rule of law also means that there should be an effective system of administration of justice, and that strong and independent legal advice and representation should exist to hold an over-bearing State, or other powerful agents, accountable within the law. Each of these elements is necessary in the public interest of maintaining the fabric of society and enabling the legitimate participation of citizens in it.

I would therefore suggest that the following could be considered to be primary objectives.

#### 3.3.1 *Supporting the constitutional principle of the rule of law*

As Sir David Clementi wrote in his final report (2004: 15):

The rule of law embodies the basic principles of equal treatment of all people before the law, fairness, and a guarantee of basic human rights. A predictable and proportionate legal system with fair, transparent, and effective judicial institutions is essential to the protection of both citizens and

<sup>12</sup> The Leveson report also helpfully refers in this context to “the proper independence and accountability of law enforcement agencies” (2012: 70).

commerce against any arbitrary use of state authority and unlawful acts of both organisations and individuals.

The democratic fabric of society cannot be protected, preserved or promoted without the rule of law; nor can the legitimate participation of citizens in that society be secured without it.

### ***3.3.2 Protecting and supporting the proper and effective administration of justice***

Although not explicitly stated as a regulatory objective in the Legal Services Act, I believe that it is implicit in any notion of the public interest, and in supporting the rule of law and access to justice, that the effective administration of justice should also be protected and supported. Although achieving the proper and effective administration of justice is a multi-agency task and responsibility, those responsible for legal services regulation should explicitly be required to consider the effects of regulation on this vital aspect of the public interest – and, indeed, to be vocal when other agencies’ policies or actions might tend to undermine the administration of justice.

Rather than leaving this objective as implicit in the regulation of legal services, I believe that it would be preferable for this important manifestation of the public interest to be made explicit as a primary objective.

### ***3.3.3 Protecting and supporting access to justice***

The correct role of regulatory influence on access to justice often polarises around the issue of whether regulation promotes or restricts access. It is perhaps difficult to find any evidence base to suggest a conclusion one way or the other: nevertheless, the Parliamentary intention at the time the Legal Services Bill made its passage was clearly to encourage improved access to justice by liberating the legal services market from some perceived restrictive practices and structures.

The challenge is that the concept of ‘access to justice’ is open to multiple (and possibly contradictory) interpretations. In the context of the current statutory obligation to improve it, the regulatory objective potentially places an impossible burden on regulators unless it is interpreted in a narrow way (to mean, in effect, judicial determination of disputes)<sup>13</sup>.

As with the effective administration of justice, those responsible for legal services regulation should explicitly be required to consider the effects of regulation on access to justice as a vital aspect of the public interest – and, in the same way, to be vocal when other agencies’ policies or actions might tend to undermine or reduce access.

Once regulatory restrictions are *removed*, arguably regulation should then be neutral on whether those who provide legal services will actually innovate delivery and so improve access to justice: the structures and methods through which legal activities are provided should not, in principle, vary with regulation of these activities but rather attach to the entrepreneurial and professional awareness of the providers. This does not imply, of course, that the *effects* will be neutral or evenly distributed: a review of developments in the market for the services and products of optometrists,

---

<sup>13</sup> See Legal Services Institute (2012) *Improving access to justice: scope of the regulatory objective*, particularly at paras 4.3.2 and 4.4: available at <http://stephenmayson.files.wordpress.com/2013/08/mayson-marley-dunn-2012-access-to-justice.pdf>.

for example, demonstrates how uneven the effects might be. Nevertheless, the opportunities were equally available albeit differently taken.

Rather than imposing an objective of improvement, perhaps a more suitable and realistic obligation in shaping and implementing legal services regulation (as with some of the other objectives) would be to express this primary objective as ‘promoting and protecting’, ‘protecting and supporting’ or, at the very least, ‘having regard to’.

### 3.3.4 *Encouraging independent, strong and effective legal advice and representation*

The current equivalent regulatory objective in section 1(1)(f) is both more broad (it includes diversity) and narrow (it refers only to the legal profession) than might be desirable<sup>14</sup>. I shall return to diversity (see paragraph 3.6.3 below). In the post-LSA world of legal services, it would seem odd to confine the public interest in this objective to the legal profession rather than to the broader provision of legal services by those appropriately qualified or licensed, whether members of the legal professions or not. Sir David Clementi also thought that “a strong and effective legal profession ... would help to ensure access to justice, the maintenance of a healthy supplier base for publicly funded work and continued support for pro bono initiatives, *thereby serving the public interest*” (2004: 17, emphasis supplied).

This regulatory objective is expressed as a compound idea, but the different elements within it could be affected in varying ways by regulation. In relation to ***independence***, the LSB says (2010: 11):

Independent primarily means independent from government and other unwarranted influence. An independent profession serves to promote the principle that legal service providers should be free from inappropriate influence (financial or institutional) to act as an agent of the client, in their best interests.

Ensuring the independence of the legal professions has been a frequently cited reason for providing regulatory protection. For example, if rights of audience were not reserved to authorised persons who are appropriately qualified, they would face competition from providers who might not adhere to similar standards of independence and competence. Thus, regulation potentially has a role to play in preserving the independence of legal services providers, as competition alone would be less likely to do so.

The LSB considers a ***strong*** legal profession to be (2010: 12) “able to speak authoritatively on matters of relevance and is fully informed of consumer need and how to meet it. Its voice on law reform and the wider justice system should not be weakened through regulation”. Strength is therefore tied in with independence – and both are underpinned by professional ethics and standards – because legal practitioners should be able to speak out without hindrance on issues they feel are important. Regulation might then play a key role in maintaining this strength in those who provide legal advice and assistance.

Finally, the LSB suggests that an ***effective*** legal profession will be (2010: 12):

able to meet the changing needs of consumers and contribute to the meeting of the regulatory objectives. The profession’s effectiveness is as much defined by consumers’ expectations in it as it is by the professions and covers quality, access and value.

<sup>14</sup> Interestingly, Sir David Clementi recommended “a confident, strong and effective legal profession” (2004: 17).

Effectiveness is an outcome that results from many different factors. These include: education and training; quality and utility of advice and service; cost-effectiveness and value for money; ability to relate to and communicate with clients, so that they are able to understand and act on any advice given (and where diversity among individuals and entities could be a major factor)<sup>15</sup>; and efficiency and innovation (which can be stimulated by fair competition). Many of the regulatory objectives that are presently within section 1(1) of the Legal Services Act could therefore be seen to support and enhance a primary objective of encouraging independent, strong and effective legal advice and representation and, for this reason, could be regarded as subordinate objectives.

### 3.4 Subordinate objectives

Adopting a hierarchy of regulatory objectives, with an overriding regulatory objective (protecting and promoting the public interest) which is directly supported by primary objectives, would allow for those objectives being further supported by subordinate objectives. Taking the current regulatory objectives in the Legal Services Act, there are some objectives which are still unquestionably important, even if they were not categorised as primary objectives: they contribute to the effectiveness of the primary objectives. In this sense, we might say that it is *in* the public interest that they are promoted but that they are not, in themselves, manifestations *of* the public interest in the way that the primary objectives are.

I would therefore suggest the following could be considered to be subordinate objectives.

#### 3.4.1 Promoting and maintaining adherence to the professional principles

The professional principles are defined in section 1(3) of the Legal Services Act 2007 as applying to authorised persons, who should: act with independence and integrity; maintain proper standards of work; act in the best interests of their clients; maintain client confidentiality; and, when exercising a right of audience or conducting litigation, comply with their duty to the court to act in the interest of justice. These are the bedrock of what all professionals would regard as their proper ethical framework and are, in this sense, uncontentious. It is right that these principles should be required of all those individuals and entities authorised to carry our regulated legal services activities.

It is interesting, though, that there is no explicit professional principle requiring authorised persons to act in the public interest, either in the Act or in the approved regulators' codes of conduct. This is in contrast to the Code of Ethics issued by the International Federation of Accountants which states that<sup>16</sup> "A distinguishing mark of the accountancy profession is its acceptance of the responsibility to act in the public interest".

Acting in the best interests of clients is too often, to my mind, used by lawyers as a justification for their actions when those actions in fact compromise independence, undermine the pursuit of justice, or run counter to the public interest. It is not necessarily in the clients' best interests for their advisers simply to do their bidding; their 'enlightened' best interests might suggest that their advisers should act or advise differently. Perhaps outcomes focussed regulation will encourage more enlightened action. However, if protecting and promoting the public interest were to become an

<sup>15</sup> Placing a primary emphasis on (a broad notion of) the effectiveness of legal advice and representation would lead to further questions about whether separate objectives relating to diversity and citizens' *general* understanding of their legal rights and duties remain necessary: see further, para 3.6.3 below.

<sup>16</sup> See <http://www.ifac.org/sites/default/files/publications/files/2013-IESBA-Handbook.pdf> at Section 100.1.

overriding regulatory objective in the future, it would be no bad thing to confirm as a professional principle the need for regulated practitioners to act in the public interest.

Authorised persons currently have a dual obligation: a legal requirement to comply with the Act's professional principles, and a duty (in section 176 of the Legal Services Act) to comply with the codes of professional conduct set by their approved regulator. The Legal Services Act also rightly prohibits (by section 90) any non-authorised persons connected to a licensed body (that is, an ABS licensed to deliver one or more of the reserved activities) from interfering with such compliance by either that licensed body or an authorised person.

The inclusion of professional principles and adherence to them within the statutory framework for the regulation of legal services is therefore to be welcomed and should be maintained. They are part of the assurance to the public, to the courts, to clients, and to consumers and markets at large that all providers of regulated legal services must abide by certain standards of ethical practice that subordinate the providers' personal and economic interests to those of others.

### **3.4.2 Enabling competition in the provision of legal services**

Economic theory would suggest that perfectly competitive markets act as the underlying regulator in securing the correct outcomes in economic exchanges. However, the notion of perfect markets is a theoretical construct and they will not be found in the real world. Consequently, 'market failures' of various kinds will inevitably arise and regulation will be needed to address them in order to restore a degree of fairness.

This is not an either-or situation (that either regulation or competition is suitable for a given market); that would be an unduly simplistic view to take. Competition can successfully co-exist with regulation, and the latter may be seen as a way of creating and sustaining consumer confidence within a market. Any loss of confidence could result in consumers either not buying at all, or only buying from a limited number of suppliers with whom they are already familiar; neither would provide scope for encouraging competition.

The LSB has declared itself in favour of competition in the legal services market, having stated that (2010: 9): "Individual providers of legal services should compete for capital and consumers, so as to drive better performance for both sides". In the context of legal services, the very creation of regulations leads to some barriers to entry (usually the need for appropriate qualification or licensing) and therefore in some way inhibits competition.

However, assuming that regulation is justified in the public interest, once the threshold level for market entry has been achieved, there is no necessary incompatibility in then allowing competition among those who have been permitted to enter the market. Arguably, this is one of the principal objectives of alternative business structures and the ABS licensing framework. In his final report, Sir David Clementi accepted that competition cannot be allowed to override other relevant factors when he wrote that the regulator should "encourage competition in the provision of legal services and the promotion of choice in both the number and type of providers, *subject to the proper safeguard of consumers' interests*" (2004: 17, emphasis supplied).

Perhaps the best way of assessing this regulatory objective is to consider balancing two public interest goals (regulation and competition) through the lens of competition law. Regulation would therefore be justified to protect consumers from unavoidable but sub-optimal market features (say, information asymmetry between provider and client). But where regulation is justified, it should be

applied in the proportional manner advocated by the European Court of Justice<sup>17</sup>. Using this approach, a regulatory tool must achieve its stated aims in the manner least restrictive of competition. Creating a threshold level for market entry through regulation could be argued to meet this test if, once beyond the threshold, providers face the normal forces of competition (subject, of course, to the other requirements of competition law that apply to the behaviour of market incumbents, such as reviews of monopolies, cartels and other anti-competitive practices).

It seems to me that the best way to consider competition in legal services is to recognise that the public interest in legal services could never allow full market and competitive forces, subject only to the normal laws relating to competition. It should therefore be the role of legal services regulation to be minimally invasive to protect the public interest but that otherwise competition should be allowed. The regulation of legal services should not therefore be designed or intended to prevent or restrict competition (unless in particular instances that is shown to be in the public interest). In this sense, the role of regulation or regulators is to operate so as not to prevent or restrict competition – in other words, it or they should enable competition rather than promote it. Even where enabled, however, competition must always remain subordinate to the wider, primary, public interest objectives.

### 3.5 The relationship between overriding, primary and subordinate objectives

An approach to a hierarchy of regulatory objectives for legal services as outlined above envisages an overriding regulatory objective (protecting and promoting the public interest), supported by primary objectives (such as maintaining the constitutional principle of the rule of law, protecting and supporting the proper and effective administration of justice, protecting and supporting access to justice, and encouraging independent, strong and effective legal advice and representation). In turn, the overriding and primary objectives would be supported by subordinate objectives (such as promoting and maintaining adherence to the professional principles, and enabling competition in the provision of legal services).

This would explicitly advocate a hierarchy of objectives in a way that the Legal Services Act does not. The primary objectives would be applied and interpreted in the context of the broader overriding objective to protect and promote the public interest. Those primary objectives would take precedence over subordinate objectives, which would have to be given effect to support the overriding and primary objectives rather than being objectives in isolation.

In this way, some apparent conflicts between current regulatory objectives could be resolved by principle. For instance, where there is a conflict between promoting the public interest and acting in the best interests of clients, the former as the overriding objective would take precedence over the latter as a subordinate objective. Similarly, enabling competition in the provision of legal services (as a subordinate objective) should not be allowed to compromise the primary public interest objectives.

Such an approach would allow the balancing act referred to in the Explanatory Notes (cf. footnote 6) to be carried out on a principled basis. It is an approach that would support the idea that where regulation is justified to achieve the primary regulatory objectives, this outweighs arguments in favour, say, of an absence of regulation intended to achieve a subordinate objective of competition.

<sup>17</sup> Case C-309/99 *Wouters et al v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1577.

## 3.6 Some original regulatory objectives no longer required?

The approach to overriding, primary and subordinate objectives also leads to a question of whether there might then be certain regulatory objectives contained in section 1(1) of the Legal Services Act 2007 that would no longer be required.

### 3.6.1 *Protecting and promoting the interests of consumers*

The definition of ‘consumer’ in section 207(1) of the Legal Services Act 2007 is drawn widely, and will include both commercial and non-commercial users of legal services. The LSB has interpreted this as meaning “anyone who might have recourse to legal services because of a legal issue” (Legal Services Board 2010: 8), lending a very wide scope to this regulatory objective.

The Clementi Review described consumer interests as follows (2004: 16):

The consumer’s principal interests include higher quality and lower prices. In part this includes the giving of choice to an informed consumer. In this way the ultimate choice of whether to accept a risk is made by the consumer.

The line between quality and price is one that the LSB is currently required to walk. One of the main arguments used to justify the reservation of certain legal activities is that it ensures the quality of service provided to consumers; on the other hand, the anti-competitive effects of such monopolies are likely to drive up prices.

From the point of view expressed in the above quotation from the Clementi Review, one of the most effective ways to further the consumer interest is to secure better information for consumers about the choices open to them: indeed, Sir David Clementi referred to the asymmetry of information between provider and consumer, and said that because of this the regulator “has a duty both to protect and further the interests of the consumer” (2004: 16). This also raises issues of where that burden should fall – not only in relation to enlightening a particular enquirer or client but also into the much broader arena of public legal education (discussed in more detail in paragraph 3.6.2 below). Indeed, given that the current regulatory powers only bite on authorised persons, any regulatory compulsion to improve consumer understanding will have to be driven from among the regulated community (either by reserved activity or regulated person).

In addition to better information for consumers, therefore, the Clementi Review ascribed a second duty to the legal services regulator: that when consumers are not sufficiently informed, a regulator should (2004: 16) “have powers to act in the market, for example, to prohibit oppressive marketing practices, raise or set standards, develop information/awareness programmes, resolve disputes and protect vulnerable groups”.

Given that the most potent regulatory powers and consumer benefits are achieved through or as a consequence of reserved legal activities, there is an argument that reservation would play a significant part in protecting and promoting the consumer interest. However, reservation is not a guarantee of quality (the complaints profile of the regulated community will attest to this), and will come at some additional cost. Historically (as Sir David Clementi’s review showed), it has also led to structures and cultures that have inhibited or discouraged innovation and the competitive quest for greater value for money for clients. Reservation and its effect on the consumer interest is therefore a balancing act: is greater assurance of quality worth the extra costs? To the extent that reservation and the associated costs will bring additional protections, there is not a simple trade-off between quality and cost. Further, where reservation is justified, it does not follow that only lawyers (even

without the historically restrictive professional rules and attitudes) should be the only ones authorised to offer the reserved activity.

I therefore wonder if the regulatory objective to protect and promote the interests of consumers is an unnecessary confusion. It is closely related to the challenging ‘public legal education’ objective considered in the following paragraph. The definition of ‘consumers’ within the current Act is in fact much closer to the narrower idea of a ‘client’ or ‘customer’ than to the broader interests of all potential users of legal services characterising a ‘market’. To the extent that there are objectives to encourage independent, strong and effective legal advice and representation (cf. paragraph 3.3.4 above) offered by providers who are bound by a professional principle to act in the client’s (enlightened) best interests (cf. paragraph 3.4.1), it seems to me that the narrow consumer interest is already protected and promoted. In addition, effective advice and representation should also encompass being able to relate to and communicate with actual or potential clients, so that they are able to understand and act on their needs for advice and representation and on any advice given: in this way, the consumer’s specific and immediate need for information, and ability to make an informed choice or decision will be satisfied.

The broader consumer interest in higher quality and lower prices is achieved through a combination of effective legal advice and representation (cf. paragraph 3.3.4) and competition (cf. paragraph 3.4.2) – where, on my argument, the latter is subordinate to the former. As for Sir David Clementi’s suggestion that regulators need “powers to act in the market, for example, to prohibit oppressive marketing practices, raise or set standards, develop information/awareness programmes, resolve disputes and protect vulnerable groups”, it seems to me that this is definitely a public interest requirement already expressed in the need for independent, strong and effective legal advice and representation – and from the need for public confidence in our legal system (see further paragraph 4.3.4 below).

It therefore seems to me that the need for a separate regulatory objective of protecting and promoting the interests of consumers is questionable, on the basis that its functions are already covered by other objectives. However, if such a conclusion were not acceptable, I would maintain that any ‘consumer interest’ objective should be phrased as a subordinate objective so that it is unarguable that the public interest always takes precedence over consumer interests.

### ***3.6.2 Increasing public understanding of the citizen’s legal rights and duties***

Lack of information for consumers, and uneven distribution of information (or asymmetry) for consumers or, more particularly, as between provider and client<sup>18</sup>, offer particular challenges to the legal services market and approaches to regulation. If citizens are aware of their legal rights and duties, and of how to find, instruct and use providers of legal advice and services, there is likely to be greater consumer confidence in accessing legal services, and fewer conflicts and complaints arising between clients and providers; this should also encourage suppliers to provide higher quality, and improved access and value.

However, there is a mountain to climb. Research has shown that one-third of the British population has experienced a civil justice problem, but many of those people take no action towards a resolution. It has also been estimated that approximately one million such issues go unresolved each

<sup>18</sup> As suggested in paragraph 3.6.1 above, this specific and immediate need for increased client understanding of legal rights and duties is perhaps better addressed as part of the objective for effective legal advice and representation (cf. para 3.3.4 above), and does not fall within the more generic public need for understanding addressed in this paragraph.

year, resulting in widespread legal exclusion amongst those affected. Such exclusion results from uninformed members of the public not knowing where to turn for help, or thinking that nothing can be done about their situation (PLEAS 2007: 7).

The wish to enshrine increased understanding as an objective is therefore laudable and reasonable. The more important issue, though, is whether it is achievable. The fulfilment of such a regulatory objective largely hangs on effective public legal education (PLE), which has been defined as follows (PLEAS 2007: 9):

PLE provides people with awareness, knowledge and understanding of rights and legal issues, together with the confidence and skills they need to deal with disputes and gain access to justice. Equally important, it helps people recognise when they may need support, what sort of advice is available, and how to go about getting it. PLE has a further key role in helping citizens to better understand everyday life issues, making better decisions and anticipating and avoiding problems.

PLE focuses on the early stages of a legal issue. Ideally, the public will be helped to avoid legal problems, but if issues do arise PLE will also aid more timely and effective responses<sup>19</sup>. It is important to note that PLE does not aim to teach people everything they might ever need to know regarding the law. The Public Legal Education Network explains that in addition to a basic knowledge about rights and responsibilities in everyday situations, a vital part of PLE is informing people about where to go to find more information and to seek further help (PLENet 2009: 4).

It seems to me that tackling the regulatory objective in its current form has to be a multi-faceted and multi-agency approach, which could start in secondary education, and extend to public campaigns mounted and funded by representative bodies and consumer organisations, as well as to local and personal ‘education’ carried out by providers in their everyday interactions with actual and potential clients. Much of this lies outside the immediate scope and control of legal services regulation. It is true that the LSB, through its oversight role and dealings with approved regulators and licensing authorities, could encourage or impose requirements to carry out activities which contribute to greater public understanding. However, it is debateable whether such a broad educative function is a truly legitimate role for a regulator.

In any event, it is worth observing (and accepting) that the vast majority of consumers will never be fully informed about the legal services market. Information asymmetries between consumers and suppliers are and will remain characteristic of legal services: to inform consumers fully would be so costly as to be impractical. Further, providing more and better information will add to the ‘search costs’ of consumers who will often be time-poor, irregular and inexperienced buyers of legal services who could be overwhelmed by the volume of information available to them: such high search costs could paradoxically become a barrier to reducing the information asymmetry between supplier and consumer.

In the context of this review of regulation, the question is whether, as part of the regulation of legal services, there should be any mandatory requirement on approved regulators or authorised persons to undertake any activities which fulfil the objective. I believe that this needs further consideration. The general professional principle to act in the client’s best interests (cf. paragraph 3.4.1 above) could be extended to include a general obligation on providers to enlighten each client about broader legal rights and duties beyond those relevant to the current matter on which they are instructed or to educate the general consumer market or population at large. This would be a significant additional burden on practitioners. Further, although there might be some competitive advantage to be derived

<sup>19</sup> See <http://www.lawforlife.org.uk/public-legal-education/pleas-task-force/>.

by providers who undertake a broader ‘educational’ role in the pursuit of new business or as part of their contribution to the local community, to require providers to do so would be to add costs to the supply of legal advice and representation that could create new (and possibly unjustifiable) barriers to entry. Perhaps providers should be allowed to make this judgement for themselves in the context of their own marketplace and of their own business and competitive interests.

I therefore conclude that the current obligation in section 1(1)(g) to increase public understanding of the citizen’s rights and duties should be reviewed as unduly broad and onerous. It is at heart an educative objective requiring the contribution and support of a number of stakeholders not all of whom are, or are accountable to, the regulators. Alternatively, the regulators’ obligation to act ‘so far as is reasonably practicable’ in relation to this (sections 3(2), 28(2), 82(1) and 116(2)) could lead to the view that so little is in fact reasonably practicable that the achievement of the regulatory objective in practice becomes far more limited in its scope and realisation than the expression of intention within it.

### ***3.6.3 Encouraging a diverse legal profession***

I have already suggested in paragraph 3.3.4 above that the restriction in the current regulatory objective in section 1(1)(f) to the ‘legal profession’ is unnecessarily limited in the context of legislation intended to open up the legal services marketplace to a wider range of providers not all of whom would be considered to be members of the legal profession. It would be unfortunate – to put it mildly – if the inference to be drawn from the drafting of section 1(1)(f) were to be that these new entrants were not expected to be independent, strong, diverse and effective.

According to the LSB, a diverse legal profession is “one that reflects and is representative of the full spectrum of the population it serves so as to harness the broadest possible range of talent in the meeting of the regulatory objectives” (Legal Services Board 2010: 12). To this, we might add that independent, strong and effective legal advice and representation also requires diversity in the structures and business models of providers (enabled by ABS, ‘non-lawyer’ ownership and new opportunities to access capital).

Social diversity (in its broadest sense of gender, background, education, religion, disability, age and sexuality) remains a pertinent issue even four years after the Milburn report on fair access to the professions which concluded that (2009: 24) “law remains one of the most socially exclusive professions”. Qualitative entry restrictions in the form of minimum educational requirements could exclude market entrants from less privileged backgrounds (Panel on Fair Access to the Professions 2009: 22). There is no doubt that regulation can affect the extent of diversity within the legal services market.

Where regulation is intended to achieve public interest objectives (say, supporting the rule of law, and the independence and strength of the legal profession), but contributes to a less-than-optimal outcome in another (diversity), there is also no doubt that there is a tension. However, to encourage (or, as seems to happen with the LSB and some other approved regulators, promote) diversity equally with (or in preference to) other regulatory objectives to my mind is to engage in positive discrimination. By its very nature, this is still discrimination and runs the risk of excluding other, equally worthy, entrants.

This country has extensive and effective laws against all forms of discrimination. Those laws apply with equal intent and force to those who operate within legal services. Diversity results from a lack of discrimination. I believe further thought should be given, therefore, to whether improved

diversity within the legal services market is best achieved by positive discrimination to improve it or the *absence* of discrimination through the effective enforcement of anti-discrimination laws. Accordingly, I raise the question whether there needs to be a specific objective in legal services regulation to encourage diversity when laws already exist to address discrimination (leading potentially to a duplication of regulatory intervention) – especially if doing so in reality means discriminating against others who might be equally well positioned but lack some aspect of a ‘minority’ characteristic.

If removing diversity as a regulatory objective is considered a step too far, then it could still be retained as a subordinate objective<sup>20</sup> not to be pursued at the expense of independent, strong and effective (non-discriminatory) provision of legal services as a primary objective.

### 3.7 A new statement of regulatory objectives

In conclusion, a restatement of the regulatory objectives for legal services might be developed along the following lines:

- (1) In this Act a reference to “the regulatory objectives” is a reference to the objectives within subsections (2), (3) and (4).
- (2) The overriding regulatory objective is to protect and promote the public interest.
- (3) In achieving the overriding regulatory objective in subsection (2), the following regulatory objectives must be taken into account:
  - (a) supporting the constitutional principle of the rule of law;
  - (b) protecting and supporting the proper and effective administration of justice;
  - (c) protecting and supporting access to justice; and
  - (d) encouraging independent, strong and effective legal advice and representation.
- (4) In achieving the regulatory objectives in subsection (3), and subject to the overriding regulatory objective in subsection (2), the following further regulatory objectives must be taken into account:
  - (a) promoting and maintaining adherence to the professional principles; and
  - (b) enabling competition in the provision of legal services.
- (5) The “professional principles” are:
  - (a) that authorised persons should act in the public interest,
  - (b) that persons who exercise before any court a right of audience, or conduct litigation in relation to proceedings in any court, by virtue of being authorised persons should comply with their duty to the court to act with independence in the interests of justice,
  - (c) that authorised persons should act with independence and integrity,

<sup>20</sup> Without wishing to read too much into the point, I would also note that diversity was not part of Sir David Clementi’s original conception of the regulatory objective: cf. footnote 14 above.

- (d) that authorised persons should, after taking into account paragraphs (a), (b) and (c), act in the best interests of their clients,
- (e) that the affairs of clients should be kept confidential, and
- (f) that authorised persons should maintain proper standards of work.

## Section 4. Principles underpinning further reform

---

### 4.1 Timing and extent of further reform

Given that it is less than ten years since Sir David Clementi's review of the regulatory framework for legal services, and that the Legal Services Act is still not fully implemented, it seems to me that the intention and principles that drive any further reform should be clearly stated and understood. Although the current, partially reformed, framework is not without its flaws and challenges (see Section 2 above), 'tinkering' with it at this stage would not be desirable.

### 4.2 Regulatory objectives and principles for reform

The difference between regulatory objectives and underpinning principles for regulatory reform might sometimes be difficult to distinguish. For me, the regulatory objectives determine *what* the regulatory framework and those responsible for its implementation must achieve; the underpinning principles would describe *why* the reform is being undertaken and therefore what will determine whether or not it has been successful.

On this basis, I would suggest that five principles should underpin the current consideration of whether the regulatory framework for legal services needs further reform.

### 4.3 Principles for further reform

It is not necessarily the case that the intentions behind the Legal Services Act 2007 have not been achieved or were misguided. The following principles therefore build on and develop those intentions.

#### 4.3.1 Achieving the regulatory objectives

The foremost duty and indicator of success must be that the regulatory objectives of any framework for regulation (cf. Section 3 above, and particularly paragraph 3.7) are achieved. I have suggested in Section 3 above that a hierarchy of regulatory objectives would help in this, by giving primacy to protecting and promoting the public interest, and in helping to resolve conflicts between objectives otherwise claiming equal weight.

The context in which the objectives are achieved remains important. From a regulatory point of view, regulation should comply with the requirements of the Legislative and Regulatory Reform Act 2006 that it should be transparent, accountable, proportionate, consistent and targeted. It is also important that regulation should not impede economic growth. There is, however, something of a tension on this.

I have always believed that it is right for law firms to be more business-like and to adopt the structures, processes and financing found in other business activities. I cannot, therefore, support any blind resistance to the adoption of modern business practices often expressed by lawyers on the basis of an argument that only lawyers can be trusted to deliver high-quality and ethical advice and

services and that, to do so, they must not be forced to change<sup>21</sup>. That said, I also believe that law and the provision of legal advice and representation are not *just another* set of business services.

As I have tried to elaborate in Section 2 above, law, justice, and legal services are an integral part of the fabric of a democratic society (as well as of its preservation and economic success) and that, accordingly, the public interest requires that we accord the rule of law and the administration of justice, supported by independent and effective legal advice and representation, a special status. The tension lies in finding and maintaining the appropriate balance between being special and being appropriately commercial and business-like.

It is therefore likely that in achieving regulatory objectives in legal services (given the public interest dimensions and the need to balance this interest against ‘normal’ business freedoms to drive entrepreneurial, innovative growth), legal services will attract a higher-than-normal regulatory burden. However, consistent with Government policy of reducing regulatory burdens<sup>22</sup>, where regulatory intervention is justified, I see no reason in principle why it should not be at the minimum level required to be effective in meeting its objectives. If, in the pursuit of a perceived or real benefit, a firm or representative body then wishes to set the threshold for practice at a higher level, that could be left as a commercial or professional matter for that firm or body, to be achieved through self-regulation or voluntary codes rather than for regulators.

#### **4.3.2 Separating regulatory and representative functions**

Where the public interest – and a corresponding regulatory objective – requires an independent legal profession (or, as I would prefer, independent legal advice and representation)<sup>23</sup>, independence from government and other representative interests is essential if public confidence in the administration of justice and in legal services is to be achieved. It seems to me that this can be done if regulators are free from political influence, and from the influence of lawyers, legal services providers and consumers (and of those who represent those interests), and they do not ‘self regulate’ in the sense that all of those who serve on the regulatory bodies are members of the regulated community.

Under the current regulatory framework of the Legal Services Act, much headway has been made in establishing the Legal Services Board as independent from government, in introducing lay membership of the approved regulators, and in separating the representative and regulatory functions of the approved regulators. However, there is one sense in which this progress has perhaps been too great and one in which it has not been profound enough.

The introduction of lay membership in the exercise of regulatory functions is to be welcomed. However, it could be argued that it is an unnecessary restriction that the chair of a regulatory body should be a layperson, and that a majority of members should be laypersons. Although there is an important dimension of the perception of independence, those perceptions are arguably driven more by the behaviour and decisions of the regulators than by the mere fact of their composition. Such decisions should also be informed and understand the regulatory context.

It is possible to avoid regulatory capture and the appearance of self-interest without potentially compromising the quality of regulatory decisions. Indeed, by having too many members of the

<sup>21</sup> See, for example, Mayson (2012) ‘External ownership and the forked tongue of ethics’ at <http://stephenmayson.com/2012/04/13/external-ownership-and-the-forked-tongue-of-ethics/>.

<sup>22</sup> See further [www.gov.uk/government/policies/reducing-the-impact-of-regulation-on-business](http://www.gov.uk/government/policies/reducing-the-impact-of-regulation-on-business).

<sup>23</sup> See para 3.3.4 above.

regulatory body who do not understand deeply enough either or both of the circumstances or the likely behaviour of the community they are responsible for regulating, there might be greater risks of inappropriate regulation or inadequate regulatory supervision. The current review might therefore usefully revisit the issue of lay chair and lay majorities, and consider whether, say, a 51-75% majority of members should be appropriately qualified, and that the chair should not necessarily be a layperson.

On the other hand, the current separation between the representative and regulatory functions of some of the approved regulators (particularly the Law Society/Solicitors Regulation Authority<sup>24</sup> and the Bar Council/Bar Standards Board<sup>25</sup>) has in the eyes of some taken far too long and has not gone far enough. This has manifested itself in public pronouncements in which the representative body has overtly sought to influence the regulator<sup>26</sup>, and in the funding and resourcing arrangements<sup>27</sup> of the regulatory function (which results in certain facilities being shared – and therefore subject to negotiation<sup>28</sup>, change and the possibility of obsolescence and contestable access).

In part, the ability to separate will be driven by more pragmatic considerations of the cost of independence. If a smaller approved regulator must pay for its own premises and supporting resources (without the benefit of some of the economies of scale or of sharing that arise under current arrangements), then the cost of regulation is likely to be higher for the regulated community. This balancing of independence and cost-efficiency is potentially going to drive towards economy in preference to full independence, and must be watched.

#### **4.3.3 Matching public expectation and the scope of regulation**

This is one of the most problematic issues arising from the current structure of a mix of regulated activities, regulated individuals and entities, and regulated titles. The notion of the ‘regulatory gap’ that the current structure creates (cf. paragraph 2.2 above) leads to the strong likelihood of a mismatch in public expectation.

If the public view is that all legal services (and the providers of them) 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)<sup>29</sup>, then the current regulatory gap leads to a situation where that view is not correct. This leads to two important consequences.

First, public and consumer confidence (see further, paragraph 4.3.4 below) in legal services could be undermined by any lack of quality or service in, and the absence of any protection in respect of,

<sup>24</sup> The Legal Services Board has expressed formal concerns about this: see <http://www.legalfutures.co.uk/latest-news/sra-independence-still-concern-lsb-keeps-law-society-report-eases-demands>.

<sup>25</sup> See, for example, <http://www.legalfutures.co.uk/regulation/solicitors/bar-council-fails-governance-test-again-while-law-society-goes-to-the-wire>.

<sup>26</sup> Cf. <http://www.legalfutures.co.uk/regulation/solicitors/plant-lays-bare-sralaw-society-tensions-caused-by-defective-legal-services-act> and <http://www.legalfutures.co.uk/latest-news/bar-council-faces-probe-undermining-independent-regulation-barristers>.

<sup>27</sup> See, for example, <http://www.legalfutures.co.uk/regulation/solicitors/law-society-and-sra-unveil-deal-to-resolve-longstanding-governance-problems> and <http://www.legalfutures.co.uk/latest-news/revealed-law-society-sra-odds-regulators-budget>.

<sup>28</sup> Cf. <http://www.legalfutures.co.uk/latest-news/exclusive-sra-seeks-law-society-approval-for-22m-investment-in-new-it-system>.

<sup>29</sup> Cf. <http://www.legalfutures.co.uk/latest-news/bringing-legal-advice-regulatory-net-may-resolve-consumer-confusion-says-lsb-chief> and <http://www.legalfutures.co.uk/latest-news/government-under-fire-will-writing-decision-few-express-faith-voluntary-regulation>.

unregulated legal services. Second, consumers of legal services might be less inclined to make proper enquiry of the expertise and experience of providers before instructing them. Indeed, recent research from the Legal Services Consumer Panel suggests that, while consumers do benefit from ‘shopping around’, barely a fifth actually do so<sup>30</sup>.

The current evidence suggests that the current regulatory framework does not adequately match expectations and the scope of regulation, and more needs to be done to fulfil this principle for reform.

#### ***4.3.4 Generating confidence in justice and legal services***

The public interest in an effective justice system and meaningful access to justice requires that people must have confidence not only in the administration of justice, and in courts and judges, but also in their ability to access effective legal advice and representation at the appropriate time and cost. Unfortunately, it appears – according to research from the Legal Services Consumer Panel – that consumer confidence has been falling<sup>31</sup>.

In addition, it would also seem that there is a similar picture for small and medium-sized businesses (SMEs). In a survey for the Legal Services Board of almost 10,000 SMEs<sup>32</sup>, more than half of them (52%) chose to deal with legal issues on their own without seeking advice, even though a slightly higher number (54%) agreed that legal processes are essential for businesses in enforcing their rights. This might be because only 13% agreed that lawyers provide a cost-effective way of resolving legal issues.

This broad lack of belief runs risks of reduced confidence of the public, consumers and clients in the legal system and those who support it. It also appears to lead to the ‘elective exclusion’ of many citizens and businesses from legal advice and processes, to the detriment of them protecting their interests or pursuing just claims: this also undermines the public interest in the legitimate participation of citizens in society and in UK plc’s economic success and growth (cf. paragraph 3.2). It is only in this way that the apparently persistent unmet need or latent demand for legal services can be met, unresolved disputes addressed, and full value to both the legal economy (and then to the economy at large) be realised.

If the cost (or at least cost-effectiveness) of legal services is not considered by clients and would-be clients to warrant seeking legal advice and representation, then the cost structure of the market needs to be addressed. This is a larger issue than can be explored fully here, but the critical issue in the context of this call for evidence would seem to be the role that the extent, nature and cost of regulation plays in the ultimate cost of legal services to the consumer.

<sup>30</sup> See Tracker Survey 2013, Briefing Note 2: Shopping for legal services; available at [http://www.legalservicesconsumerpanel.org.uk/ourwork/CWI/documents/2013%20Tracker%20Briefing%202\\_shop\\_ping.pdf](http://www.legalservicesconsumerpanel.org.uk/ourwork/CWI/documents/2013%20Tracker%20Briefing%202_shop_ping.pdf).

<sup>31</sup> See Tracker Survey 2013, Briefing Note 4: Public confidence in the market; available at [http://www.legalservicesconsumerpanel.org.uk/ourwork/CWI/documents/2013%20Tracker%20Briefing%204\\_confidence.pdf](http://www.legalservicesconsumerpanel.org.uk/ourwork/CWI/documents/2013%20Tracker%20Briefing%204_confidence.pdf).

<sup>32</sup> See Findings of the Small Business Legal Needs Benchmarking Survey 2012; available at [http://www.legalservicesboard.org.uk/news\\_publications/press\\_releases/2013/2013\\_05\\_22\\_small\\_business\\_legal\\_needs\\_research\\_final.pdf](http://www.legalservicesboard.org.uk/news_publications/press_releases/2013/2013_05_22_small_business_legal_needs_research_final.pdf) and <http://www.legalfutures.co.uk/latest-news/smes-deeply-unhappy-legal-services-lawyers-warned-risk-going-way-hmv>.

In Section 5 below, I shall argue that the public interest and the need to match public expectations to the scope of regulation does not require uniform regulation of all legal services. Part of the issue here lies in the balance between ‘before-the-event’ assurance of competence and quality of providers and ‘after-the-event’ redress when something has gone wrong. The regulation and consequences of assurance are typically much more expensive than the structure and mechanisms for redress, suggesting that targeted and proportionate regulation is required in relation to assurance. It could also suggest a need to expand the scope of jurisdiction for after-the-event redress (as advocated by the Office for Legal Complaints<sup>33</sup>).

Finally, there is a need for the regulated providers of legal services to have confidence in the regulatory framework and regulators. If the regulated community believes that the regulators are introducing and enforcing impractical or inappropriate regulation, focusing on the wrong issues, under-resourced, out of touch, or too expensive, then confidence and, ultimately, compliance, will suffer – further undermining public and client confidence in the regulatory framework for legal services, the rule of law, the reality of access to justice, and the administration of justice.

#### ***4.3.5 Effectiveness of the regulatory framework***

The effectiveness of the regulatory framework for legal services will ultimately be judged on a number of dimensions. These will include the achievement of the principles expressed in this Section. In turn, an effective framework will: promote the rule of law and access to justice; contribute to the effective administration of justice; secure the independence of regulation from government and any sectional interests; uphold the professional principles and ethical standards in client relationships and the delivery of legal services; support timely and appropriate handling of complaints and redress; and result in simple, appropriate, proportionate, cost-effective and responsive regulation.

---

<sup>33</sup> See [http://www.legalombudsman.org.uk/downloads/documents/press\\_releases/0613-Call-for-new-vision-meet-future-challenges.pdf](http://www.legalombudsman.org.uk/downloads/documents/press_releases/0613-Call-for-new-vision-meet-future-challenges.pdf).

## Section 5. The scope and nature of legal services regulation

---

### 5.1 The extent of further reform

Given that the reforms of the Legal Services Act 2007 are presently incomplete, it could be argued that it is premature to be considering further reform of the regulatory framework. I do not share this view. I believe that, for all Sir David Clementi's hard work and good intentions, the Act nevertheless proceeded on a flawed basis and the present regulatory framework will not prove to be fully capable of delivering the original policy intentions or its own objectives. These flaws are the current set of reserved legal activities, and the absence of any hierarchy or priority in the regulatory objectives (this later point has already been addressed in Section 3 above). I regard these two issues as the most important areas for further reform.

### 5.2 Current reserved legal activities as a fundamental flaw

The Legal Services Act builds much of its regulatory framework around 'authorised persons'. They are defined in section 18 as either those who are authorised by a relevant approved regulator to carry out a reserved legal activity or a licensed body (ABS) which is authorised by a relevant licensing authority to do so. An authorised person can therefore be an individual practitioner or an entity. This approach inevitably brings the mix of regulation by person and activity referred to in paragraph 2.3 above.

The ultimate sanction for any serious breach of regulations applying to regulated individuals or entities is to remove the right to practise (striking off or removal of licence). There is undoubtedly deterrent force in such potential loss of the ability to remain in business. However, the distinction between the current reserved and non-reserved legal activities dilutes this deterrent power. An individual or entity that is no longer allowed (and therefore no longer regulated) to deliver a reserved activity can still, of course, set up a new business delivering only non-reserved legal activities outside the framework of regulation.

Unfortunately, the current reserved legal activities do not cover the most important life-events of consumers, and therefore do not offer them the full protection of regulation in relation to important advice and services (such as will writing) legally delivered by non-authorised persons. Importantly, the effects of this regulatory gap could be acute in terms of potentially exposing consumers to advice from those who were not considered fit to practise in other areas of regulated legal activity.

I have come to the conclusion that using the current reserved legal activities as the fulcrum around which the regulatory framework turns creates a fundamental flaw in the existing approach which should be addressed in any review.

### 5.3 Other approaches to regulation

Reservation is but one form of regulation by activity. For example, there are some presently regulated but not reserved activities, such as immigration advice and services, claims management services, and insolvency practice. In addition, there are circumstances where otherwise non-regulated activities become subject to regulation because individuals or entities comply with the

requirements of a regulatory organisation or accreditation process. This would include the regulation of non-reserved activities by an approved regulator or a licensing authority, as well as by voluntary self-regulating bodies.

There are also other sources of regulation that apply to the activities of legal services providers. These are often part of the general law which apply to a number of businesses (such as competition law, ‘cooling-off’ periods in respect of pressure (door-step) selling, misleading advertising, and unfair contract terms).

## 5.4 Using alternatives to regulation

Current government policy rightly encourages the consideration of alternative ways of bringing about change, with regulation as a last resort<sup>34</sup>. In this way, the regulatory burden on citizens and businesses can be reduced, and economic growth encouraged. However, a recent Government report contains evidence from the OECD that the relative regulatory burden on the legal professions in the UK is already significantly lower than in the US, Germany, France and Japan<sup>35</sup>, so there may be limited scope for any further reduction. Indeed, many of the alternative approaches have already been used in legal services.

### 5.4.1 Self-regulation

The traditional professional model of self-regulation was the predominant approach examined and replaced by the Clementi Review and the Legal Services Act 2007. It was the approach in which the public and consumers had largely lost confidence by 2004 by being insufficiently independent of those who were regulated, insufficiently responsive to the handling of client complaints and consumer concerns, and unduly restrictive in the structures and innovation that self-regulation either prevented or discouraged. It is difficult to see that any return to such an approach would be welcome or acceptable so soon after replacing it.

That said, because of the regulatory gap referred to several times in this response, the use of such inherently ‘voluntary’ regulation remains a viable option for those who operate in the unregulated sectors of legal services but wish to promote ethical practice and redress for dissatisfied consumers. This is the approach adopted, for example, by the voluntary codes of conduct of the Institute of Professional Willwriters and the Society of Will Writers.

The significant drawback of such voluntary self-regulation is that the consumers who are most in need of protection will most likely be those who choose to use providers whose service and track record is such that they elect not to submit themselves to self-regulation. This leaves those consumers with no redress or remedy, and no access to the sanctions that might otherwise follow or to Ombudsmen services.

---

<sup>34</sup> See <https://www.gov.uk/government/policies/reducing-the-impact-of-regulation-on-business/supporting-pages/using-alternatives-to-regulation>.

<sup>35</sup> See DBIS (2013) *Growth is Our Business: A Strategy for Professional and Business Services*, available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/211842/bis-13-922-growth-is-our-business-professional-and-business-services-strategy.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/211842/bis-13-922-growth-is-our-business-professional-and-business-services-strategy.pdf).

### **5.4.2 Information and education**

In light of the conclusion at the end of the preceding paragraph, consumer education and informed decision-making by them can help reduce the risks associated with the choice of unregulated providers. There is a necessary connection here with general public legal education<sup>36</sup> and the development of legal capability in citizens, as well as the informed ability to recognise and deal with a specific legal need.

The use and protection of professional titles, and the use by professional bodies of quality accreditations (such as The Law Society's Conveyancing Quality Scheme and the Wills and Inheritance Quality Scheme), are capable of providing both before-the-event signals to potential clients that a provider is appropriately qualified for their needs and that after-the-event redress could be available. Beyond this, independent – and perhaps commercial – systems are emerging to offer directories and comparisons of legal services providers<sup>37</sup>: however, the veracity and reliability of such assessments – and the reputational harm that could be caused to providers by them – remains relatively untested, adding to the challenge for the previously uninformed, inexperienced, and time-poor enquirer.

### **5.4.3 Co-regulation**

Co-regulation, involving a mix of self-regulation and government involvement, presents particular challenges in legal services regulation. The legal sector already has elements of professional codes of conduct, and the adoption of other standards and accreditation. The principal challenge of government involvement (beyond establishing the statutory framework for regulation, and the appointment of the chairman of the Legal Services Board) is the fundamental need for the perception and reality of independence from government of regulation, regulators and the providers of legal advice and representation.

### **5.4.4 Economic instruments or incentives**

There would appear to be very limited scope for the use of economic instruments in legal services to change people's behaviour, or to adjust the financial incentives facing businesses and citizens. There are, perhaps, two significant points – though neither is attributable to legal services regulation directly.

First, the cost of legal services is tax deductible for businesses, and the VAT paid by them is recoverable. This presents a rather significant disparity in the treatment of businesses and private citizens. It increases the relative net cost of legal services for private citizens, and will add to the disincentives to seek legal advice when it is perhaps most needed. In terms of supporting the rule of law and access to justice, as well as encouraging further economic growth (at least in relation to the legal services market, or assisting those who might wish to take legal advice in respect of starting their own business), some element of tax break or VAT exemption for certain legal services or certain types of client might encourage different behaviour that will strengthen personal or social relationships and fuller participation and economic growth in society.

<sup>36</sup> Cf. para 3.6.2 above.

<sup>37</sup> See, for example, Law Comparison (<http://www.lawcomparison.co.uk/law-information.php>) and AccessSolicitor (<http://www.AccessSolicitor.com>).

Second, the availability of legal aid represents an economic incentive for some to seek legal advice and representation in some of the ways and for some of the purposes suggested in the previous paragraph. The interplay between regulation and legal aid is somewhat complex, in that many of the issues for which legal aid is required (such as housing and social welfare, immigration, and crime) involves highly technical law in respect of which the competence and experience of an adviser are critical. The accreditation and regulation of a provider might therefore be necessary to give assurance both to the client (who will be affected by acting on the advice and representation) and to the state (which is providing the funding, and paying for the courts system that underpins the rights and obligations in question).

However, where the cost of accreditation or regulation is (too) high, the ultimate economic burden on providers of participating in the legal aid system may prove to be too great if the rewards offer an inadequate return on the expertise, experience or resources required for effective advice and representation.

#### **5.4.5 No new intervention**

I recognise that regulation and its alternatives will usually generate costs as well as benefits, and so the cost-benefit of regulation should be considered carefully by policymakers and regulators before further regulation is introduced.

In terms of the options available, however, it seems to me that a ‘do nothing at all’ conclusion in the context of the current regulatory framework for legal services would not be the right outcome. That would leave the following:

- (1) use existing regulation: for the reasons set out in this paper, I do not believe that the existing regulatory framework for legal services is robust enough to deliver the public interest in appropriate and cost-effective regulation;
- (2) simplify or clarify existing regulation: this option is explored in paragraph 5.5 and Section 6 below;
- (3) improve enforcement of existing regulation: there does not appear to me to be any evidence that existing regulation is not being enforced, although it might be open to approved regulators to take a more aggressive line with those who transgress; or
- (4) make legal remedies more accessible or cheaper: this is in part a matter of simplifying the underlying law (a matter for government and law reform), improving legal aid funding (a matter for government), and encouraging more cost-effective legal advice and representation through more appropriate accreditation and regulation, greater competition and innovation (an objective that is being stimulated by the current framework and should be continued in any further reform).

### **5.5 Redesigning the scope and nature of legal services regulation**

While I agree with the policy objective that conventional regulation should be used as a last resort, I believe that such regulation is required in parts of the legal services market, and that further reform is needed to bring about a more appropriate framework for achieving the public interest objectives that should underpin effective regulation of legal services.

I therefore turn to examine the proper use of regulation for legal services where:

- (1) the regulatory goals cannot be achieved by self-regulation or other methods; and
- (2) analysis of the costs and benefits shows that regulation is preferable to self-regulation or other methods.

If the current reserved legal activities represent a fundamental flaw in the scope and nature of regulation (cf. paragraph 5.2 above), then addressing this must be a principal goal in any new approach or redesign.

### **5.5.1 The principles for legal services regulation**

I alluded earlier (in paragraph 4.3.4 above) to the distinction in regulatory approach between before-the-event assurance and after-the-event redress, and the tendency of the former to be more expensive. It is arguable that too much of the current regulatory framework for legal services puts its emphasis on the former. This feeds the professional conception that legal services are too different or too important to be provided by anyone other than those who are suitably qualified (usually as lawyers). While some legal advice and representation undoubtedly falls into such a description, it is not a universal truth across the spectrum of legal needs. In any event, reservation of legal activities has now proved itself to be too limited a concept around which to build the modern regulation of legal services.

For regulation to be a justifiable regulatory response, I would suggest that it is necessary to be satisfied on two out of three foundation issues that:

- (1) regulation is in the public interest; *and*
- (2) *either* alternatives to regulation are less effective;
- (3) *or* regulation affords a degree of additional protection to clients by virtue of their purchase of a regulated activity.

#### **5.5.1.1 Regulation in the public interest**

I believe that some of the current reserved legal activities can be justified in the public interest, and that some cannot; I also believe that there are some additional legal activities that could be considered for regulation (though not necessarily by reservation).

My approach to the issue of regulating legal activities is that such regulation must be shown to be in the public interest (adopting the approach to defining ‘the public interest’ outlined in paragraph 3.2 above). This leads me to advance the proposition that regulation can be justified to secure either, or both, of two purposes:

- (1) the public good, including advancing the overriding regulatory objective suggested earlier (cf. Section 3 above); and
- (2) protecting the consumer.

In relation to the first purpose, I would incorporate supporting the constitutional principle of the rule of law, including the effective administration of justice; improving access to justice; and encouraging

independent, strong and effective legal advice and representation. In my view, the effective administration of justice is necessary to maintaining the rule of law and securing access to justice. It is therefore a public good in its own right, and is separate from what might be regarded as a broader consumer interest in cost-efficient administration. Efficiency (as represented by good quality and value for money) is certainly necessary for effectiveness, and can be achieved by providers other than lawyers; but effectiveness is not simply a consumer interest or consumer protection issue. Genn also makes the point (2010: 16-24) that civil justice is a public good.

However, beyond this, society also needs to encourage reliability and stability in social relationships (which are central to good social order and commerce). I would therefore go further than legal outcomes, and suggest that this first purpose should also extend to promoting and protecting the UK and its justice system as a legal forum, as well as to advancing the commercial interests of 'UK plc'<sup>38</sup>. There is much evidence that, in a global marketplace, the UK is regarded as a 'safe' place to do business, and English law is often the governing law of choice in multinational commercial transactions.

Confidence in the English legal system is therefore critical to our continuing social stability, global competitiveness, economic success and tax revenues. In part, this confidence stems from the UK's adherence to the rule of law, as well as from its reputation for an independent and impartial judiciary and the standing of the professional qualifications and independence of its lawyers. In part, it is why we need free movement of and access to financial and human capital (itself a public interest issue: see paragraph 3.2 above) rather than professional regulations and norms that prevent or discourage such movement.

In relation to the second purpose, I would not advance consumer protection as a generic justification for regulation. Rather, regulation is in the public interest in circumstances where, *as a result of legal advice or representation*, detriment to the citizen's (a) liberty, (b) physical, mental, emotional or social well-being, or (c) property, could arise, and for which compensation after the event would not represent an adequate or reasonable remedy. I regard these matters as fundamental to someone's ability to participate fully in society as an equal citizen (cf. paragraph 3.2 above).

The issue for both purposes, in essence, becomes one of the distinction between 'assurance' and 'insurance'. Although compensation for imprisonment following a wrongful conviction is available, if that conviction is a consequence of the incompetence or poor service of the client's advocate, after-the-event redress is poor recompense for a situation that could have been avoided by more competent or better representation from the client's lawyer. Monetary compensation cannot make good the damage done to a person's well-being, reputation and personal life by time spent unnecessarily imprisoned. In this and other circumstances, regulating to assure competence before the event is preferable to regulating only for complaint or compensation after it.

This is a particular dimension of 'credence' goods and services, where the consumer is rarely in a position to assess quality or utility until after consumption. Of course, before-the-event assurance will never eliminate all poor service or incompetence, and so both assurance and redress might be required. My concern here would be to identify circumstances in which reliance on after-the-event redress should not be the only or principal response of a 'decent' society.

Where regulation is justified in the public interest, it is not necessary in principle to construct so as to allow regulated activities to be carried out only by those who hold broader legal qualifications.

<sup>38</sup> Such a view is also consistent with the Government's growth strategy for professional and business services: cf. DBIS (2013).

There is no reason why, as now, a new regulator should not be approved with powers only in respect of one or a limited number of regulated legal activities. The issue of whether a broader legal understanding or experience is necessary<sup>39</sup> in the context of each regulated activity is one to be weighed in the assessment of whether to recommend approval of the new regulator (cf. paragraph 13 of Schedule 4 to the Legal Services Act). In an activity-based approach to regulation, simply attaching the authority to conduct a regulated legal activity to a professional qualification is also questionable. The specific right to practise such an activity could be granted as a separate authority in relation to each activity (say, by way of one or more endorsements to a practising certificate or licence) when an approved regulator is satisfied that the practitioner's competence in relation to that activity has been suitably demonstrated and is manifestly current.

Further, where the public interest justifies regulation of a legal activity, it is then arguable that the need for (and the fact of) that activity being carried out by a regulated person should be expressly notified to consumers and clients. Thus, where any issue is taken to an adviser by a client that involves such a regulated activity, consideration could be given to requiring that the adviser's terms of business or letter of retainer state that this element of the client's instructions must be performed by an authorised or licensed person, and then give the name and accreditation of an authorised person(s) who will be responsible to the client for that element of the work<sup>40</sup>.

#### *5.5.1.2 Regulation is more effective*

For me, it is not sufficient merely that there is a public interest justification for regulation: there must also be a case that formal regulation provides a better response or more protection for consumers than not regulating.

As anticipated in paragraph 5.4 above, there are other approaches that might be adopted and need to be compared in assessing whether or not regulation is more effective. In the context of legal services, this might suggest doing nothing specific and relying on the general laws applying to competition and business behaviour to deal with any consumer detriment. Another response would be to consider alternative approaches to regulation (such as voluntary codes of conduct). As with the general law, too often these are also focused on consumer protection issues and, in the absence of true regulatory enforceability, provide only after-the-event responses.

In general, these alternatives to direct, formal regulation apply to behaviour by providers in the acquisition of new business or in their conduct of business, and normally offer after-the-event restitution, compensation or sanction. As such, they tend to be focused on addressing consumer protection. As explained in paragraph 5.5.1.1 above, this is only one of the circumstances in which I would argue that regulatory intervention could be justified (the other being to secure the public good); and further there are situations in the provision of legal advice and representation where after-the-event responses to consumer detriment are manifestly not sufficient.

<sup>39</sup> This must be necessary, rather than desirable: one could always argue that it is desirable and sensible (and even rational) for a consumer to seek advice from a practitioner with the broadest possible knowledge and experience. But that desirability is not a matter for regulation: the necessity to regulate arises from a proper application of the need to secure the public good or to avoid consumer detriment as described rather than to avoid a broader disadvantage arising from consumers' foolishness, short-sightedness or penny-pinching.

<sup>40</sup> This person need not necessarily be the individual who actually carries out the client's work or any part of it: the point here relates to someone being responsible to the client for regulated work and carrying accountability for it.

In some circumstances, however, these alternative responses also lose their force. For example, there might be situations where there is a mandatory alternative. Some legal activities which are not currently reserved are nevertheless provided by regulated individuals or entities other than authorised persons under the Legal Services Act. Tax advice provided by chartered accountants would be an example. Under the regulatory framework applying to accountants, there will be mandatory obligations that certainly offer an acceptable alternative to the reservation of those activities.

However, to the extent that these obligations only apply to non-reserved activities, the provision of those same activities by other providers who are not bound by the same obligations means that the current framework for reservation at least presents a uniform protection across the market rather than a patchwork of mandatory and voluntary approaches that are dependent on the consumer's choice of adviser. In other words, the nature and extent of any current protection does not arise for all consumers because of regulation attaching to the *activity* but rather from the *choice of adviser* by the consumer.

My concern here is not that the regulatory effectiveness of obligations attaching to, say, chartered accountants, is any less than that attaching to authorised persons – far from it, since I do not believe that this is the case. Rather, my unease is that, if the activity in question is sufficiently important to the public interest to warrant regulation, the nature or scope of that regulation (and therefore the degree of protection offered) ought not to rest on the serendipitous choice by the consumer of an adviser who might be an authorised person, a regulated but not authorised person subject to mandatory duties, an unregulated person subject to voluntary and minimally enforceable obligations, or an unregulated person subject to no obligations at all beyond the general law.

I accept that regulation inevitably creates barriers to entry and so possibly limits competition, and will also probably increase the costs of providers entering and remaining in the legal services market (and that those costs will in all likelihood be passed on to consumers). However, my view is that where the public interest justifies regulation, this should outweigh these consequential effects. I believe in, and support, competition in the provision of legal services – but not at the expense of securing the public good or the achievement of overriding and primary regulatory objectives.

I also believe that, again, consistent with the general approach that any form of regulatory intervention should be proportionate to the identified mischief and least restrictive of competition, the public interest justification for regulation should ensure that regulatory intervention will secure the public good or consumer protection, without necessarily or inevitably inhibiting competition or innovation among those who are authorised to deliver the regulated activity. Even so, this might still present a particular challenge in relation to the regulation of multidisciplinary practices (MDPs), where the entity in question is also regulated in respect of some or all of its activities by a body other than its licensing authority for legal services.

### 5.5.1.3 Additional protection

I have already noted the regulatory gap in the legal services market of England and Wales, as a result of which consumers may find that, if they purchase a non-reserved and non-regulated legal activity from an unregulated provider, there is no protection beyond that provided by the general law relating to the supply of services. With this in mind, if a consumer chooses (or is required to choose) a legal service provider who is subject to regulation by virtue of being an authorised person, it is helpful to consider what additional level of protection results from purchasing a regulated activity from an

authorised person – and whether such protection is, in the circumstances, justified, proportionate and targeted.

To the extent that a dissatisfied client who has received incompetent or poor service from an authorised person could pursue an action in negligence, or use the general law relating to the sale of goods and services, this would leave the client in no better position than when engaging someone who is not authorised. However, *additional* protection available under the existing framework that is relevant to the current discussion arises by way of:

- (a) The professional principles (cf. paragraph 3.4.1 above) and the associated protection arising from them (see sections 90 and 176 of the Legal Services Act: also at paragraph 3.4.1 above), as well as the protection of client money. The professional principles apply to authorised persons; it is currently the authorisation to conduct a reserved activity that brings the provider with the regulatory framework that includes these principles and the obligation to comply with them.
- (b) The first-tier complaints and disciplinary processes that apply to providers of legal services if they are regulated by an approved regulator (see sections 21(1) and 122(1) of the Legal Services Act). The complaint itself does not have to relate to a reserved legal activity. However, as with the professional principles, it is the authorisation to conduct a reserved activity that currently brings the provider within the regulatory framework that includes the requirement for a complaints process.
- (c) Where the first-tier complaints process does not deliver an outcome satisfactory to the complainant (cf. section 126), then the issue may be referred by the complainant to the Legal Ombudsman (see Part 6 of the Act). The Ombudsman’s jurisdiction again extends only to those authorised to provide a reserved legal activity, although the complaint itself can relate to a non-reserved activity (section 128(1)). Issues that do not constitute professional misconduct (which must be referred by the Ombudsman to the relevant authorising body: section 143) will be dealt with by the Ombudsman, who has the power to require an apology, limit or require the refund of fees, award compensation for poor service, and order rectification at the provider’s expense (cf. section 137).
- (d) The availability of indemnity and compensation arrangements that are a consequence of the providers of reserved legal activities being regulated or licensed by approved bodies (see sections 21(1) and 83(5)). These make a considerable difference to the protection available to clients who instruct authorised persons, because the mandatory nature of indemnity and compensation arrangements gives an aggrieved client much greater certainty of securing recompense if the practitioner provides wrong advice or defaults in some way.

Given that, in my conception, one of the major justifications for regulation (cf. paragraph 5.5.1.1 above) is the inadequacy of after-the-event remedies of complaint and compensation, it is worth noting that not all of the additional protection offered is confined in this way (for instance, the Legal Ombudsman has powers to direct rectification). Further, the possibility of these remedies, combined with disciplinary action and the potential loss of the right to practise, should also encourage the type of before-the-event competence and care that will increase the quality of these credence purchases.

The additional protection offered will apply to non-reserved activities as well as to reserved ones. However, *this protection is currently not available at all until a service is provided by a person authorised in respect of one of the reserved legal activities*. It is therefore the existence of reservation that brings these protections into being.

Although there is some additional cost in funding these protections (such as the costs of training and authorisation, maintaining an internal complaints process, contributions to regulatory structures and compensation funds, and indemnity insurance premiums), where the public interest justifies before-the-event assurance, then the benefits derived from regulation arguably outweigh and justify these additional costs (even where they are passed on to consumers in whole or part). It still remains important, however, that the subordinate objective of encouraging competition and innovation in the delivery of legal services is enabled (so as to ensure maximum cost-effectiveness in these regulated activities). This would suggest a regulatory framework that disallows or removes other regulatory restrictions (such as those on permissible business structures and access to capital) that might drive up costs further or inhibit their reduction through scale-efficiencies or different ways of working.

Where a consumer lacks knowledge, experience or power in pursuing a complaint against a professional adviser, there is a collective benefit to all clients in having a regulator impose and enforce codes of practice, and complaints and disciplinary procedures which individual consumers could not hope to match. This can include the ‘specialisation’ and deeper knowledge of the regulator in understanding when, and to what extent, any transgression or poor service has occurred; it will also include the structure and staffing of the regulator with the knowledge and resources needed to take action against a practitioner; and it will also include the implicit power of the regulator to impose sanctions (including ultimately the removal of the right to practise) where the issue is serious and the complaint is not addressed promptly and properly<sup>41</sup>.

### **5.5.2 The nature and consequences of regulation**

Presently, the right to carry out a regulated legal activity can only be given by an approved regulator. The existence of an approved regulator then ensures that clients have the benefit of the range of regulatory arrangements relating to qualification, authorisation, practice, conduct, discipline, indemnity and compensation (cf. section 21 of the Legal Services Act).

As indicated in paragraph 5.5.1.1 above, although regulation means that a relevant legal activity could only be carried out by an ‘authorised person’, it does not follow that the authorisation should only be given to someone who holds a full legal qualification. However, where before-the-event assurance is justified, it will be important that the appropriate approved regulators set suitable entry requirements by way of relevant training and fitness to practise, and that they assure consumers that the necessary expertise and experience is maintained by continuing professional development and quality assurance requirements.

There are three significant limitations in the regulatory approach of the existing framework:

- (1) For the most part, authorisation to practise the reserved legal activities is attached to the award of professional titles (such as barrister, solicitor, or chartered legal executive). This can impose additional burdens and costs on those practitioners who might only wish to conduct fewer of the reserved activities than are automatically authorised by virtue of their title. For example, solicitors are authorised to carry out probate activities, even though their entire practising career might have been spent in contentious or corporate practice with no exposure to probate matters at all. In this sense, the cost of initial qualification might well have been greater than reasonably required; and the currency of the authorisation in respect of reserved activities that are not pursued will

<sup>41</sup> In the language of economic theory, this represents a ‘positive externality’.

have lapsed and will, in later years, constitute a risk of consumer detriment from a practitioner who, for some reason, decides to take up those lapsed activities.

- (2) The additional protections identified in paragraph 5.5.1.3 above only come into effect in relation to authorised persons. The costs of this protection will therefore need to cover both before-the-event accreditation and authorisation as well as after-the-event redress. In some cases, after-the-event redress might be sufficient to deal with the consumer protection required, given the risk in the nature of the advice or representation sought. The inability of the current framework to separate the availability of before-the-event assurance and after-the-event redress potentially leads to either or both of unwarranted cost and lack of adequate protection.
- (3) Because the reserved legal activities are the fulcrum around which the existing framework is structured, authorisation and protection spring from these activities. The assumption that there is a rational and justifiable foundation for the reservation of these activities in the first place is wrong<sup>42</sup>, and it might therefore be reasonable to consider in this review whether there could be a more rational and policy-driven foundation to the future regulation of legal services.

The existing framework therefore starts from a flawed assumption (and probably does not secure the public good in the most effective way), proceeds to add unnecessary costs and limitations on consumer protection, and therefore fails to meet a public interest test for regulation or the objectives of cost-effectiveness.

### 5.5.3 Conclusion

Regulation by title, person or activity can each secure some element of the public interest, and there is a degree of inevitability in more than one form working in tandem with another. My contention is that the public interest can justify the regulation of legal activities where:

- (1) this is required to secure a public good or protect the consumer (or both); and
- (2) *either* other responses are less effective *or* regulation provides additional protection that supports (1).

Reservation is one available response to a perceived justification for regulation, along with other general legal requirements and law-specific regulation. The question for policy-makers and regulators is which response best serves the public interest.

In any event, formal and explicit regulation will be implemented within a broader social and cultural environment with sets of expectations and norms, and with the additional impetus of providers wishing to avoid reputational risk. These extra-regulatory influences can work both to support and to frustrate formal regulation. Nevertheless, in my view, the binding nature of formal regulation (and its superiority to voluntary self-regulation) suggests that regulation should be pursued for the public interest reasons proposed above, and that policy-makers and regulators should not be reticent about extending the regulatory net in this way.

<sup>42</sup> See Legal Services Institute (2010) *Reserved legal activities: history and rationale*: available at <http://stephenmayson.files.wordpress.com/2013/08/mayson-marley-2010-reserved-legal-activities-history-and-rationale.pdf>.

The existing regulatory framework for legal services fails to achieve the public interest as elaborated earlier, and a fundamental review and a new approach to the design of the framework is justified. A more principled foundation than the currently reserved legal activities is required, along with a clearer distinction between, and justification for, before-the-event assurance and after-the-event redress (and where the latter is not conditional on, or necessarily attached to, the former).

## Section 6. A new approach to legal services regulation

My assertion so far is that the framework of the Legal Services Act 2007 is flawed by its reliance on the existing set of reserved legal activities and the absence of any priorities in its regulatory objectives, and that the structure of regulation that flows from it is unnecessarily complex and inadequate. This Section therefore explores ideas for a different, but principled, approach to the regulation of legal services that seeks to address these shortcomings of the 2007 Act.

### 6.1 Foundations of regulation

This Section offers thoughts on the principles that might govern:

- (i) *what* should be regulated;
- (ii) *who* should be regulated;
- (iii) *how* they should be regulated; and
- (iv) *by whom* should they be regulated.

For me, the answer to (i) is fundamental and would drive the rest. The existing framework mixes its approach and regulates reserved *activities*, *individuals* and *entities* as authorised or approved persons, and the holders of certain protected *titles*. Based on the experience of the Legal Services Act, there is now a strong case for the principal driver of future regulation being the *activities* involved and the policy justification for regulating those activities.

In the following paragraphs, I draw a distinction between those activities that might in the future be *reserved* legal activities (broadly in the same way as now) and would therefore only be provided by those who are authorised to do so, and *regulated* legal activities which need not necessarily be provided by authorised persons but which would nevertheless be subject to after-the-event redress. In this conception, reserved legal activities would provide both before-the-event and after-the-event protection, whilst regulated legal activities would attract only after-the-event protection: this is explored further in paragraph 6.4 below.

### 6.2 What should be regulated: potential public good reservations

A policy-based approach to regulation could support (as in the current framework) the reservation of certain legal activities to authorised persons in order to secure the public good (as elaborated in paragraph 5.5.1.1 above). Under this heading, the justification to regulate should be a policy decision supported by *principle*: this is different to the consumer protection reservations discussed in paragraph 6.3 below, which would need to be supported by *evidence* of risk or detriment to consumers. This line of thinking is consistent, for example, with Milne's view that (1993: 49) "many judgments of the requirements of the public interest have to be based on reasons which are not decisive and evidence which is not conclusive". It does, however, present difficulties for regulators who seek always to be 'evidence-based', and who rightly prefer decisions made on the basis of fact rather than the special pleading of factions. Nevertheless, implicit faith in the availability, reliability or determinative power of evidence to inform every decision will be misplaced.

### 6.2.1 *Activities connected to the administration of justice and due process*

Reserving to secure the public interest objectives and public good outcomes relating to the rule of law, the administration of justice, access to justice, and independent, strong and effective legal representation could justify the continuing reservation to authorised persons of:

- (1) *rights of audience*;
- (2) *rights to conduct litigation* (with associated legal professional privilege<sup>43</sup>); and
- (3) *court-related reserved instrument activities* (these are preparing an instrument relating to court proceedings in England and Wales: see Legal Services Act, Schedule 2, paragraph 5(1)(c) and (2)).

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

A conclusion that these activities should remain reserved would be consistent with the view in the final report of the Royal Commission on Legal Services<sup>44</sup> which suggested that the need for effective administration of justice is validation for the reservation of rights of audience (Chapter 18, with a particular emphasis on the skills required and independence) and the conduct of litigation (paragraph 19.17, which emphasises the knowledge and integrity of officers of the court), in that the proper discharge of these responsibilities assists in the smooth functioning of the court system.

The continuation of these current reservations would secure the public interest objectives and public good outcomes relating to the rule of law, the administration of justice, access to justice, and independent, strong and effective legal advice and representation, as well as promoting and protecting the interests of the UK in general both commercially and as a leading global legal forum. The credibility and reliability of precedent in a common law system are vital to the underlying credibility of the legal system as a whole (which is important to achieving the regulatory objective of supporting the rule of law).

Removing or diluting the requirement for these activities to be carried out by authorised persons would probably lead to suggestions that there would be higher levels of self-representation and litigants-in-person, as well as – perhaps more disturbingly – representation by paid but incompetent or inexperienced advocates. This, in turn, could create greater inefficiencies in the justice system as courts and judges were forced to deal with, and assist, those with little or no experience or competence<sup>45</sup>. Such inefficiencies could greatly reduce the efficacy as well as the cost-efficiency of the justice system, and potentially result in less credible and reliable justice and dispute resolution and in much poorer value for money to the public purse.

Public interest reservation therefore would not need to undermine the continued right of individuals to represent themselves, but it would require the exclusion of non-authorised persons, especially where they act for reward, but also arguably where they do not. There are currently no exemptions for rights of audience or rights to conduct litigation being carried out otherwise than for or in

<sup>43</sup> I recognise the additional regulatory challenges connected with legal professional privilege, but do not seek to deal with them in this paper.

<sup>44</sup> (1979) Cmnd. 7648 (London, HM Stationery Office).

<sup>45</sup> Over time, as self-representation and other challenges to the smooth running of judicial lists increase, one might also expect that the number and quality of applications for judicial office could also decline. On the other hand, work in Canada, which looks to support ‘self-helpers’ as they navigate their way around the courts system, might point to ways in which the overall efficiency (and cost-efficiency) of the system could be promoted.

expectation of any fee, gain or reward; indeed, consideration might be given to removing the exemption that currently applies under Sch. 3, para 3(10) for court-related reserved instrument activities.

For these reasons, this reservation should not be restricted only to criminal proceedings or where the liberty of the citizen is at risk: the public interest in confidence in the effectiveness of the justice system is much more extensive. The extra cost that would be borne by an individual consumer as a result of engaging authorised legal representation (as opposed to being a litigant-in-person or being allowed to instruct a non-authorised advocate) could be justified by gains in a number of areas:

- the personal benefit to the individual consumer of being represented in court by someone trained to do so;
- the gains made by all other consumers within the justice system in having that structure operating as effectively as possible and delivering reliable outcomes;
- securing equality of citizenship and participation (cf. paragraph 3.2 above);
- reduced costs to public finances through having a justice system that operates efficiently; and
- the continuing additional revenues brought into the UK that such a system attracts.

These reservations would also achieve an additional consumer protection benefit (cf. paragraph 6.3 below) in the purchase of ‘credence’ services. Incompetence or poor service in the delivery of these reserved activities could result in irreparable detriment to the client – such as incarceration, fines, a criminal record, loss of assets or of access to children, and so on. These consequences might arise, for instance, from failing to obtain evidence or call witnesses, not calling expert evidence, failing to object to evidence, conducting a cross-examination that is not in accordance with instructions, asking questions that allow the introduction of otherwise inadmissible evidence, missing relevant deadlines, or problems with disclosure.

Proven incompetence in the exercise of rights of audience is not necessarily sufficient to overturn a judicial result, such that before-the-event assurance becomes more valuable in the possible absence of after-the-event redress. As Buxton L.J. explained in *R. v. Day* [2003] EWCA Civ 1060 at paragraph 15:

While incompetent representation is always to be deplored; is an understandable source of justified complaint by litigants and their families; and may expose the lawyers concerned to professional sanctions; it cannot in *itself* form a ground of appeal or a reason why a conviction should be found unsafe. We accept that, following the decision of this court in *Thakrar* [2001] EWCA Crim 1096<sup>46</sup>, the test is indeed the single test of safety, and that the court no longer has to concern itself with intermediate questions such as whether the advocacy has been flagrantly incompetent. But in order to establish lack of safety in an incompetence case the appellant has to go beyond the incompetence and show that the incompetence led to identifiable errors or irregularities in the trial, which themselves rendered the process unfair or unsafe.

Lord Hoffman addressed the same point in relation to the conduct of litigation in the *Arthur Hall* case<sup>47</sup>:

<sup>46</sup> The Court of Appeal in *R. v. Joshil Thakrar* [2001] EWCA Crim 1096 developed the ‘safety of the conviction’ test, to be considered alongside a person’s right to a fair trial under Article 6 of the European Convention on Human Rights.

Irrespective of the need to comply with the Convention, the public good of securing fair trials should be an important consideration in assuring the competence of those who represent both the prosecuting authority and the accused.

<sup>47</sup> See *Arthur J.S Hall and Co. v. Simons, and Barratt v. Ansell and Others (trading as Woolf Seddon (a firm))*, and *Harris v. Scholfield Roberts and Hill* (conjoined appeals) [2000] UKHL 38, at para 34.

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

After-the-event restitution or compensation might be available, but in many of these circumstances this might not represent a sufficient justification for failing to assure before-the-event competence. In addition, it can prove challenging to establish negligence, and this might deter otherwise worthy claimants from taking any action – especially where the consequences are not as dire as those suggested earlier. Further, for a consumer to rectify any harm caused by the negligent exercise of a right of audience, he or she will have to engage another lawyer to bring a claim. From the point of view of the wronged consumer, this potentially raises the (off-putting) perception of a conflict of interest – even if no such conflict in fact exists.

Given the reserved rights currently attaching to costs lawyers (including rights of audience and rights to conduct litigation in relation to costs matters, as well as the administration of oaths), when shifting emphasis from regulation by title to regulation by activity, there could well be a public interest justification for extending specific reservation

(4) *law costs activities*

(with those activities to be defined).

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

(5) *the administration of oaths.*

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

The possible consequences of an oath being improperly administered are as varied as the situations in which they are required, from a doctor embarking on his or her career to a witness giving evidence in court. In some situations rectification may be possible simply by the client involved swearing a valid oath<sup>48</sup>; in others, irreparable harm may have occurred.

A significant part of the reliability of an oath and the credence which may be attached to it is a consequence of the standing of the commissioner for oaths who administered it. For this reason, there are criminal penalties attached to forging or fraudulently altering a commissioner's seal or signature, or knowingly tendering or using an affidavit having such a forged or fraudulently altered seal or signature<sup>49</sup>. While this may serve to punish the perpetrator involved, it will do little to rectify any harm caused to an innocent client or third party relying on or affected by the relevant document. Again, therefore, I support the continuation of this reserved legal activity to achieve the public good identified (as well as some incidental before-the-event consumer protection).

<sup>48</sup> Every commissioner for oaths should state when and where each oath is taken (Commissioners for Oaths Act 1889, s. 5).

Failing to make such a statement would therefore render an oath invalid, as would swearing an oath before a person who was not a commissioner for oaths or who was representing a party in legal proceedings in which the person swearing the oath was involved.

<sup>49</sup> Commissioners for Oaths Act 1889, s. 8.

There are, of course, many documents which are of public importance that do not need to be sworn (such as a passport application or a will); these documents are not currently subject to any form of reserved legal activity. Documents that are notarised (cf. paragraph 6.2.2 below) are also regulated separately. It is arguable that the special status of the administration of oaths should derive from the status of the person administering the oath being in some way an officer of the court or other public official. This makes it questionable whether the authorisation should be extended (as now) to essentially all authorised persons. The training to discharge this reserved function currently seems to be superficial (at best), and the activity is often carried out with little regard for its solemnity and by those who often take the fee as a personal reward (even where they are employed by a firm).

I would therefore suggest that thought should be given to confining the authorisation to administer oaths to those authorised persons who are separately trained and accredited in respect of future public good reserved legal activities; and that the training for these reserved rights should include appropriate training for the administration of oaths.

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

### 6.2.2 Notarial activities

Securing the effective administration of justice and global legal reputation within the UK, as well as protecting and promoting confidence in the global trading position of 'UK plc', justifies the continuing reservation to authorised persons of:

(6) *notarial activities.*

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

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

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

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

trail for each document verified through the notary to the client. Not only does this provide a certain level of reassurance for the other parties in a transaction, but it also serves a wider purpose in helping to combat international fraud.

Due to the nature of the work of notaries, any error made is likely to be discovered after the fact. If a wrongfully certified document is accepted for use in a foreign transaction, problems may only arise in the future, after decisions have already been made based on the accuracy of that document. Similarly, if for some reason a notary's records are needed to trace someone through a past document, that will be the time when any gaps in those records will appear. It is this status of notarial activities as 'credence' services that may provide some additional justification for their reservation.

The reliance that parties to (particularly) commercial – and often international – transactions can place on notarised documentation allows trade, and the resolution of disputes, to be undertaken with greater confidence. Without regulatory force, confidence in the activities and promises of English participants in international trade could be compromised, to the detriment of the nation's growth and economic well-being.

Given the nature and importance of notarial activities, and the credence that must be placed on the notary's verification (and professional regulation and standing to back it up), the current exemption in Schedule 3, paragraph 5(4) of the Legal Services Act for individuals carrying out notarial activities otherwise than for or in expectation of a fee, gain or reward seems out of place, and consideration should be given to whether this exemption can be justified on public interest grounds. There seems to me to be a stronger case in relation to notarial activities than there is for the administration of oaths (which has no such exemption). There is also no case for self-representation here: an individual cannot credibly provide notarial services for themselves: the whole rationale of notarial services is *independent* verification.

### 6.2.3 *Immigration advice and services*

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

- (a) a claim for asylum;
- (b) an application for, or for the variation of, entry clearance or leave to enter or remain in the United Kingdom;
- (c) unlawful entry into the United Kingdom;
- (d) nationality and citizenship under the law of the United Kingdom;
- (e) citizenship of the European Union;
- (f) admission to Member States under Community law;
- (g) residence in a Member State in accordance with rights conferred by or under Community law;
- (h) removal or deportation from the United Kingdom;
- (i) an application for bail under the Immigration Acts or under the Special Immigration Appeals Commission Act 1997; and

- (j) an appeal against, or an application for judicial review in relation to, any decision taken in connection with a matter referred to above.

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

The original suggestion in 2005 in the legal services white paper<sup>50</sup> that these activities should become reserved was not pursued in the Legal Services Act for policy and pragmatic reasons. This could now be revisited.

The public interest must be defined by reference to a State or territory<sup>51</sup>, and the right of individuals to participate in society is an integral part of whose public interest is at stake and by reference to which conception of 'the public' it is framed. It is therefore in the public interest that advice and representation in relation to a citizen's status should be given only by those appropriately qualified. This would help to secure the public interest in ensuring that only those who are entitled to the benefits of citizenship have the rights attached to it, but also that those who are so entitled are then able to participate fully and equally (cf. paragraph 3.2 above).

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

(7) *immigration advice and services*

becoming public interest reserved activities. Given that the notion of reserved legal activities is specific to England & Wales, there is no insurmountable difficulty in having the same activities regulated as reserved activities within this jurisdiction, but regulated differently (though by a different regulator with comparable powers) in Scotland and Northern Ireland.

There would also be a consumer protection benefit (as intended by the 1999 Act) in that those seeking to clarify or confirm their immigration or asylum status should not be represented by those who are not appropriately trained and qualified. After-the-event complaint or compensation is likely to be a most inadequate remedy for someone denied a right to enter or reside, or who is wrongly deported to a country in an asylum case, as a result of incompetent or ineffective advice or representation.

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

<sup>50</sup> Cf. Department for Constitutional Affairs (2005) *The Future of Legal Services: Putting Consumers First*, Cm. 6679, Appendix B.

<sup>51</sup> This is implicit in the references to 'citizens' and 'society' in the definition of the public interest suggested earlier (see para 3.2 above).

#### 6.2.4 *Public law advice and services*

Immigration advice and services are addressed separately in paragraph 6.2.3 above because these are already regulated (albeit not currently reserved) legal activities, but immigration is in fact just one of a number of areas involving legal advice and representation that affects the individual in his or her relationship with the State<sup>52</sup>. Others are: crime and human rights, social welfare and housing, health care, education, taxation, planning, infrastructure and the environment.

To the extent that elements of these relationships require governmental or regulatory decisions, those decisions can be challenged in courts or tribunals. Absent self-representation, if the exercise of rights of audience is a reserved activity, then someone with authorisation for the relevant rights of audience would be required to appear, and the public interest in the effective representation of a party, in access to justice and in the effective administration of justice would be secured (as discussed in paragraph 6.2.1 above).

However, where non-contentious advice or services are needed, arguably different considerations apply to the question of whether or not the provider of that advice and service should be required to be appropriately accredited or qualified in order to offer advice on a paid basis. Such advice actually or potentially affects an individual's relationship with the State, and therefore goes to the heart of maintaining the fabric of society and enabling the legitimate participation of citizens in it (the two key components of my conception of the public interest: cf. paragraph 3.2 above). Consideration might therefore be given to whether the public interest requires that

(8) *public law advice and services*

should be reserved legal activities and providers authorised. Reservation could provide before-the-event assurance of competence and experience in circumstances where after-the-event redress will too often prove inadequate.

These areas of law are also areas in which there will usually be a considerable asymmetry of knowledge and resource as between the individual and the State. Indeed, these are often some of the most technically complex areas of law. Access to appropriately qualified advice is part of the way in which, through regulation, the public interest might address this imbalance.

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

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

#### 6.2.5 *Property-related activities*

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

<sup>52</sup> In this context, 'State' includes central and local government and their agencies, as well as regulatory authorities.

Act. For this purpose, an ‘instrument’ includes a contract for the sale or other disposition of land (except a contract to grant a short lease within the meaning of s. 54(2) of the Law of Property Act 1925), but excludes wills and other testamentary instruments, agreements not intended to be executed as deeds (other than the contracts already mentioned), letters or powers of attorney, and transfers of stock that contain no trust or limitation (Schedule 2, paragraph 5(3) and (4)). The reservation also extends to preparing any other instrument relating to real or personal estate for the purposes of the law of England and Wales (Schedule 2, paragraph 5(1)).

There are exemptions in respect of:

- (a) farm business tenancies where the activity is carried out by a Fellow of the Central Association of Agricultural Valuers, or a Member or Fellow of the Royal Institution of Chartered Surveyors (Schedule 3, paragraph 3(5) and (6));
- (b) a person employed merely to engross the instrument or application (Schedule 3, paragraph 3(9)); and
- (c) an individual who carries on the activity otherwise than for, or in expectation of, and fee, gain or reward (Schedule 3, paragraph 3(10)).

Before land registration (or still for first registration of title<sup>53</sup>), there would have been a strong public interest argument for suggesting that those who verified title (and thereby ensured the buyer of good title to the property acquired) should be appropriately qualified and experienced. In fact, assurance could reasonably be sought both by the State (to provide substance to the State-backed guarantee inherent in land registration) and by the buyer (to provide greater certainty and security to the purchase).

There are, therefore, public interest justifications (both public good and consumer protection) for the proper registration of title. The advantages are expressed by the Land Registry in this way<sup>54</sup>:

Registration supports home and property ownership and the secured credit market by:

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

These considerations are only relevant, of course, to registered title. However, if appropriate expertise would be justified in relation to first registration because of the requirement to investigate hitherto unregistered land, logically it should also apply to any other transactions and transfers relating to unregistered land. The potential complexity and uncertainty of unregistered title strongly suggest that appropriate expertise should be applied in transactions involving transfers and other dealings in unregistered real estate. This would offer consumers confidence in the competence of the

<sup>53</sup> About 20% of land in England & Wales is still unregistered: [www.landregistry.gov.uk](http://www.landregistry.gov.uk).

<sup>54</sup> Cf. <http://www.landregistry.gov.uk/professional/guides/practice-guide-1>.

practitioner as well as a degree of protection in an otherwise potentially uncertain and complex process.

For these reasons (and to fulfil public good objectives in relation to registered land, and consumer protection objectives in relation to unregistered land), there is a strong case for continuing the reserved instrument reservation in respect of (a) preparing any instrument for the purposes of first registration under the Land Registration Act 2002; (b) making an application or lodging a document relating to first registration under that Act; and (c) preparing any other instrument relating to unregistered real estate in England and Wales. In these circumstances, the reservation should logically extend to the preparation of the contract for the sale or other disposition of the land in question.

However, even in relation to registered land, there are further – and broader – justifications that merit exploration. First, despite the Land Registry’s reference to the State-backed guarantee of title, there are still overriding interests, local land charges, and possibly other obligations or restrictions which could affect the value of the property (and therefore the value of any security) or the ability to use it. There are, therefore, potential (and avoidable) risks to the client that are not covered simply by registration of title, and the involvement of appropriately qualified and experienced advice would reduce the risk of consumer detriment arising from ill-advised transactions or inadequate representation.

Second, there is a further dimension to confidence and efficiency of process that arises from the involvement of authorised persons (solicitors and licensed conveyancers). At the point of completion, there will often be a mortgage to be discharged on the property being sold. The buyer will need to know that title to the land will pass without being subject to that financial charge. There is a timing issue: until sellers receive the buyers’ funds from the sale, they are not in a position to discharge their secured loans, and therefore could not give the assurance of unencumbered title.

This conundrum is usefully solved by the seller’s conveyancer giving an undertaking to the buyer that the funds received will indeed be used to discharge the mortgage. On the basis of that undertaking, the buyer should have the confidence to complete the purchase even though at the moment of completion the property has not yet been released from the mortgage. Further, both the buyer and seller can have confidence that their money in the hands of their respective authorised conveyancers is protected by the approved regulators’ arrangements for the protection and repayment of client money if the conveyancer absconds with it. If there was any danger that the ‘chain’ of simultaneous conveyancing transactions might break down, the efficiency of the conveyancing process and transfer of title to real estate could be compromised to the detriment of society at large.

Confidence in the conveyancing market, and its efficiency, is therefore underpinned by the undertakings of conveyancers. The standing of the practitioners as authorised persons (whether solicitors or licensed conveyancers, or others in the future) is crucial. Their undertakings are binding as a professional obligation<sup>55</sup>, and are backed up by professional indemnity cover and compensation fund arrangements.

<sup>55</sup> The obligations of undertakings are onerous, in that the court will normally require a solicitor (and, presumably, a licensed conveyancer) to perform an undertaking (though it does have power to order instead that the solicitor make good any loss arising from a failure to perform): *Clark v. Lucas Solicitors LLP* [2009] EWHC 952. Conveyancers therefore need to be very careful in offering undertakings: for example, if a conveyancer has undertaken to discharge a seller’s outstanding mortgage in full then, subject to the discretion of the court, the undertaking must still be fulfilled even if the proceeds of sale are insufficient to meet the debt or the conveyancer has not received the proceeds of sale.

The conveyancing ‘chain’ simply could not work if every party had to be physically in the same place at the same time, simultaneously exchanging bankers’ drafts. The public good of an efficient and reliable property market therefore depends on the credibility and enforceability of conveyancers’ undertakings. I do not believe that this should arise merely as an incidental (or coincidental) benefit of the conveyancer being an authorised person in respect of a different reserved legal activity. The public interest suggests that such an assurance should arise as a direct result of a relevant reservation.

I therefore conclude that the current reservation is too narrowly drawn:

- (a) In relation to registered land, there is a justification for regulation founded on consumer protection. The ‘guarantee’ of title registration is incomplete if there are risks to the quality of the title and the enjoyment of the property potentially compromised by inadequate investigation or representation. There is also risk of fraud and practitioners absconding with purchase money or proceeds of sale. Regulation offers either or both of an assurance of competence or additional protections of the type outlined in paragraph 5.5.1.3 above.
- (b) On even stronger ground, however, is the public good in the effective and efficient operation of the housing market, in confidence in land registration, and in some protection to consumers engaged in transactions involving unregistered land. The purpose of reservation here would not be related directly to the validity of the contract, or completing the land registration process; it is to protect the public (economic and social) interest in the credibility and reliability of the property market – including the significant contribution to this of conveyancers’ undertakings, as discussed above<sup>56</sup>.

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

It may well be that the public interest in public good benefits and consumer protection coincide on this issue: much will depend on the rules of conduct and discipline that apply to authorised conveyancers and to the enforcement of their undertakings, as well as the existence of indemnity and compensation arrangements that are sufficient to cover the value of the property concerned<sup>57</sup>. To be effective, all of these provisions rely on enforcement powers (rather than voluntary self-regulation, from which rogues could easily exclude themselves), and this arguably tips the balance in favour of reservation<sup>58</sup>.

<sup>56</sup> It must follow that all authorised persons for the purposes of this reservation – including entities holding ABS licences – should be able to offer similar confidence in their undertakings through professional obligations, indemnity insurance and compensation fund arrangements, and regulators and licensing authorities would need to assure themselves that this is the case.

<sup>57</sup> Unlike bank deposits, where consumers are able to split their cash among a number of banks to gain the advantage from each of deposit protection, conveyancing transactions cannot be split. The dependence of each client on the scope and enforceability of their conveyancers’ compensation arrangements is therefore key to consumer confidence.

<sup>58</sup> More accurately, perhaps, the balance is tipped in favour of regulation (of some kind) rather than reservation (in particular): there are other regulatory schemes which require parallel protections to those found for lawyers (see the Compensation Act 2006, for example) that could be applied to the regulation in this area.

On this view, (b) above appears to be a better foundation for reservation. To achieve these broader objectives, one approach would be to extend the current reservation to:

(9) *conveyancing services*.

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

As with court-related reserved instrument activities (cf. paragraph 6.2.1 above) and notarial activities (cf. paragraph 6.2.2 above), given the reasons advanced here for a public good justification for the reservation of conveyancing services, there is a need to consider withdrawing the current exemption in paragraph 3(10) of Schedule 3 for individuals who carry out the relevant activities otherwise than for or in expectation of any fee, gain or reward. The reasons for the reservation are connected to the authorised status of someone acting on another’s behalf: these are not achieved by someone who is not authorised, and the absence of reward does not seem to outweigh the public interest in the need for reservation. This would not, of course, prevent someone who is authorised acting without reward.

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

(10) *intellectual property activities*

should be considered for reservation. There are already statutory definitions that could be adopted relating to patent attorney work (section 275A(7) of the Copyrights, Designs and Patents Act 1988), trade mark agency work (section 83A(7) of the Trade Marks Act 1994) which could form the basis for future reservation.

### 6.3 What should be regulated: potential consumer protection reservations

There are some aspects of ‘public good’ reservation covered in paragraph 6.2 above that might also be conceptualised as consumer protection reservation, often on the basis of the before-the-event assurance provided for these ‘credence’ services. For example, rights of audience could also be included here, on the basis that they protect the client’s physical, personal, social or economic well-being (cf. paragraph 5.5.1.1 above). Similarly, advancing a public good rationale in relation to real estate transfers could lead to a broader reservation than we currently have, with consequential consumer protection benefits (cf. paragraph 6.2.3 above).

I suggested at the beginning of paragraph 6.2 above that reservation justified by the public good should be granted as a matter of principle and that evidence of actual or potential consumer risk or detriment should not be required. Regulation to provide consumer protection is different, and such evidence should be required as part of the justification for regulation. Evidence will be needed of the specific risks and detriment, and the implications for consumers of those risks or detriment arising. This might include, for example, circumstances in which consumers are widely known to receive incompetent or sub-standard advice and representation; where there are known to be providers

preying on vulnerable consumers, providing services where they are not required, or in combinations or at prices that take advantage of the vulnerability; and where there are instances of providers absconding with consumers' money. In probably all of these instances, 'rogue traders' will not choose to bring themselves within any self-regulatory framework, and will actively arrange their businesses either to avoid or ignore mandatory regulation.

If risk and detriment is known to exist and, in these and similar circumstances, consumers are offered no mandatory alternative which would allow them to check the authorisation of advisers, they are knowingly left to the devices and deviance of an unregulated market. The question then becomes whether, as a matter of public interest, there are some legal activities that are so important to consumers, or the need to protect them so evident, that they should not be left to market forces and the general principle of 'buyer beware', or to the application of general consumer law and trading standards protection.

### 6.3.1 *Will writing*

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

The Lord Chancellor's recent unwillingness to take an early opportunity to reserve will-writing activities can be revisited as part of this review. There appears to be a strong case, supported by evidence, for reservation to authorised persons being extended to:

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

This need not necessarily be based on broad consumer protection issues – such as pressure selling or cold calling, inappropriate bundling or pricing of services, misleading advertising, and the like – which can be covered by other approaches and for which reservation could very easily be argued to be a disproportionate and unnecessary response. Rather, reservation could be justified on the basis that, as a result of unregulated provision, detriment to the consumer might be caused by incompetent, inadequate or biased advice or by an invalid will or one that does not properly give effect to their intentions.

Consumer detriment might arise, for example, from: the adviser failing to address the tax consequences of testamentary dispositions resulting in avoidable or higher-than-necessary tax liabilities to the estate; the adviser failing to consider the legitimate claims of some potential beneficiaries, resulting in post-death disputes and cost to the estate; or the adviser failing to ensure a valid execution (when, for example, the attestation is witnessed by a beneficiary). Given that many failures of advice and representation in these circumstances will only come to light when the clients have died and can no longer articulate or clarify their intentions, or execute a valid will, after-the-event compensation will hardly ever represent an adequate or reasonable remedy and will almost certainly involve the estate in some cost and inconvenience.

Although it would be possible to regulate against the inappropriate 'bundling' of estate administration into will-writing engagements, reservation gives rise to an alternative approach. By bringing will writing into reservation to authorised persons, the professional principles set out in the

regulatory objectives and an approved regulator’s conduct rules would come into play (cf. paragraphs 3.4.1 and 3.7 above). Rather than regulating separately against inappropriate bundling or charging, authorised persons who provide will-writing and estate administration services would then be obliged to show that they had acted in the best interests of the client and could therefore be called on to justify to a regulator any bundling of services or charges made.

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

Finally, in the public interest of parity of treatment within the United Kingdom, the power in Scotland to regulate will writing (see the Legal Services (Scotland) Act 2010, Part 3, Chapter 2) arguably strengthens the case for reservation in England and Wales.

It would seem sensible for testators to be able to draw up their own wills<sup>59</sup>, and for an exemption to continue for individuals acting otherwise than for or in expectation of a fee, gain or reward<sup>60</sup>. As a reservation for consumer protection, consumers should perhaps be allowed to make a free choice whether or not to gain the benefit of protection by instructing an authorised person.

### 6.3.2 *Probate and the administration of estates*

The current reservation of the preparation of papers for the grant of probate or letters of administration is in my view the most contentious of the current reservations and so more difficult to justify. As with reserved instrument activities in relation to the transfer of real estate, I conclude that the current reservation is inappropriately drawn.

I can see no reason based on public good for reserving simply the preparation of probate papers. Under the current reservation, the only part of the entire process of dealing with an estate that is reserved to authorised persons is preparing papers on which to found or oppose a grant of probate or of letters of administration<sup>61</sup>. But there are numerous tasks and processes that must be completed during the administration of an estate. Amongst these are activities that appear more obviously open to abuse than that which is reserved, such as collecting the assets due to the estate, releasing monies to pay any debts or make distributions, or preparing the estate accounts. From a consumer protection viewpoint, it is difficult to account for these steps in the probate process not being reserved to authorised persons, while the preparation of papers to apply for a grant of representation is.

Although problems might arise in relation to contentious probate, or estates involving foreign assets, it is questionable whether these, by themselves, represent a strong enough argument to support reservation. In these circumstances, a sensible executor or administrator would probably seek professional advice. The strongest reason for any probate reservation therefore appears to lie in the

<sup>59</sup> In this context, there would not seem to be any reason to regard as “preparation” for the purposes of this reservation any off-the-shelf will templates (whether paper-based or online) that are completed wholly by the testator with no interaction or advice (other than any offered by individuals without reward).

<sup>60</sup> Arguably, this exemption should not be available to those who offer free will writing in expectation of being appointed as executor: such bundling seems to imply that the will is written in some expectation of future reward.

<sup>61</sup> I note that the equivalent Scottish process of ‘confirmation services’ is similarly narrowly drawn: cf. Legal Services (Scotland) Act, s. 90(2).

protection of the estate's assets from maladministration or misappropriation by someone carrying out estate administration for reward. It would be a consumer protection justification.

I note with interest that the 'administration' of an insolvent company's 'estate' is a regulated (though not currently reserved) activity (cf. paragraph 6.3.3 below): to regulate this while not regulating the administration of a deceased person's estate seems illogical. The risks to the assets in the hands of those who are not suitably qualified or regulated are arguably no different. The equivalence of processes, as well as the public interest in the efficiency of these State-authorized collections and dispositions of property, coupled with consumer protection for creditors and beneficiaries, could provide a strong base for comparable regulation in both cases.

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

As with reserved instrument activities, therefore, my conclusion is that the current reservation is too narrow. In the public interest of consumer protection, consideration should be given to whether

(13) *the preparation of papers on which to found or oppose a grant of probate or letters of administration; and*

(14) *the administration of an estate following a grant of probate or letters of administration*

need to be reserved legal activities. Arguably, any case for reservation is weakened by insolvency practice being regulated rather than reserved; but this would not weaken the case for *regulation*, but rather put the emphasis on the choice of regulatory approach. I would argue that the public interest requires relative parity of regulation and protection, even if the choice of approach is not identical.

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

### **6.3.3 Insolvency practice**

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

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

At one level, it is difficult to see why the distribution of assets of a ‘deceased’ company or business, or of an individual in financial distress, should be regulated when the estate of a deceased human being is not (unless the deceased was insolvent). The potential mischief that could justify reservation in relation to the administration of estates, and the benefits to be derived from reservation, could apply with equal force to insolvency practice. There are assets to be collected and distributed, the value of the ‘estate’ to be preserved, the risk of assets being misappropriated, and the potential claims of the ‘beneficiaries’ to be met<sup>62</sup>.

A strong case for reservation of

(15) *insolvency activities*

(as carried out by persons acting as insolvency practitioners under the Insolvency Act 1986) therefore could arise from its current regulation and similarity to other reserved activities. Although in one sense, the extension is not necessary to achieve the benefits of regulation since insolvency practice is already regulated, nevertheless as part of a regulatory ‘tidying up’ and principled re-definition of reserved legal activities, this would be a logical inclusion and worthy of consideration.

#### 6.3.4 *Claims management services*

Although the previous Government expressed an initial intention to add claims management to the list of reserved activities<sup>63</sup>, this addition was not included in the Legal Services Act 2007. Claims management services can only be provided by those who are authorised under the Compensation Act 2006 or who are exempt. There are exemptions, for example, for lawyers, those subject to FSA regulation, charities and not-for-profit advice agencies, unions, and individuals who are not acting for reward.

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

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

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

<sup>62</sup> One principal difference could be that executors and administrators of estates collect the deceased’s assets and distribute them to beneficiaries in accordance with a will or the rules of intestacy; insolvency practitioners not only collect and distribute assets, but also have to apportion them among creditor ‘beneficiaries’ when there is not enough available for distribution to satisfy their legitimate claims.

<sup>63</sup> Department for Constitutional Affairs (2005) *The Future of Legal Services: Putting Consumers First*, Cm. 6679, Appendix B, Section 7.

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

There was clearly a Parliamentary wish to regulate claims management activities – and particularly the claims-farming, referral and investigation elements where there was previous evidence of malpractice by unregulated businesses. However, this has, in the process, been extended to incorporate the provision of legal advice and representation. As a result, authorised persons under the Compensation Act (who need not be lawyers but who are nevertheless subject to satisfying the regulator that they are competent and suitable to provide regulated claims management services) are able to provide legal advice and representation under a parallel regulatory framework.

The purpose behind the Compensation Act would clearly satisfy a consumer protection rationale for public interest reservation. The totality of claims management services as defined under the 2006 Act do not currently qualify as ‘legal activities’ under the Legal Services Act 2007, and could not therefore become reserved as a package of advice and services within the 2007 Act. Further, if some claims management activities remained subject to the regulatory regime of the Compensation Act, while the legal activities elements became reserved under the Legal Services Act, there would potentially be a need for some businesses to apply to different regulators in order to continue providing the same range of services as now.

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

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

(16) *claims management advice and representation*

should now become a reserved legal activity (defined for this purpose as in the 2006 Order). These activities are so closely connected to – if not already part of – the rights of audience and conduct of litigation activities considered earlier (cf. paragraph 6.1.1 above) that there is a strong argument for treating them in the same way. Alternatively, consideration could be given to bringing all claims management services currently covered by the Compensation Act 2006 within the legal services framework.

## 6.4 What should be regulated: regulation of non-reserved legal activities

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

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

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

If reservation remains the principal approach to providing regulation of legal activities where the public interest requires their direct regulation and performance by authorised persons, then the definition above provides a basis for regulation of non-reserved activities. Reservation can address both before-the-event and after-the-event solutions in relation to the most critical legal activities. For other legal activities, after-the-event remedies and redress are likely to be sufficient.

The current regulatory gap (cf. paragraph 2.2 above) excludes many legal services from such possibility of remedy or redress unless they happen to be provided by otherwise authorised persons. A relatively simple extension of the Legal Ombudsman's jurisdiction to allow any client or other person affected by the provision of any legal activity (as defined above, and including reserved legal activities) to refer a complaint to the Ombudsman where the activity has been provided either by an authorised person or for, or in expectation of, any fee, gain or reward.

Such an approach could achieve two objectives. First, it would match expectation and scope (cf. paragraph 4.3.3 above) and consequently generate greater confidence in legal services (cf. paragraph 4.3.4 above). Second, it would allow Ombudsman's remedy or redress in respect of all legal services, regardless of who provided them. The Ombudsman's powers could be different in relation to authorised persons where the complaint relates to a reserved activity, or where the non-reserved legal activity in question is provided by a person who is otherwise regulated (for example, where non-contentious tax advice is provided by a member of the Chartered Institute of Accountants). In addition, although the professional principles (cf. paragraphs 3.4.1 and 37 above) apply mainly to authorised persons, in reaching a determination on a complaint against a provider of non-reserved legal activities who is not an authorised person, the Ombudsman should be able to take those principles into account as though the provider were an authorised person.

I accept that the funding of such a broader approach would need to be considered carefully, though the relative informality of ombudsmen schemes should keep costs lower than formal regulation. With no authorisation being implicit in my suggestion for the regulation of non-reserved activities, but with consumer access to the Legal Ombudsman being available without the need for non-authorised providers of non-reserved activities to submit to a voluntary scheme, some variant of 'polluter pays', with discretion for the Ombudsman to award costs compensation against a frivolous or vexatious complainant, might offer a way forward.

In the same way that an authorised person can lose their licence to practise, consideration could be given to the Legal Services Board (or any future successor, or the Ministry) having the power to determine that any individual or entity should be prohibited from providing one or more (or indeed all) legal activities because of conduct meriting such an outcome – whether the provider was previously an authorised person or not. This could be reinforced by the Board maintaining a public register of such prohibited providers of legal services – including those who lose or are denied a licence to practise by decision of an approved regulator. There could, if thought necessary, be a new offence of providing legal activities for reward while on the prohibited register.

In this way, a distinction could be drawn between reserved legal activities (which must be provided by authorised persons) and other regulated legal activities (which could all be within the Legal Ombudsman's jurisdiction, irrespective of provider or voluntary submission to that jurisdiction).

## 6.5 Who should be regulated

A consequence of the approach suggested in paragraph 6.4 above would be that all providers of ‘legal activities’, as defined, would in some way be regulated. If any legal activity is reserved, then the relevant provider (individual or entity) would still need to be an authorised person, subject to the same range of requirements, obligations and sanctions as now.

If a legal activity satisfies a public interest test for reservation, then the current offences in sections 14 and 17 of the Legal Services Act relating to carrying on a reserved activity if not entitled to do so and pretending to be entitled should be sufficient without the need for further specific offences relating to the wrongful use of the titles of solicitor and barrister.

## 6.6 How they should be regulated

The emphasis of the regulatory framework in the future could be more definitely activity-based. From the point of view of public confidence and consumer protection, regulating *what* is done is to my mind more important than *who* does it (given that the same activity can be carried out by an individual, by an entity, by someone who has a professional qualification and title, or by someone who does not). Regulation by activity allows focus and consistency of regulation, as well as different consequences to be attached to different activities – leading to more targeted, proportionate and risk-based solutions.

Professional bodies could continue to award titles and determine training and accreditation requirements. Save in relation to reserved legal activities (where regulatory requirements would remain subject to approval by the LSB, or its successor), there would be no mandatory regulatory requirements, nor any need for statutory protection of any titles awarded. While there might be additional requirements attaching to professional qualification in respect of non-reserved legal activities, these would be a matter for individual judgement of the competitive benefit of such qualification and any additional protection voluntarily offered to clients. These consequences in respect of non-reserved activities need no longer be inevitably attached to authorisation in respect of reserved activities.

## 6.7 By whom they should be regulated

Regulation principally by activity also leads to the possibility of specialist regulators, and raises the thorny question of whether different regulators should be able to authorise in respect of the same reserved activity.

Reducing the complexity and overlap within the current regulatory framework suggests that serious consideration should be given to each reserved activity being authorised by only one approved regulator. Competition among providers is a legitimate public interest goal; competition among regulators is less easy to justify, given that consistency of approach and enforcement, as well as cost-efficiency, are then more difficult to achieve.

With some reserved activities, such singularity of authorisation would be easy to achieve (notarial activities can already only be authorised by a single approved regulator). True separation of regulation and representation would ease this process, but with other more common reserved activities – such as conveyancing, will writing and estate administration – challenges would be

presented. This might point towards a single regulator (a Legal Services Authority), with specialist sections for each reserved activity. Composite reserved activities, such as rights of audience or the right to conduct litigation, need not be authorised on a composite basis. Instead, specific rights could be authorised separately, such as rights to appear in the higher courts, or in patent and trademark matters.

Greater consistency in policy and implementation, as well as improved cost-efficiency, in regulation might be achieved through a single legal services regulator. This would represent a long-term goal, with a significant transitional role for the Legal Services Board. Alternatively, if the current multiplicity of approved regulators remains, the oversight role of the Board should, in my view, remain in place. This would provide assurance of consistency in regulatory policy and implementation across legal services. However, there is an additional need to address the cost-efficiency of legal services regulation, given that the multiplicity – and the disparity in the size and activities – of the current approved regulators results in fragmented and duplicated resourcing of regulation across the range of regulated activities. It could be worth exploring whether this might be achieved by extending the remit of the Legal Services Board or through, say, establishing a council of legal services regulators, which could achieve a critical mass of regulatory support across multiple approved regulators, leading to scale economies through co-location of resources and personnel, and the use of common technology and processes.

## 6.8 Summary

A possible new approach to legal services regulation could be summarised as follows:

### Public good reservations

Would require authorisation (individual or ABS) for, say:

- \* rights of audience
- \* conduct of litigation
- \* court-related reserved instruments
- \* law costs activities
- \* administration of oaths
- \* notarial activities
- \* immigration advice and services
- \* public law advice and services
- \* conveyancing services
- \* intellectual property activities

Authorisation to be provided by specialist approved regulators for each reserved activity

Provides before-the-event assurance and after-the-event redress

### Consumer protection reservations

Requires authorisation (individual or ABS) for, say:

- \* preparing a will or other testamentary instrument
- \* preparing/lodging power of attorney
- \* probate activities
- \* administration of estates
- \* insolvency practice
- \* claims management advice and representation

Authorisation to be provided by specialist approved regulators for each reserved activity

Provides before-the-event assurance and after-the-event redress

### Legal activities regulation

Includes all 'legal activities', as defined, but requires no prior authorisation other than for reserved activities

All legal activities subject to the jurisdiction of the Legal Ombudsman

LeO can refer authorised and otherwise regulated persons to their approved regulator for disciplinary matters, and all providers to the LSB/MoJ for adding to register of prohibited providers

**Stephen Mayson**

1 September 2013

[stephen@stephenmayson.com](mailto:stephen@stephenmayson.com)

[www.stephenmayson.com](http://www.stephenmayson.com)

## Bibliography

---

- Clementi, D. (2004) *Review of the Regulatory Framework for Legal Services in England and Wales* (London)
- Department for Constitutional Affairs (2005) *The Future of Legal Services: Putting Consumers First*, Cm 6679 (London, The Stationery Office)
- Genn, Professor Dame Hazel (2010) *Judging Civil Justice*, The Hamlyn Lectures 2008 (Cambridge, Cambridge University Press)
- Legal Services Board (2010) *The Regulatory Objectives* (London), available at: [http://www.legalservicesboard.org.uk/news\\_publications/publications/pdf/regulatory\\_objectives.pdf](http://www.legalservicesboard.org.uk/news_publications/publications/pdf/regulatory_objectives.pdf)
- Legal Services Institute (2010) *Reserved Legal Activities: History and Rationale*, available at: <http://www.stephenmayson.com>
- Legal Services Institute (2011) *The Regulation of Legal Services: What is the Case for Reservation?*, available at: <http://www.stephenmayson.com>
- Legal Services Institute (2012) *Improving Access to Justice: Scope of the Regulatory Objective*, available at: <http://www.stephenmayson.com>
- Leveson, B. (2012) *An Inquiry into the Culture, Practices and Ethics of the Press*, Volume I (London, The Stationery Office); available at: <http://www.official-documents.gov.uk/document/hc1213/hc07/0780/0780.asp>
- Mayson, S. W. (2013) *Legal services regulation and 'the public interest'*, available at: <http://www.stephenmayson.com>
- PLEAS (2007) *Developing capable citizens: the role of public legal education*, available at: <http://www.lawforlife.org.uk/wp-content/uploads/2013/05/pleas-task-force-report-14.pdf>
- PLENet (2009) *Public legal education: improving lives, empowering communities*, available at: <http://www.lawforlife.org.uk/wp-content/uploads/Public-Legal-Education-Improving-lives-empowering-communities.pdf>