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CONSUMER HARM AND LEGAL SERVICES

FROM FIG LEAF TO LEGAL WELL-BEING

Stephen Mayson

SUPPLEMENTARY REPORT of the Independent Review of Legal Services Regulation

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INDEPENDENT REVIEW OF LEGAL SERVICES REGULATION

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Preface

"Sometimes an expert non-lawyer is better than a lawyer non-expert."[a]

It is almost two years since the Final Report of the Independent Review of Legal Services Regulation was published (IRLSR 2020). The catalyst for the Review was the market study carried out by the Competition and Markets Authority (CMA 2016). The CMA concluded that the legal sector was not working well for consumers. In carrying out its work, the CMA made several references to consumer harm and detriment. So, too, did the Final Report.

However, what transpired in conversations following the Final Report was that the nature of consumer harm was largely being assumed or only illustrated. A core goal of regulation – protection for consumers from harm – faced some under-developed but important challenges. What exactly are the *types* of consumer harm in legal services, the *causes* of that harm, the *consequences* of experienced harm, and the particular *remedies* that might be available for it (depending on its nature and who caused it)?

This Supplementary Report to the IRLSR seeks to answer these questions.

The following pages identify two major categories of harm – structural and transactional. The first arises from the inability of far too many of our fellow citizens to access legal advice and support when they need it. It is described as 'unmet legal need' and, regrettably, it is persistent and growing over time.

Whereas structural harm results from an inability to access legal services, transactional consumer harm arises from the unsatisfactory engagement of them. Transactional harm manifests itself in a variety of failings or activities of the providers of legal services, including scams and dishonesty, incompetence, under- and over-engineering of services, over-charging, and poor service.

The Final Report emphasised the current 'regulatory gap' that creates a sector-specific framework that addresses 'regulated' providers (mainly lawyers) but cannot deal with 'unregulated', but nevertheless legitimate, providers of many legal services. The consumer harms identified in this Report can be caused by both regulated and unregulated providers.

However, the regulatory framework differs depending on whether the provider in question is regulated or unregulated. In relation to the former, the sector-specific framework of the Legal Services Act 2007 supports a regime of regulators who are able to authorise regulated providers, require those providers to make certain disclosures to consumers and to carry professional indemnity insurance, as well as submit to the investigation and resolution of unresolved complaints by the Legal Ombudsman.

Where harm is caused by unregulated providers, their principal protection arises under the Consumer Rights Act 2015. While this also imposes certain expectations on providers, the remedies generally have to be pursued by third parties or through private

a. Chief Judge Jonathan Lippman (New York Court of Appeals): see further paragraph 6.2.5 of this Report.

court action by consumers. Not surprisingly, these burdens mean that enforcement is patchy.

The main emphasis of both the sector-specific and general consumer law approaches is on 'dealing with' the provider rather than providing redress directly to the consumer who has suffered harm. These harms are likely to be continuing unresolved legal issues (because the provider has not dealt with the presenting legal need effectively or at all), economic loss, or consequential detriment for the consumer such as stress, ill-health, delays and lost opportunities.

For the most part, only economic loss will be remedied directly under the current approaches to regulation – though the Legal Ombudsman has some power to require rectification or compensation.

The Report finds that the fundamental weakness of the current regulatory approaches is their 'front-end loading'. They focus more on before-the-event requirements that reduce the *prospect* of harm, but leave consumers exposed and without redress when they try to pursue after-the-event redress for the *actuality* of harm suffered.

The current approaches also emphasise taking action against delinquent providers, which are usually undertaken by third-party regulators with limited powers to offer redress directly to individual consumers, or by the consumers themselves in (expensive and uncertain) legal action.

How individual consumers react to their presenting legal needs, and then seek – or fail to seek – advice and support, will depend on what type of consumer they are and their own legal capability. This Report identifies three broad types of consumer: the fully informed, rational consumer (broadly, the *homo economicus* of neoclassical economics), the ordinary consumer (broadly, the 'average' consumer of consumer protection legislation), and the vulnerable consumer.

Existing research of consumer behaviour suggests that we are all, in some way, likely to be vulnerable when addressing our legal needs. In these circumstances, vulnerability is universal and not exceptional. Regulation should therefore recognise this universality and not seek to treat vulnerable consumers as a separate sub-group.

When types of consumers are combined with degrees of legal capability, the Report suggests that four states of consumer engagement emerge: the empowered consumer, the self-representing consumer, the disengaged consumer, and the excluded consumer. Unfortunately, for those who have low to medium legal capability, the tendency will be towards disengagement and exclusion. This translates into unmet or unresolved legal needs for most people.

Even more unfortunately, the Report also suggests that the current structures of consumer protection (whether applying to the regulated or the unregulated communities of providers) exacerbate – or, worse, possibly even cause – this observable tendency towards disengagement or exclusion. In particular, their emphasis on the prevention of harm, sanctions against providers, transparency and disclosure requirements that increase the cognitive burdens on consumers, and reliance on consumers to assume the risk and cost of personal action when things go wrong, all contribute to an overwhelming and daunting sense of challenge.

Against this background, the Report offers an alternative approach. In affirming the conclusions and recommendations of the Final Report, it advocates for a shift in emphasis in legal services regulation. Primarily, it seeks a move away from the pursuit of a negative (the avoidance of consumer harm) to a positive. The outcome would be a positive state of 'legal well-being'.

Such a state is not so much about securing the *absence* of harm as about achieving the *opposite* of it. The concept of legal well-being imagines a state in which consumers can have confidence in their choice of legal advisers without burdensome enquiry about their regulatory status; in which the legal sector offers ease of access to advice, representation and document preparation; in which enquiry, engagement and redress are similarly less burdensome processes; and through which the legitimate participation of citizens in society is supported, in accordance with their legal rights and duties.

In promoting such outcomes, regulatory policy would need to accept that vulnerability is not exceptional, that *caveat emptor* (buyer beware) has no role in the engagement of legal services, that disclosure creates more difficulties than it solves, that competition in provision needs to be encouraged but cannot be relied on to result in fair dealing without some regulatory underpinnings, that legal aid, pro bono services and public legal education cannot close the gap in meeting unmet needs, and that qualified lawyers are not always the best providers of legal services.

In any consideration of whether consumers do, or are likely to, suffer harm in their use of providers of legal services, it is difficult to draw clear separating lines between the ideas (and ideals) of addressing unmet need and the challenges of 'access to justice'. For the purposes of this report, I have been guided by the following approach of the OECD (2019: page 24) to 'justiciable' problems[b]:

> access to justice "denotes the general subject of the extent to which citizens are able to gain access to the legal services necessary to protect and vindicate their legal rights"…. In functional terms, this does not mean that use of legal services is necessary to ensure access to justice, only that appropriate services are available for those who are unable to achieve otherwise appropriate solutions to justiciable problems.
>
> The concept of access to justice is thus closely linked to the constituent concept of legal need. In broad terms, legal need arises whenever a deficit of legal capability necessitates legal support to enable a justiciable issue to be appropriately dealt with. A legal need is unmet if a justiciable issue is inappropriately dealt with as a consequence of effective legal support not having been available when necessary to make good a deficit of legal capability. If a legal need is unmet, there is no access to justice.

The importance of this mission is well captured by further OECD work, in a message that resonates entirely with the direction of this Report (2021: pages 3 and 15):

> Effective and efficient justice systems and access to justice are crucial pieces of the institutional foundations underpinning inclusive economic growth, sound democracies, and a thriving investment climate. Justice helps to protect the social contract, uphold the rule of law and foster citizens' trust in public institutions.... [In 2020], more than 5.1 billion people worldwide still lacked meaningful access to justice.

b. This expression is intended to "describe problems that raise legal issues, whether or not this is recognised by those facing them, and whether or not lawyers or legal processes are invoked in any action taken to deal with them" (OECD 2019: page 58).

> This gap has been exacerbated by the COVID-19 pandemic and its economic fallout. With rising legal needs and increased pressures on justice systems, waves of social movements across the globe have revealed concerns over their limited effectiveness, responsiveness and accessibility. They have also highlighted uneven trust in justice as the guarantor of people's rights, with the potential of undermining trust also in other public institutions and, ultimately, democracy. As such, rebuilding trust between institutions and the citizens they serve will be important to build back better....
>
> The more people-centred a justice system is, the more responsive it will be to the legal and justice needs of individuals, contributing to fair outcomes and helping build just societies. Moving forward, shifting the focus to the people's perspective and making justice systems more accessible, effective and transparent will thus be essential for rekindling the bonds that hold our societies together, and for strengthening trust between people and public institutions....
>
> [All] aspects of life are impacted by laws, regulations, rights and responsibilities[c]. From the moment a person is born, through education, housing, employment, transport, health, to the end of life, the law impacts their day-to-day life and economic and social well-being. As such, legal and justice needs are common in the lives of most people. Addressing legal and justice needs demands access to public justice services and other dispute resolution mechanisms in order to recognise and obtain a remedy to the legal need in question, thus giving place to justice needs. The ability of the legal and justice system to effectively respond and address those needs for all people and generate fair outcomes is critical to ensure well-being, equal opportunity and access to public services. Conversely, the inability of justice systems to prevent or resolve people's legal issues can weaken the social contract and lead to unresolved grievances, instability, or even violence.

The persistent and increasing volume of unmet legal needs in England & Wales (and beyond) is arguably the greatest structural challenge facing the regulation of legal services and the performance of the legal sector in its widest sense. While the question directed to me following the publication of the Final Report ('Where is the evidence of consumer harm?') is apparently reasonable and legitimate, it turns out to be a red herring.

When so many citizens do not know that they have a legal need, when so many citizens who have legal needs turn away from seeking help from lawyers, when those who are dissatisfied with their use unregulated providers of legal services have no meaningful route to complaint or redress, when those who are dissatisfied with their use of regulated providers take no action and join the ranks of 'silent sufferers', it is hardly surprising that those most in need of support have no voice ... and so there is no evidence.

As Gillers suggests (2013: page 407):

> It may be that the truth or falsity of the prediction of harm cannot easily be verified (or verified at all), but that the level of harm if the prediction is correct but ignored is greater than the level of harm if the prediction is adopted but wrong. Therefore, the burden of disproving the prediction should lie with its opponents.

c. This is Hadfield's description of a 'law-thick' world (see Hadfield 2017).

But even then, waiting for disproof relies on proving a negative (there is insufficient harm) rather than securing a positive (public and consumer confidence in the rule of law and legal services, as well as legal well-being). We have waited for long enough.

The principal structural recommendation of this Report acknowledges that more lawyers, more pro bono services, more legal aid funding, more public legal education, more sandboxes, and improved legal capability will not – even collectively – close the gap between met and unmet legal needs. Nor can we continue to allow complexity of laws and legal services regulation and the relative inaccessibility of regulated legal services – whether for financial, social or cognitive reasons – to force people into either doing nothing or using unregulated providers.

The structural recommendation, therefore, is to extend the scope of regulation to allow competent providers who are not legally qualified to offer legal services in a sector-specific regulated environment. This might not fully close the gap between met and unmet need but it stands a better chance of slowing or reversing the increase in it than current approaches.

An increase in the number of regulated providers would also allow the natural forces of competition to influence market discipline, quality, efficiency and prices, to the benefit of consumers. However, this Report does not support free and unconstrained competition. The contribution of legal services to the rule of law and the fabric of society, and the vulnerability of the vast majority of the users of legal services, are too important to be left at the mercy of unfettered competition.

Accordingly, to advance the greater well-being of those who engage providers of legal services, this Report (reinforcing the conclusions and recommendations of the Final Report) also advocates for a single point of entry for regulation, registration and complaints about conduct and service, and the extension of mandatory consumer dispute resolution to complaints against all providers of legal services.

On closer examination, the 'protections' of the current framework for the regulation of legal services turn out to be little more than a fig leaf. The main force of regulation is applied to preventing harm and to dealing with delinquent providers rather than for the direct benefit of consumers who have actually suffered harm.

Further, although this Report focuses on harm caused to individual consumers, there is also little in the current regulatory framework that supports the pursuit of collective redress for one-to-many consumer harm that could be caused, say, by scams, dishonesty and mistakes perpetrated by one provider on many consumers – especially through the increasing use of online services.

If citizens cannot readily and effectively enforce or defend their rights, if their health and well-being are adversely affected by the effort of doing so, if they do not feel that their quality of life is enhanced by their successful interaction with the law (even in a positive life-event, such as moving home), then it does us as a society little credit to stand by and do nothing to improve their experience.

When a state supreme court judge in the United States says that the interests of justice now require 'breakthrough change' (see page 136), we know that the challenges are not merely national, and it is time to take notice. When an English judge says that the interests of clients are not best served when "professional, trained lawyers … behave like schoolchildren in the playground" (see page 11), it is time to take action.

We believe that in England & Wales we have the best legal system in the world, and some of the best lawyers. We are right to believe that. But we must also accept that our regulatory framework that oversees it is an emperor with precious few clothes on.

Stephen Mayson[d]
4 April 2022

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

Acknowledgements

This Supplementary Report has been a largely solitary endeavour, conducted through various iterations of Covid-19 lockdowns and isolation. Nevertheless, it has continued to build on the many meetings and submissions made during the course of the main independent review between 2018-2020.

I therefore gratefully acknowledge again the value of those contributions in shaping the content, concerns and possibilities explored in this Report. Similarly, I am grateful for the contributions and support of members of the Advisory Panel.

There are two other individual acknowledgements to make in relation to this Report. The first is to Crispin Passmore (former Strategy Director of the Legal Services Board and former Executive Director of the Solicitors Regulation Authority). He particularly encouraged me to think more carefully about the challenge of unmet need in the legal sector and the role of competition.

The second is to Gill Steel, a specialist in wills, trusts and estate planning. Gill helped me to sharpen the examples in Chapter 1 and so define more carefully the nature of the transactional consumer harms identified there.

As with the main review, I remain grateful to the UCL Centre for Ethics & Law, under the leadership of Professor Iris Chiu and Dr Alan Brener. Thanks also to the UCL communications and media teams, particularly Jessica Luong, for preparing the report for publication.

Needless to say, notwithstanding the help and insight offered, this Report purports to represent only my views, and any errors and imperfections are mine.

SWM

Glossary

The following terms and abbreviations are used in this report.

ABS	alternative business structures (licensed bodies under Part 5 of the Legal Services Act 2007), not wholly owned or managed by lawyers and authorised for one or more of the reserved legal activities
BEIS	Department for Business, Energy & Industrial Strategy
BSB	Bar Standards Board, the regulatory body for barristers
BTE	before-the-event
CDR	consumer dispute resolution
CILEX	Chartered Institute of Legal Executives, the professional body for chartered legal executives
CMA	Competition & Markets Authority
Consumer Panel	see LSCP
CPS	Crown Prosecution Service
CPUTR	Consumer Protection from Unfair Trading Regulations 2008, S.I. 2008 No. 1277
CRA	Consumer Rights Act 2015
HiiL	The Hague Institute for Innovation of Law
IAALS	Institute for the Advancement of the American Legal System
IRLSR	Independent Review of Legal Services Regulation
lawtech	technology that provides self-service direct access to legal services for consumers by substituting for a lawyer's input, and can be experienced by the consumer without the need for any human interaction in the delivery of the service
LeO	Legal Ombudsman, established by the OLC to operate the ombudsman scheme rules in accordance with section 115 of the Legal Services Act 2007
LSB	Legal Services Board, the oversight regulator for legal services established by section 2 of the Legal Services Act 2007
LSCP	Legal Services Consumer Panel, established by the LSB under section 8 of the Legal Services Act 2007 to represent the interests of consumers
non-reserved activities	legal services that are not reserved legal activities (see RLA)
OLC	Office for Legal Complaints, established by section 114 of the Legal Services Act 2007 to administer the LeO ombudsman scheme
reserved activities	reserved legal activities, as defined in section 12 of the Legal Services Act 2007, namely: the exercise of a right of audience; the conduct of litigation; reserved instrument activities; probate activities; notarial activities; and the administration of oaths
SLCC	Scottish Legal Complaints Commission
SRA	Solicitors Regulation Authority, the regulatory body for solicitor

CHAPTER 1

TYPES OF CONSUMER HARM AND THEIR EFFECTS

1.1 Introduction

The first recommendation of the Final Report of the Independent Review of Legal Services Regulation is that the primary objective for the regulation of legal services should be promoting and protecting the public interest (IRLSR: paragraph 4.2.1). This is elaborated to incorporate two aspects of the public interest:

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

(b) the private benefit of appropriate *consumer protection*.

The first underpins the very fabric of society, providing national and personal security, and confidence in the maintenance of all of our personal, economic and social relationships.

In relation to the second, the Final Report suggests that regulation is justified to secure the private benefit of appropriate consumer protection, where incompetent or inadequate legal services could result in harm or detriment to citizens, and particularly where such harm or detriment could be irreversible or imperfectly remedied.

However, this second aspect also begs a question about the first. If citizens are not able to access legal advice and representation, their legal needs remain unmet. The predictable and enforceable ordering of relationships in accordance with legal rights and duties is undermined. At that point, so, too, is the rule of law.

There is therefore a public benefit in regulating the legal services sector in such a way as to secure the public good of the rule of law, sound personal and institutional relationships, and confidence in economic productivity. This is in addition to the private benefit of protecting consumers from harm.

There are accordingly two perfectly reasonable questions to ask in relation to regulating legal services in such a way that public and consumer harm and detriment is minimised. First, what, exactly, are the types of harm or detriment to which the public and consumers are exposed? And then, second, what are the cost-effective ways of protecting them from the risk of such harm or detriment arising or their consequences?

This Supplementary Report will seek to answer both questions. Perhaps not surprisingly, they are not straightforward. In particular, evidence of the extent of any given consumer harm in the market is often difficult to come by – particularly when they

arise from the actions of providers who are not already subject to sector-specific regulation[1].

These questions also beg further enquiry about the nature and extent of the consequences of actual or perceived harm. To some extent, these consequences manifest themselves as unmet, or differently met, legal need. In other words, consumers have not realised that they have a need for legal advice and representation, decided consciously not to seek it, have not for some reason been able to access it, or decided (consciously or otherwise) to seek it from those who are not authorised and regulated as legal practitioners[2].

In short, we need to understand the nature of harm or detriment to which citizens are exposed as consumers of legal services, how and why that exposure arises, the possible effects of it, and what can or should be done to address those risks.

Nine distinct types of consumer harm are identified in paragraph 1.2. They range from inability to access legal services, deliberate scams and dishonesty, through incompetence, to over-charging and poor service. The effects or consequences on consumers of the identified harms can be broadly analysed in three categories: unresolved legal need; economic loss; and consequential detriment. These are considered in paragraph 1.3.

1.2 Types of harm

1.2.1 Introduction

Harm and detriment can arise in many different forms and circumstances, and the effects of that harm may vary depending on the nature of the consumer (this is picked up in Chapter 3). In the ordinary meaning, 'harm' usually refers to a physical injury or loss, and is often deliberately inflicted. The meaning of 'detriment' is sometimes taken to be synonymous with harm, but can also extend – as I intend it here – to disadvantage, prejudice or disservice to a citizen's best interests.

It is important in the context of this Report to draw a distinction between any harm or detriment arising from the underlying legal need (such as domestic abuse, or loss of home or employment) and any harm or detriment arising from the provision *or lack of provision* of legal services in the pursuit of that legal need. This is more likely to arise from, say, not being able to secure advice at all, receiving incompetent or inadequate advice and representation, or paying too much for legal services.

There may, nevertheless, be some overlap. The impacts and effects can be very similar[3] and may, indeed, result from a combination of both causes. While physical injury in the procurement and performance of legal advice and representation is rare, physical injury to a client might well arise, for instance, if incompetent or ineffective advice results in

1. Cf. IRLSR (2020: paragraph 3.9) on the nature and extent of 'unregulated' provision of legal services.
2. Cf. IRLSR (2020: paragraph 2.3) on legal needs and sources of help used by consumers.
3. For example, Wintersteiger in relation to harm and detriment caused by the use of legal services providers reports that the "most common aspects were stress-related ill-health, loss of income, and confidence; followed by fear, physical ill-health and family breakdown" (2015: paragraph 3.6).

aggravated abuse following a complaint of domestic violence. In this case, there is harm both from the underlying legal need (domestic violence) and from the provision of ineffective legal services (aggravated abuse).

The OECD adopts the following definition (2014: pages 3-4):

> 'Consumer detriment' means the harm or loss that consumers experience, when, for example, i) they are misled by unfair market practices into making purchases of goods or services that they would not have otherwise made; ii) they pay more than what they would have, had they been better informed, iii) they suffer from unfair contract terms or iv) the goods and services that they purchase do not conform to their expectations with respect to delivery or performance. This may occur, for example, when the goods or services that they have purchased do not conform to their reasonable expectations with respect to quality, performance or conditions of delivery. This also may occur if the goods or services are not provided in a timely fashion, are defective or dangerous, do not meet operational expectations or are inconsistent with information provided to the consumer prior to the transaction. Consumer detriment can take many forms: it can be structural in nature (i.e. affecting all consumers) or personal; apparent to consumers or hidden; and financial or non-financial. Consumer detriment may be apparent to consumers immediately, may take time to emerge, or remain hidden.

In line with later OECD thinking, this Report will "focus on those types of detriment that occur due to a market failure or an action or inaction by a business (or businesses), rather than on detriment associated with consumer misjudgement or regret[4]" (OECD 2020: page 10).

For ease of reference, this Report will refer to 'consumer harm', with the intention that it is understood to incorporate all forms of harm and detriment. In short, it is meant to include all circumstances in which consumers are in some way in a worse position after their interaction (or inability to interact) with a provider of legal services than they were beforehand or would have been without it.

For the purposes of analysis, nine types of consumer harm are identified here. They can all arise in legal services, and the regulated or unregulated status of the provider is not at this stage a relevant consideration: all providers are capable of causing the harms identified. Also, the different categories are not hermetically sealed or mutually exclusive: it is quite possible that elements of one will shade into another, or even lead to another or incorporate elements of it.

The nine types of harm arise for different reasons, and there is an initial – and fundamental – distinction between the first and the remaining eight. The first type of harm results from systemic, or structural, effects at the level of the legal services sector or market. The others arise from a specific transactional engagement between a provider and consumer.

4. For this reason, I would propose not to regard as a consumer harm the idea of 'indulgence', namely "agreement by a professional to carry out a course of action which is requested by the client but which the professional, on the basis of his specialized knowledge, judges will prove to be against the client's interest" (Matthews 1991: page 740). It may be that such action could be a breach of professional ethics (not acting in the client's enlightened best interests), but this might not always be clear.

1.2.2 Systemic or structural causes of harm

1.2.2.1 The systemic deficiency

The evidence of the nature and extent citizens' unmet legal needs has been consistent, persistent, and replicated worldwide.[5] The consequences are significant and serious for society, as well as for the individuals involved (as powerfully expressed in this judicial observation from the United States[6]):

> Many thousands of our ... most vulnerable residents have serious legal problems and cannot get any help in resolving them. Many don't even realize their situations have a legal dimension. Others don't know where to seek help or are too overwhelmed to try. Meanwhile they are systematically denied the ability to assert and enforce fundamental legal rights, and forced to live with the consequences.

The acknowledgment of 'systematic denial' and being 'forced to live with the consequences' should send shivers down the spine of anyone with a concern – let alone a responsibility – for supporting the constitutional principle of the rule of law (as in section 1(1)(b) of the Legal Services Act 2007).

The particular harm here is the persistence of unmet legal needs resulting from the inability of consumers to access legal advice and representation because it is, for any reason, not available to them. This *absence of access and availability* is a systemic deficiency when it arises because the sector (or market) is not supplying any or enough providers of legal services who are competent, local, accessible, and affordable for the legal needs in question.

1.2.2.2 The nature of unmet legal need

For the purposes of the analysis in this Report, I wish to distinguish between 'unmet legal need' and 'unresolved legal need'. The latter will be considered in paragraph 1.3.1 below.

First, we should perhaps be clear about the nature of a 'legal need' before considering whether or not it is unmet. On this, the OECD suggests (2021: page 24; emphasis in original):

> a ***legal need*** refers to *a problem with a legal dimension* in various sectors (e.g. health, social, business, family and neighbourhood), whether or not this is recognised by those facing them. In turn, addressing legal and justice needs demands access to public justice services and other dispute resolution mechanisms in order to recognise and obtain a remedy to the legal need in question, thus giving place to ***justice needs***.... Some of the most prevalent legal and justice needs across countries globally include: disputes related to consumer issues, neighbour affairs, debts and contract enforcement, family, housing, employment, social safety net assistance and nationality. Unlike facing criminal procedure, many people do not recognise the legal dimension of their civil problems; have difficulties to precisely define it; and encounter multiple and compounded barriers in accessing justice. Furthermore, there is substantial evidence that both legal and social issues tend to trigger others, having a cascading and clustering effect.

5. See, for example, SRA (2017), World Justice Project (2019), YouGov (2020), and HiiL & IAALS (2021).
6. See www.courts.wa.gov/newsinfo/content/taskforce/CivilLegalNeeds.pdf, page 5.

The next point to make here, as Sandefur explains, is that not all instances of citizens not having legal advice or representation should be characterised as 'unmet legal need' (2016: page 451):

> The conventional understanding greatly oversimplifies the idea of 'need.' If a justice problem is a situation that has civil legal aspects, raises civil legal issues, and has consequences shaped by civil law, we can consider a legal need as a special case of this phenomenon: a legal need is a justice problem that a person cannot handle correctly or successfully without some kind of legal expertise. Not all justice situations are legal needs in this sense. People are perfectly capable of handling some situations on their own without understanding the legal aspects of those problems, in the sense that the problem is resolved in a way that is roughly consistent with the law but without reference to it or contact with it....
>
> The ... challenge is figuring out when these informal solutions are consistent enough with formal norms not to threaten the rule of law and social order[7].... Sometimes we do want to make sure that people resolve their justiciable problems with explicit reference to law. For those situations where we do, people's justice situations become legal needs.

The key, then, to a 'legal need' is that the need engages an explicit reference to law.

A further point, though, is that a need with an explicit reference to law does not have to be met only with the assistance of a lawyer: it must simply engage 'some kind of legal expertise'. Consequently, not having access to a qualified lawyer will not necessarily mean that the legal need is unmet.

This is important because the evidence suggests that, over time, there are fewer lawyers available and willing to act in relation to the sort of criminal and civil law problems most often faced by individual 'consumers'. Available data shows that lawyers and law firms turn increasingly to revenue (and profit) from serving commercial and organisational interests and away from individual consumers' needs.

In England & Wales, as an admittedly rough-and-ready proxy, 'large' law firms tend to deal with the legal needs of businesses and institutions, and the smaller firms with the needs of individuals[8]. Taking firms with more than 11 partners as a working definition of 'large', the Law Society's annual statistical reports show that, in 1988, only 367 firms of 8,216 (4.5%) solicitors' firms were large. They employed 33.6% of all practising solicitors in private practice.

Some 30 years later, in 2019, the number of solicitors in private practice had increased by more than 52,500 (that is, more than doubled from 1988). However, the distribution had changed such that there were then 424 'large' firms (up 15.5%) but still only representing 4.5% of the total of 9,339. These large firms, however, now employed

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7. This is a point that Sandefur picks up in later work. As she points out, the way to deal with citizens' unresolved issues is not necessarily to describe them as 'unmet legal needs', for which the remedy is assumed to be more legal services. Instead, they can be identified as 'unresolved problems governed by civil law'. She suggests that what is needed is a wider range of options leading to "results that satisfy legal norms" (2019a: page 50).
8. This can only be an approximation because some large firms are now serving the 'process' market for such matters as residential conveyancing and personal injury claims. Equally, though, some small firms are focused on specialist services to businesses and institutions. The text therefore necessarily adopts a 'swings and roundabouts' approach based on orders of magnitude rather than precise numbers.

54.2% of practising solicitors. In other words, about 70% of the increase in the number of solicitors in private practice between 1988 and 2019 had located in 'large' firms – meaning that these large firms had, on average, grown relatively even larger.

This trend shows that the 'centre of gravity' in private practice has shifted further towards the generally more lucrative areas of business, commercial and institutional law, and away from the needs of individual consumers and their everyday legal problems.

There are two particular consequences of this shift. First, in relation to criminal legal aid, the report of the Independent Review of Criminal Legal Aid records that, on any measure, there has been a significant decline in the number of solicitors' firms engaging in criminal legal aid – in excess of 20% (Bellamy 2021: page 47).

Second, gradual shift in provision by qualified lawyers has led to an inevitable increase in the number of litigants-in-person (see, for example, Moorhead & Sefton 2005 and Grimwood 2016, and paragraph 3.4.2 below).

These trends are not confined to England & Wales. A recent analysis in the United States[9] shows that, between 2007 and 2017, while the value of fee income increased in all categories, the percentage of lawyers' revenues from individuals declined from 29.1% to 25.4%, while revenues from businesses increased from 66.1% to 69.6%. On a per capita basis, the average spend by individuals on legal services declined marginally over that period from $222.40 to $221.50 with a conclusion that "it is near certain that a growing proportion of people are, with each passing year, being priced out of access to legal services".

In the face of these trends, it is simply not credible to claim that the solution to unmet legal need lies in more qualified lawyers, since the evidence is that the majority of any further increase in numbers would almost certainly gravitate towards the more remunerative work for businesses and institutions.

In summary, a legal need will be unmet only if it does not engage *any* kind of legal expertise or experience. This outcome therefore arises in a different way from the circumstances of transactional causes of harm that will be identified in paragraph 1.2.3 below. Here, harm arises from *not* seeking or being able to access legal advice, assistance or representation. In paragraph 1.2.3, unresolved legal need arises *from or because of* the engagement of such expertise.

On this basis, unmet legal need could arise, for instance, because of consumers:

(a) not realising that there is a legal problem: as Sandefur expresses it (2016: pages 448-449): "Among the most important reasons that people do not take their justice problems to lawyers or other legal professionals is that they usually do not think of the problems as legal [and] problems that look legal to lawyers do not seem particularly legal to the people who experience them";

(b) looking for, but not being able to find, legal advice and representation (such as facing an 'advice desert' caused by an absence of available providers);

9. See https://www.legalevolution.org/2022/01/eight-updated-graphics-on-the-us-legal-services-market-285/#more-16759.

(c) not realising that help is available or thinking that legal help is not available to them[10];

(d) not knowing what to do;[11]

(e) thinking that seeking legal advice or pursuing legal action will be too stressful;[11] or

(f) thinking that seeking legal advice or pursuing legal action will cost too much.[11]

There is no doubt that unmet legal need can create harm to consumers. For the most part, that harm will arise from the underlying legal need itself, or because the failure to address it exacerbates that underlying need and leads to further harm (such as repeated instances of domestic violence, eviction for unpaid rent, or compounding interest on unpaid debt).

In short, the potential harm of unmet need is that the consumer's legal rights remain unenforced, that their innocence or lack of culpability is not proved, or that the outcome of their failure to engage any type of legal expertise is that their situation becomes worse than it would have been otherwise.

As understood here, 'unmet legal need' is extensive and serious. It imposes costs and disadvantages on individuals, families and society as a whole. It is a longstanding challenge for which legal aid, pro bono advice and public legal education can offer some relief (though cf. paragraph 6.2.4), but cannot address all needs.

An increase in the number, type and distribution of suitable providers might offer the best prospects for success here (cf. footnote 7 above). This will necessarily increase the number of providers in the sector, and competition might well result. This will not inevitably be a bad thing if appropriately regulated market forces do their work in applying discipline to the sector in terms of availability, quality and price (see paragraph 2.3.2 below).

1.2.3 Transactional causes of harm

Unlike systemic causes of harm, transactional causes of harm arise from the engagement by a consumer of a provider of legal services. They arise from the particular circumstances or experience of a specific engagement or transaction.[12]

In order to illustrate the types of transactional harm that are identified in the following paragraphs, I am going to assume a consumer transaction in which the buyer (C) contracts for the preparation of a reasonably straightforward will and lasting power of attorney (LPA) by a provider (P) in return for a fee of £499.[13]

10. Cf. footnote 6 above.
11. These causes are taken from the analysis by McDonald & People (2014) of the reasons given by respondents for taking no action in response to legal problems: see further paragraph 3.4.4 below.
12. While not completely following their typology, I am grateful to Siciliani et al (2019) for their many insights into consumer harm on which this section of the Supplementary Report is based.
13. See IRN's *UK Wills, Probate & Trusts Market Report 2022*, which reports that the value of the wills, probate and trusts market is estimated at £2 billion in 2021, with contentious work increasing and the

1.2.3.1 Scam

Arguably the most extreme form of consumer harm is to pay for a product or service that is not delivered at all. With a scam, there is never an intention on the part of the provider to supply any product or service in return for the price paid. It is, in the vernacular, a rip-off.

For example, P might be an online provider who takes payment from C and then intentionally fails to deliver any final documents at all, or the will but no LPA. Alternatively, P could be knowingly offering faulty online software resulting in documents that are so deficient that they are of no legal effect whatsoever. This could arise, for instance, where the service makes no attempt to follow C's instructions or to ensure that the will is properly signed or witnessed.

While consumers can tell whether or not they have received the documents that they have paid for, unfortunately they will not always know (and may never know) that they have been otherwise scammed. Consequently, those who insist on evidence of harm before contemplating any regulatory intervention are, necessarily, not always going to find it. A consumer cannot report harm of which they are not aware. The harm and lack of consumer protection is then likely to be perpetuated.

Even if consumers do become aware that they have been ripped off, there is evidence that they are then often too embarrassed to follow up or report it[14]. Also, "consumers may be unwilling to admit to having experienced detriment, even when alerted to it, as they may employ psychological defence mechanisms to rationalise their past decisions" (OECD 2020: page 11). Again, therefore, it is not surprising that there may only be limited direct evidence of consumer harm.

1.2.3.2 Incompetence

Particularly with credence goods and services, consumers rely on the supposed competence of the provider. However, where the provider is incompetent, the product or service delivered to the consumer will be worthless because it does not address the presenting client need.

Alternatively, the work done could reflect such a level of incompetence that the provider could never address the client's need or, say, P presents documents that fail to give effect to C's wishes (for instance, by not properly identifying relevant property or beneficiaries).

Consumer harm caused by incompetence could be either knowing or inadvertent. Unlike a scam, therefore, there might not necessarily be an overriding intention to harm the consumer. In addition, there are degrees of incompetence. At one extreme would be the completely incompetent, when providers are aware that they do not have the

use of solicitors for will-writing declining from 56% to 52% in a year: http://www.irn-research.com/news/wills-probate-trusts-market-passes-2bn/#.

14. See OECD (2005), paragraph 3.1.

relevant knowledge or experience to handle the matters in question, or even completely fail to recognise that they do not have the relevant competence.

At the other extreme, there might be a slip-up in relation to a part of the overall service. Such a slip-up could include, for example, P failing to check C's mental capacity, overlooking a relevant tax issue, or adopting ambiguous or conflicting drafting. There might also be situations where the competence and quality of what is supplied is not in doubt: the incompetence lies in what is *not* supplied, such as P not including one or more of C's specific bequests or failing to offer relevant advice.

As with a scam, though, consumers may never realise that the service for which they have paid and on which they have relied is harmful, worthless or less than fully effective because of the provider's incompetence. Similarly, therefore, consumers cannot report harm of which they are not aware, and limited direct evidence of such harm might exist.

1.2.3.3 Dishonesty

Dishonesty is treated as a separate category because there may have been no initial intention to take advantage of the consumer (unlike a scam in paragraph 1.2.3.1 above), and the dishonesty might not relate to the professional competence of the provider (unlike incompetence in paragraph 1.2.3.2 above).

For example, a fundamental type of dishonesty in legal services is the diversion of client money or assets to the personal benefit of the provider.[15] In the case of C's will, it could relate to P later inserting into the will, without C's knowledge or consent, a clause that leaves a legacy to P, or that appoints P as the executor (putting P in a position where as executor the provider can later divert estate funds or assets for their own use).

Dishonesty can occur both during the client's lifetime (such as forging a will or coercing the client to name the provider as a beneficiary) and afterwards (such as stealing from the client's estate). Professional qualification and being regulated are not guarantees of consumers avoiding dishonest activity by providers – though the remedies might be different (see paragraphs 4.2.1(3) and 4.3.1(3) below).

1.2.3.4 Under-engineering (inadequate advice or service)

In these circumstances, consumers receive less by way of product or service than their legal needs require or was promised by the provider. This is also described as 'under-treatment'.

15. See, for example, https://www.legalfutures.co.uk/latest-news/leading-criminal-law-solicitor-struck-off-over-100-gift (2 March 2022), where a solicitor tried to persuade a client to make a 'thank you gift' of £100 to cover travel expenses that were also claimed from the Legal Aid Agency. For a typology of dishonesty in a professional (healthcare) context, see Gallagher & Jago (2016): they include dishonesty by commission (telling untruths), omission (not telling the truth), impersonation (assuming the identity of another person), theft, fraud, and academic dishonesty (through, for example, cheating, plagiarism and bribery).

This type of harm will arise where, for instance, consumers are:

(a) not advised of risks in unfamiliar transactions[16];

(b) misled into believing that price is a proxy for quality: C's enquiries have suggested that the 'going rate' for a will and LPA is around £499, and therefore assumes that all firms charging that amount must be providing similar quality, whereas P does not have the experience or levels of service to match competitors' quality;

(c) told that their instructions will be given bespoke and individualised attention, whereas in fact their instructions are not followed or documents are simply the product of a standard 'boilerplate' approach: C is led to believe that his or her particular circumstances and needs will be reviewed and considered carefully in the preparation of the will, but the document (although effective for C's purposes) is produced using a template or document generation system that takes no account of those circumstances and needs at all;

(d) the victims of 'cut and paste' approaches to document generation[17] that results in inconsistencies, irrelevancies, omissions, ambiguities, contradictions, and unnecessary complexity; or

(e) reluctant to pay what they perceive as high prices for add-on products or services and therefore forgo a desirable benefit: C is aware that P's annual will-storage fee of £99 is above the market rate and therefore declines the add-on service, then creating a risk of losing or misplacing a valid will.

The issue here is not so much that consumers are over-charged for what they were *expecting* to receive. The agreed price might well be in line with usual market practice. It is that, for the agreed price, the consumer did not *actually* receive the expected level of quality or service.

Again, not only has the consumer paid over the odds for the product or service actually received, but that product or service necessarily does not fully meet their expectations. Indeed, the engagement of P has prevented C from using a different provider who could definitely (and fairly) have met the relevant needs and expectations at the same price.[18]

1.2.3.5 Over-engineering (excessive advice or service)

This is the converse of inadequate or under- treatment – hence it is also described as 'over-treatment'. Consumers are offered, receive and pay for more quality than they need. In many ways, this is a more problematic form of harm. Almost by definition, the

16. See, for example, https://www.lawgazette.co.uk/news/solicitor-leaves-profession-after-clients-lost-money-on-unfinished-flats/5111696.article (2 March 2022), where a solicitor failed to advise adequately on the risks of a development project and his clients were saddled with full ownership before the development was completed and the developer went into liquidation.
17. See SRA (2022) referring to an overly mechanical 'copy-and-paste' approach.
18. Pleasence & Balmer (2019: page 143) write: "When people seek help from an inappropriate source, it diminishes the likelihood that they will go on to obtain appropriate aid."

product or service supplied will have met the underlying legal need of a consumer, so they are likely to be unaware that they have been over-sold.

Excessive advice or service is likely to arise where, for instance, consumers are:

(a) persuaded to pay an all-in price that incorporates more product, services or quality than they need (including, for example, not paying separately for an add-on service but having it unnecessarily included in an all-inclusive price): C's fixed price of £499 in fact includes an element of fee for P considering estate planning considerations that are irrelevant given the likely value of C's estate);

(b) the subject of boilerplate documentation[19]: failing to remove irrelevant clauses can result in a document that addresses irrelevant considerations (such as P including unnecessary complexity or 'gold plating' for residual bequests to C's parents who have already died, or tax mitigation and trusts where C's estate involves only modest assets);

(c) involved in 'bad-tempered litigation', where the actions of lawyers drive up the costs of dispute resolution: this might be because they fail to delegate work to less expensive members of staff, spend too much time on research and investigation or on reviewing evidence, or send too many staff to a hearing (see *Crypto Open Patent Alliance* v. *Wright* [2022] EWHC 242, where the judge penalised the claimant on costs and lamented the "mud-slinging (on both sides)", and could not understand why "professional, trained lawyers … think it is appropriate to behave like schoolchildren in the playground").

The risk of this type of harm is greater in the case of credence services, which many legal services typically are. This is because the services need to be bundled in two ways that increase the consumers' risks: first, the provider must 'diagnose' the issue faced and then, second, provide the appropriate 'treatment'.

Consumers are therefore at risk of providers over-diagnosing the extent of the treatment required (the excessive or over- treatment that is the subject of this paragraph). Perhaps C does not really need a trust that P recommended. There also remain the risks of over-pricing (cf. paragraph 1.2.3.6 below) and of inadequate delivery relative to the diagnosis (cf. paragraph 1.2.3.4 above).

Short of retaining a separate independent adviser to determine the nature and extent of the legal services required in the consumer's specific circumstances, it is unlikely that the consumer can – without additional cost – mitigate the diagnosis risk. The consumer's trust must lie with a single provider. I shall address later the ways in which such trust might be assured (see paragraph 6.4.3.2 below).

19. Removal of standard clauses can amount to under-engineering (cf. paragraph 1.2.3.4 above) by failing to take into account other relevant considerations, such as appointing guardians for children, or providing for residuary estate or the death of beneficiaries before the testator; and cf. footnote 17 above in relation to cut-and-paste clauses.

1.2.3.6 Over-charging

Over-charging can take a number of forms. It will typically arise, for example, when consumers:

(a) are charged more for a product or service than other consumers would be for a comparable quality of product or service (also sometimes referred to as 'price gouging'): the 'going rate' for C's will and LPA might, for instance, be £299; or

(b) pay for time not actually incurred on their work (resulting from, say, the 'padding' of chargeable time recorded[20]).

These are distinct situations where the nature of the consumer harm relates to the price paid. The competence of the underlying service or its 'engineering' is not in question.

There are other circumstances, though, in which the 'real underlying harm' will result in consumers effectively being overcharged for the product or service received. This can happen, for example, where they:

(i) pay for a level of quality that turns out to be below that promised by the provider: as with incompetence (paragraph 1.2.3.2 above) and under-engineering (paragraph 1.2.3.4 above), P's final documents might not in fact give effect to C's wishes so that C does not receive value of £499; or

(ii) end up paying additional, hidden or opaque fees for add-on products or bundled services that they had not expected or needed (see also paragraph 1.2.3.7 below), say where P's terms and conditions signed C up to an ongoing contract for will storage at £99 a year.

Not only do consumers in these situations suffer economic detriment by paying more for legal products or services than they need to, but they may also receive a sub-optimal (or even wrong) solution to their legal needs. For the purposes of this paper, the consumer harm in these particular situations is assessed by reference to the real underlying harm: the overcharging is a further *consequence* of that harm.

The exposure to over-charging is particularly acute in the case of professional services that are 'credence' goods whose quality cannot be verified by a consumer in advance and, often, not even afterwards.

It is important to emphasise here that the over-charging in question must be considered relative to the provider's own level of charges. It does not refer to a situation where, in a competitive market, one provider (P1) charges more than another (P2): because of relative overheads, P1's higher charge might still represent a lower level of profit margin than P2's. Even if it does not, though, in a competitive market it does not mean that P1 is deliberately over-charging: uncompetitive pricing is not a 'harm' in the context of this Report.

20. For reported recent examples, see footnote 79 below, and (in a case that is akin to a scam but without evidence of an original intention not to deliver service) https://www.legalfutures.co.uk/latest-news/solicitor-who-took-10000-fee-and-then-ghosted-client-struck-off (28 February 2022).

1.2.3.7 Sub-optimal choices

This paragraph is aimed at a range of circumstances in which consumers are encouraged, whether knowingly or unknowingly, to make sub-optimal choices in their procurement of legal services. For explanatory purposes, these are grouped into four categories: misleading behaviour; confusing terms; voluntary add-ons; and hidden terms or intentions.

(a) *Misleading behaviour:* providers intentionally set out to distort consumers' decision-making or actions. In all cases, the consumer is not in a position to make an informed, optimal choice of provider because not all of the relevant information and factors are presented in a way that allows such a choice to be made at the time. Any form of misrepresentation by the provider would fall into this category, including, for example, claiming to be qualified, authorised or otherwise regulated when not, or including invented 'successes' for clients.[21]

This can arise because the provider *overstates the risk* to the client in one course of action versus another, encouraging the buyer to agree to more extensive services than those actually required (cf. paragraph 1.2.3.5 above). A similar tactic in will-writing services would be to include P by default as the executor (and possibly with an additional charge payable if C's family later require P to renounce the executorship), to suggest that such inclusion is 'normal market practice', or to claim falsely that relatives may not act as executors.

This category can also include high pressure '*drip pricing*', where consumers are initially enticed by a base price that cannot realistically address most people's actual needs, and the provider then trades up the consumer's expectations and responses to more extensive and expensive products and services.

For example, P's website tempted C to approach P on the basis that a 'simple' will would cost £19.99. C was then persuaded that additional clauses for guardianship for children and specific bequests were required, as well as a mirror will with a spouse, will storage, and the LPA.

Alternatively, the provider can later deny that elements of product or service that the consumer believed were included in the base price were covered (after all, what is a 'simple' or 'straightforward' will?), and require the consumer to pay more.

Further misleading behaviour can include incorporating *unfair conditions* into the terms of engagement (such as waiver of cancellation rights) that are then themselves waived – but only if challenged by the consumer.

Finally, the provider's terms of business or engagement can *misrepresent or fail to signpost remedies or redress* that the consumer can pursue if dissatisfied with the provider's products or services.

(b) *Confusing terms:* providers can intentionally set out to make it difficult for consumers to make informed and comparative decisions. This will typically arise from complex pricing structures, menu pricing, and contingent pricing. All make

21. See, for example, https://www.legalfutures.co.uk/latest-news/solicitor-made-up-court-wins-for-facebook-and-practised-unauthorised (25 February 2022).

it difficult for consumers to assess in advance the cost involved in agreeing to proceed.[22] In some cases – say, pre-paid probate and estate administration charges payable by instalments over a period of time, perhaps backed by a credit agreement – it can be difficult to establish what services are covered by the arrangement or what would happen if the provider became insolvent.

(c) *'Voluntary' add-ons:* terms of engagement for legal services can incorporate a number of 'add-on' charges that are apparently voluntary (that is, subject to the client's choice or ability to avoid), but which can easily become binding obligations that the client in fact has no option or capacity to avoid. These can include, for example, late-payment charges; fees for the transfer of funds; additional charges for copies of documents; insurance premiums to cover risks in respect of which the provider is not willing to give definitive advice; penalties for withdrawing from a contract for continuing services. It is not that such charges are wrong but that the client is under the impression that they can all be avoided when, in their particular circumstances, they cannot.

(d) *Hidden terms or intentions:* we know from many types of consumer transactions that 'the small print' can hide in plain sight a number of unwelcome terms and conditions, or limitations of liability, that are not explicitly brought to a consumer's attention at the time of engagement but are later relied on by the provider to thwart the consumer's expectations[23]. Many of the aspects of voluntary add-ons described above can equally be hidden in such small print. Further, these terms can be expressed in confusing language and so be even more opaque – even to those rare consumers who do in fact read the small print.[24]

Rather than small-print terms that are 'hidden in plain sight', the provider might offer a low price to a consumer as a form of 'bait', with the hidden, unexpressed intention of selling other services. For example, P might offer C the will and LPA for a market-reduced price of £399, rather than £499. P then seeks to sell other products and services such as a funeral plan or a life assurance policy from which P will recover more than the £100 forgone on the core transaction. Such harm would be compounded if P then used under-experienced staff, boilerplate

22. In 2013, the Office of Fair Trading described as 'confusopoly' circumstances in which firms present the attributes of products or services, or their pricing, in unnecessarily confusing ways (OFT 2013: page 1). This is intended to make it difficult for consumers to compare prices, and so reduce the need for firms to compete on price. In some ways, this appears to be the response of many law firms to requirements to increase transparency by disclosing prices in advance. The OFT explained that the 'opoly' element was intended to refer to situations in which a market was dominated by a small number of providers engaging in the practice of confusion. Given that the legal market is different, I would adopt the slightly different term 'confusology' to describe this practice in the sector.
23. Maule records that 'too much small print' is one of the reasons that deters consumers from taking legal advice (2013: page 59).
24. The question of 'readability' is important here, not simply in the words used (such as avoiding jargon) but also in terms of the average reading age required to make sense of the language and syntax used: cf. Tang et al (2008: page 159) and Martínez et al (2022).

clauses, or technology to provide an under-engineered will and LPA service for the reduced price (cf. paragraph 1.2.3.4 above).[25]

1.2.3.8 Poor service

This category of harm is potentially the most problematic, not least because the perception of the quality of service received can be subjective. There are often clear differences between a client's view of service and responses to concern compared to the view of the provider (see London Economics 2017).

In addition, there could be said to be degrees of poor service, and not all instances of poor service will necessarily result in 'harm' or 'detriment' to the client.

Analysis of the reasons for clients' and consumers' expressions of dissatisfaction with the providers of legal services show that the principal areas of concern are[26]:

(a) delays and failure to progress;
(b) failure to update or keep informed;
(c) mistakes and incompetence;
(d) failure to follow instructions;
(e) failure to advise; and
(f) excessive costs.

Some of these have already been identified as specific harms, such as incompetence and excessive costs (see paragraphs 1.2.3.2 and 1.2.3.6 above). It is important to note, though, that some mistakes are not necessarily seen as incompetence but as, say, 'sloppy' work (such as errors in parties' names and addresses, and false cross-references in formal documents – often resulting from cutting and pasting or the use of boilerplate templates), or inadequate computer security leaving the firm vulnerable to cyber-attack and the consequent criminal exploitation of client confidential material[27].

While all of these concerns might be expressed as 'poor service', they do not necessarily lead to harm. For example, a client might perceive there to be delays in their matters, but it could be that the provider is doing everything possible to progress it and the reason for the delay lies with third parties. In these circumstances, there is a significant difference between the delay experienced by the client (not the fault of the provider) and a failure to progress a matter (which would be the fault of the provider).

Similarly, a delay or failure to progress might just be irritating or frustrating for the client, but not harmful. In other circumstances, the delay could result in, say, a time limit being missed, or a mortgage offer being withdrawn and replaced by a new one

25. There may even be further market-distorting consequences and consumer harm if other, more competent, providers are unable to compete at the reduced price, and so withdraw from the market or feel compelled to make similar sacrifices in quality and service to maintain their revenue and margins.
26. See London Economics 2017: paragraph 3.2, YouGov 2020: pages 74-75, and IRLSR: paragraph 2.4.4.
27. See, for example: https://www.legalfutures.co.uk/latest-news/top-criminal-law-firm-fined-98000-for-cyber-security-negligence (10 March 2022).

with more onerous or expensive terms. In these cases, there is clear detriment to the client.

Even where a delay is not the fault of the provider, there might nevertheless be a valid claim for not keeping the client informed[28].

1.2.4 The Utah typology of harm

As a cross-check, it might be worth a brief comparison of the approach to consumer harm taken by a regulator in a different jurisdiction. In 2020, the Supreme Court of Utah approved a new regulatory sandbox to regulate innovative approaches to the delivery of legal services in the state of Utah. It set up an Office of Legal Services Innovation to oversee the new scheme.

The Office describes a regulatory sandbox in this way[29]:

> A regulatory sandbox is a policy tool through which new models or services can be offered and tested to assess marketability and impact and inform future policy-making. The sandbox tool was first put to use in the financial services industry, in which a highly regulated market was grappling with significant technological advances that did not fit under the traditional regulations (think cryptocurrency). The sandbox model offers similar advantages in the legal space, a traditionally highly restricted market in which the market, and particularly services driven by technology, are outstripping the traditional regulatory approach. In the sandbox, regulations can be relaxed, data gathered, and policy improved.

The Office initially assesses potential risk by reference to the nature of the entity applying for authorisation (such as percentage of non-lawyer ownership, the extent to which lawyers are managed by non-lawyers, the extent of fee-sharing with non-lawyers, whether the entity is a software provider or non-lawyer with or without lawyer involvement). However, the occurrence of consumer harm ('actualised risk') is assessed by reference to three criteria[30]:

(1) A consumer achieves inaccurate or inappropriate legal results: this would incorporate elements of incompetence, under-engineering and over-engineering within paragraphs 1.2.3.2, 1.2.3.4 and 1.2.3.5 above.

(2) A consumer fails to exercise legal rights through ignorance or bad advice: this would incorporate both unmet legal need within paragraph 1.2.2 above and possibly scam, incompetence, dishonesty and inadequate advice within paragraphs 1.2.3.1 to 1.2.3.4 above.

(3) A consumer purchases an unnecessary or inappropriate legal service: this would incorporate over-engineering and most sub-optimal choices in paragraphs 1.2.3.5 and 1.2.3.7 above.

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28. See, for example, https://www.legalombudsman.org.uk/case-studies/low-financial-remedy/, where a solicitor was found by the Legal Ombudsman not to have been responsible for delay. However, her failure to update the client had led to a perception of delay and caused "upset and worry in a difficult time" such that this failure amounted to unreasonable service and warranted compensation of £150.
29. At https://utahinnovationoffice.org/about/what-we-do/.
30. See Office of Legal Services Innovation (2022: page 16).

The Utah typology does not on the face of it include over-charging or poor service (in paragraphs 1.2.3.6 and 1.2.3.8 above), although it does emphasise in (1) the consequential effect of unresolved legal needs (as in paragraph 1.3.1 below).

1.3 The effects of consumer harm

Although harm can arise from a number of different causes, as considered in paragraph 1.2, the effects of those harms on individual consumers can be clustered into just three main categories: economic loss, unresolved legal needs, and consequential detriment.

However, in suggesting a limited number of categories, I do not intend to deny that those effects can be multi-faceted and have relative consequences that will be experienced differently by consumers, depending on their own individual circumstances.

As the OECD have noted (cf. paragraph 1.2.1 above), these effects can be personal or affect all consumers, be apparent or hidden, and be financial or non-financial.

1.3.1 Unmet and unresolved legal need

Arguably, the most disturbing consequence of experienced harm is that the underlying legal need remains unmet or unresolved. The core purpose of needing legal services is unfulfilled.

In paragraph 1.2.2.2 above, I attributed a particular meaning to 'unmet legal need', namely, a legal need in respect of which a consumer has *not* engaged 'some kind of legal expertise'. The issue being considered here as 'unresolved legal need' is that some kind of legal expertise *has* been engaged but it has not been effective in addressing the underlying need such that it remains unresolved despite that engagement.

Accordingly, while unmet legal need and unresolved legal need have the same outcomes, the causes of each have different origins. The outcomes include that the consumer's legal rights remain unenforced, their innocence or lack of culpability is not proved, or their failure to engage any type of legal expertise is that their situation becomes worse than it would have been otherwise.

There can then be direct detriment arising from unmet and unresolved needs, such as:

- a term of imprisonment;
- the loss of (or disadvantageous outcomes relating to) employment, housing or child residency arrangements;
- less favourable contract terms or additional (and unwanted or unnecessary) legal obligations; or
- aggravated or worsened relationships with other parties.

In fact, the failure to resolve one legal need can lead to other, or to exacerbated, legal needs, so complicating the citizen's relationship with the law. For example, C not

having an effective will in place could lead to C's estate facing unwelcome claims from dependants or from tax authorities.

Unmet legal need can arise because of systemic failings (cf. paragraph 1.2.2 above), as well as from the *consumer's* own decisions and actions (which could be informed and rational as well as arising from ignorance or unfortunate circumstances: cf. paragraphs 3.4.3 and 3.4.4 below). Both unmet and unresolved legal needs should be of particular concern to regulators. This is because they will arise from some failure on the part of market structure or of a provider.

It is also possible that current or past experience of legal services leading to unmet or unresolved legal needs will become the principal reason why future legal needs are not addressed. A negative experience could have such a lasting impact on a consumer's willingness to engage with the legal process or potential providers, that it leads to a vicious cycle of unmet need and other consequences.

1.3.2 Economic loss

The most usually identified (and, indeed, most often addressed) effect of harm is economic loss. At the very least, this will be the whole or part of the fee paid (or over-paid) by the consumer for legal services that transpire to be less than fully effective to meet the consumer's needs and legitimate expectations.

But economic loss can come in different forms and at different times. In general, economic loss will equate to the OECD's description of 'financial detriment' (OECD 2010: page 55, Table 3.1 and OECD 2020: page 11, Table 2.1).

Thus, economic loss will also include, for example:

- the loss of property (e.g. because of fraud or dishonesty);
- reduction in asset or estate values (e.g. because of failures to include, transfer or protect relevant property);
- the additional costs of acquiring alternative property;
- the value of any loss of opportunity (including, say, forgone acquisition or investment opportunity caused by a transaction failing to complete or a deadline being missed, or a favourable mortgage offer lapsing);
- the cost of alternative services or restitution (including additional expert advice and assistance);
- the cost of related flawed products (such as an insurance policy recommended by an at-fault provider that, because of misleading omissions, fails to provide cover); and
- lost earnings and administrative costs incurred in addressing the harm caused.

Economic loss can therefore be current or future, and direct, indirect or opportunity cost. The loss might also be sustained even if it might not always be recoverable in legal proceedings.

1.3.3 Consequential detriment

Just as the OECD identifies different types of financial detriment (cf. paragraph 1.3.2 above), so it recognises different types of non-financial detriment. These include (OECD 2010: page 55, Table 3.1 and OECD 2020: page 11, Table 2.1):

- adverse effects on health;
- psychological issues (such as stress, anger and embarrassment);
- delays, lost time and opportunity, as well as the inconvenience of addressing problems caused by harm;
- the compromise of personal information or privacy; and
- restricted choices (including not being able to afford alternative provision to deal with the unresolved needs of the original engagement).

These instances of consequential detriment can be in addition to the direct detriment of an unmet or unresolved legal need identified in paragraph 1.3.1 above.

Stress and distress are particular – and frequently cited – consequences to consumers. They usually manifest themselves as one or more of health, emotional or financial detriment.

There is a well-proven link between ill-health and legal issues. Either can cause the other in a potential cycle of increasing and self-reinforcing harm.[31] Legal issues can cause stress, leading to loss of employment and home, rising debt and greater ill-health. Health issues can equally lead to rising debt, loss of home and employment, and so on.

The emotional toll and stress created even by 'normal' or 'positive' legal events such as moving house have been well known for a long time. The stress caused by an underlying legal issue or need is compounded when matters do not proceed smoothly or are exacerbated by poor quality, inadequate, delayed or fractious legal services. Such consequences can all too easily lead to wasted time, strained relationships or third-party conflict. And then to the cycle of ill-health and other legal issues referred to above.

These situations all create a 'double whammy' of consumer harm. The original, underlying stress or harm is bad enough; but it is then potentially compounded by the consequential harm of physical or emotional upset, stress and additional cost arising from dealing with a provider in trying to resolve that harm or from not being able to engage a provider at all.

Indeed, it may be that the underlying issue is not in itself sufficiently serious or demonstrative of culpability on the part of the provider as to amount to harm, but nevertheless the provider's failure to communicate effectively with the client might lead to upset or distress sufficient to warrant compensation (see footnote 28 above).

Although the three consequences described here can arise singly and independently, it is perhaps most likely that this third form of consequential detriment will almost always

31. See Pleasence et al (2004a: page 28), Lawton & Sandel (2014), Genn (2019), Keene et al (2020) and Genn & Beardon (2021); and see further paragraphs 3.2.3.1 and 5.2.1 below.

arise as a result of experienced harm, either on its own or in combination with one or both of the other two. It is, in that sense, an almost universal experience of using legal services.

Indeed, it would be fair to observe that stress will often arise in otherwise *successful* engagements with the law and legal services providers. It is not, therefore, an outcome only of troublesome relationships. However, it is unfortunate that legal services cannot always deliver entirely positive outcomes from successful engagement.

This is important because a positive sense of well-being is arguably what should be delivered from successful engagement – a sense of comfort, confidence, and peace of mind in having achieved a desired result. If that cannot be universally realised in successful results, let alone unsuccessful ones, then the potential for the vicious cycle of legal need and compromised well-being will persist, along with the personal and societal costs that go with it.

1.4 Conclusion

This chapter has identified a number of forms and causes of consumer harm. The extent and effects of the harm will depend on the consumer's needs, circumstances and reactions, and on the provider's competence and service in responding to them.

As conceived in this Report, the notion of 'harm' is a broad one, and extends to harms that can be characterised as physical, psychological, emotional, social, financial, personal, familial or societal. It also includes both direct and indirect harm, and harm that can be suffered overtly as well as (more insidiously) silently.

The consequences of consumer harm present themselves in different ways, too, including the failure to resolve the presenting legal need, economic loss, or consequential detriment in the form of ill-health, stress, embarrassment or significant inconvenience.

To the individual consumer these consequences can be all-consuming and contribute to feelings of marginalisation and powerlessness. They all result in consumers feeling that they are in a worse place than they were before their engagement with the law and legal services providers.

That consumers could feel in some way short-changed by their experience of legal services should be troubling to policy-makers, politicians, regulators, professions and providers. If rights and obligations are to be meaningful and underpin – as they should – the fabric of a democratic society and the rule of law itself, then we should not knowingly maintain or refuse to reform a structure that excludes, disadvantages or diminishes the participation and dignity of some of its citizens.

At this point, it could be tempting to frame the concerns as either an 'access to justice' issue or as a 'consumer protection' issue. This Report suggests that neither is complete but that both must in some way be incorporated. In fact, it goes further and proposes that access and protection would both be better assured by considering how regulation

can contribute not just to the absence and avoidance of harm but to the presence and encouragement of consumer well-being.

Having identified the types of consumer harm and their consequences, Chapter 2 will consider the current regulatory responses. As we shall see, they initially depend on whether the provider is regulated under the framework of the Legal Services Act 2007 or, if not, on the provisions of general consumer law.

CHAPTER 2

CURRENT REGULATORY APPROACHES

2.1 Introduction

Consumer protection in relation to legal services is currently characterised by two very different approaches. The first is 'sector-specific', and is supported by the Legal Services Act 2007. It applies to what I shall describe as 'regulated providers'. The second is 'general', by which I mean the application of general consumer law. It is the only approach that applies to what I shall describe as 'unregulated providers' of legal services.

2.2 The formal regulatory approaches

2.2.1 The sector-specific approach to consumer protection

The Legal Services Act 2007 confirms and adds to a regulated approach to legal services that offers protection to the consumers of those services and providers regulated under the Act.

The 2007 Act supplements, rather than consolidates, a variety of pre-existing legislation relating to legal services. This includes the Ecclesiastical Licences Act 1533, the Public Notaries Acts 1801 and 1843, the Commissioners for Oaths Act 1889, the Solicitors Act 1974, the Administration of Justice Act 1985, and the Courts and Legal Services Act 1990. This adds unhelpful complexity[32] to the regulatory framework. For ease of reference, I shall refer to this unconsolidated collection of legislation as the '2007 regulatory framework'.

The 2007 Act therefore oversees sector-specific regulation. It is built around six reserved legal activities[33], for which a provider must have prior authorisation before offering these services to the public. This authorisation is almost exclusively the consequence of holding a professional title. In short, reserved legal activities are only provided by qualified lawyers.

The foundations of this approach result in a one-size-fits-all system. For the most part, a professional qualification will lead to authorisation for more than one reserved activity

32. So complex, in fact, that even practitioners can claim to find it difficult to understand and comply: see, for example, https://www.legalfutures.co.uk/latest-news/solicitor-made-up-court-wins-for-facebook-and-practised-unauthorised (25 February 2022).
33. These activities are: exercising rights of audience and rights to conduct litigation; preparing documents that relate principally to the transfer or registration of land (reserved instruments) and to applications for probate; carrying out notarial functions; and administering oaths.

(despite the specialisation inherent in most of them). The front-line regulators[34] are responsible for ensuring authorisation and professional compliance; the Legal Ombudsman (LeO) is responsible for investigating and, where appropriate, defining redress for unresolved complaints from consumers about poor service from authorised providers.

Once a provider is authorised for at least one reserved activity, their regulator (and LeO) will also have jurisdiction over any non-reserved activities performed by that provider. No distinction is then drawn between legal services that must be delivered only by regulated providers (reserved activities) and those that need not (non-reserved activities). However, the vast majority of legal services that are provided to consumers by regulated providers are, in fact, non-reserved[35].

This approach to the reserved activities is not risk-based: the reserved activities are the result of historical practices and anachronisms.[36] The regulatory approach to all of the legal services provided by authorised practitioners draws no explicit distinction (beyond authorisation) between reserved and non-reserved activities that would have any meaning to consumers, although the 2007 Act does not specify how non-reserved activities are to be regulated (leaving at least the *possibility* of a risk-based approach).

Where the sector-specific framework applies, consumers are in principle protected in a number of ways, including:

- the authorisation of appropriately qualified providers of reserved legal activities;
- disclosure of certain information to them in relation to regulatory status, terms of engagement, pricing (as appropriate), and processes for complaints;
- requirements for the provider to have professional indemnity insurance;
- potential access to a compensation fund in the case of a provider's dishonesty[37] or failure to account for client money; and
- investigation and redress for unresolved service complaints against a provider, carried out through the Legal Ombudsman.

2.2.2 The general approach to consumer protection

The general approach applies to non-reserved legal services that are provided by those who are not (and do not need to be) authorised practitioners under the Legal Services Act 2007 because they do not also wish to offer reserved legal activities to the public.

34. They are: Solicitors Regulation Authority, Bar Standards Board, CILEX Regulation (the regulatory body of the Chartered Institute of Legal Executives), Master of the Faculties, Council for Licensed Conveyancers, Intellectual Property Regulation Board, Costs Lawyer Standards Board, Institute of Chartered Accountants in England & Wales, Institute of Chartered Accountants in Scotland, and Association of Chartered Certified Accountants.
35. See Mayson (2020: paragraph 4.5).
36. See IRLSR (2020: paragraph 3.4) and Mayson & Marley (2010).
37. For a recent example of the SRA Compensation Fund paying out £595,000 to the former clients of a solicitor who had dishonestly used money from conveyancing transactions to make payments related to other clients and to his own personal bank account, see: https://www.legalfutures.co.uk/latest-news/compensation-fund-pays-out-600000-to-clients-of-dishonest-solicitor (23 November 2021).

In other words, the sector-specific approach of the 2007 regulatory framework does not – and, indeed, cannot – apply.

It would perhaps be potentially misleading to describe this approach as 'unregulated', since general consumer law will apply. Nevertheless, it is unregulated in the sense that the 2007 sector-specific regulatory framework cannot apply to non-reserved activities carried on by those who are not authorised under the Act ('unregulated providers').

Second, it is unregulated as a matter of practice because general consumer law either does not offer adequate protection or, alternatively, even where it applies, it is cumbersome and expensive to apply. This is because consumers must either pursue their rights through court, or they must be enforced – most often – through local trading standards authorities (whose remit is broad and varied).

General consumer law[38] in broad terms requires that a service must be carried out with reasonable care and skill, within a reasonable time, and for a reasonable price (CRA 2015, sections 49, 51 and 52). Remedies include a right to have the work done again ('repeat performance': CRA 2015, section 55) and a right to a price reduction if the work is not carried out with reasonable care and skill or within a reasonable time (CRA 2015, section 56).

The enforcement of any breaches of the CRA 2015 is typically pursued through the courts (see also CRA 2015, section 58). In addition, various regulators (including the Competition & Markets Authority, trading standards authorities, the Information Commissioner, and the Consumers' Association) can consider complaints from consumers about unfair contract terms relating to exclusion of liability, with a view to seeking an injunction against the trader concerned (CRA 2015, Schedule 3).

General consumer law[39] also imposes a *negative* obligation on providers not to engage in 'unfair commercial practices' (CPUTR, regulation 3(1)). It does not impose a *positive* obligation to adopt fair commercial practices or more generally to deal fairly with consumers.

For this purpose, practices are unfair if a trader:

(a) contravenes the requirements of professional diligence (CPUTR, regulation 3(3)(a)): this means "the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers which is commensurate with either honest market practice in the trader's field of activity, or the general principle of good faith in the trader's field of activity" (CPUTR, regulation 2(1));

(b) materially distorts, or is likely to materially distort, the economic behaviour of the average consumer[40] (CPUTR, regulation 3(3)(b));

38. Under the Consumer Rights Act 2015 ('CRA 2015').
39. Under the Consumer Protection from Unfair Trading Regulations 2008, S.I. 2008 No. 1277 ('CPUTR'). These Regulations apply, among other things, to products, professional services and digital content (regulation 2).
40. The 'average consumer' is a recurring theme of consumer protection law. It refers to an individual who is "reasonably well informed, reasonably observant and circumspect" (CPUTR, regulation 2(2)). The concept is discussed and compared in Chapter 3.

(c) uses information that is false or, even if factually correct, deceives or is likely to deceive the average consumer, about (for example) the nature of the product or service, the price or how it is calculated, the existence of a specific price advantage, the need for a service, and the consumer's rights or risks, as a result of which it causes or is likely to cause such consumers to take a transactional decision that they otherwise would not (CPUTR, regulations 3(4)(a) and 5(2)(a) and (4));

(d) markets a product or service (including comparative advertising) in a way which creates a confusion with a competitor, such that it causes or is likely to cause average consumers to take a transactional decision that they otherwise would not (CPUTR, regulations 3(4)(a) and 5(3)(a));

(e) having indicated that the trader is bound by a code of conduct with which it has voluntarily[41] undertaken to comply, makes a firm and verifiable commitment contained in that code and then fails to comply with it (CPUTR, regulations 3(4)(a) and 5(3)(b));

(f) omits or hides material information, or provides material information in a manner which is unclear, unintelligible, ambiguous or untimely, such that it causes or is likely to cause average consumers to take a transactional decision that they otherwise would not (CPUTR, regulations 3(4)(b) and 6);

(g) engages in activity which, taking account of all of its features and circumstances, significantly impairs, or is likely significantly to impair an average consumer's freedom of choice or conduct in relation to the product or service concerned through the use of harassment, coercion or undue influence, as a result of which it causes or is likely to cause average consumers to take a transactional decision that they otherwise would not (CPUTR, regulations 3(4)(c) and 7); and

(h) does certain other specific actions included in CPUTR, Schedule 1, such as: claiming to be a signatory to a code of conduct when not; displaying a quality mark or equivalent without having the necessary authorisation; making an invitation to purchase at a specified price either without disclosing any reasonable grounds for believing that the product or service cannot be supplied at that price (bait advertising) or with the intention of later promoting a different product or service (bait and switch advertising); or falsely stating that a product or service will only be available (or available on particular terms) for a very limited time in order to elicit an immediate decision and deprive consumers of sufficient opportunity or time to make an informed choice.

There are thus many explicit instances in the CPUTR of unfair practices that could be, and are, found in the provision of legal services – perpetrated by both regulated and unregulated providers.

Any breach of the requirements of the CPUTR will probably result in the trader concerned having committed an offence (CPUTR, regulations 8 to 18). The enforcement of these breaches is the responsibility of local trading standards authorities

41. The CPUTR only apply to codes of conduct that are "not imposed by legal or administrative requirements": regulation 2(1).

(which "tend to focus almost entirely on enforcement against criminal behaviour"[42]) and the Competition & Markets Authority (CPUTR, regulation 19(1) and (2)).

However, rights of redress for the consumer (including rights to unwind a contract, to a discount, and to damages) are restricted and must be pursued as a claim in civil proceedings, that is, in court (see CPUTR, regulations 27A to 27K). As the recent consultation paper from the Department for Business, Energy & Industrial Strategy acknowledges (BEIS 2021: paragraph 3.7):

> Taking a trader to court is an option that some dismiss as too expensive or daunting to consider. Alternatives to the courts exist, but are sporadic in availability, type, and quality. This is demoralising and confusing, so consumers too often give up trying.

The same might be said of another general consumer remedy, namely, suing an incompetent or defaulting provider for professional negligence or breach of contract.

Even in circumstances where provision is made for certified alternative dispute resolution (ADR) for consumers (following implementation of the EU ADR Directive), the government's own evidence (BEIS 2018[43], page 4) shows that:

> the characteristics of consumers that took a dispute to ADR or to court are very different to the general consumer population. Of the consumers who had used ADR, 69% were male, 69% were over 50 years old, 66% held a degree level qualification or higher, and 42% reported a household income about £50,000 (of those that reported an income). Consumers who had used the courts reported similar characteristics.[44]

For consumers who do not have these characteristics, "ADR systems have not been designed with consumers in vulnerable circumstances in mind … [and] the ADR landscape is complicated and confusing for consumers which is likely to cause people not to pursue complaints" (Graham 2021: paragraph 10.1).

There is also evidence that business participation in ADR is particularly low in non-regulated sectors with a high number of SMEs and microbusinesses (BEIS 2021: pages 118 and 122). The current consultation on mandatory ADR (which is not being applied to legal services, despite a slightly below-average ranking) might lead to a more systemically consistent approach to consumer ADR that would be constructive in the legal services sector as a whole.

As Riefa observes (2020a: pages 452-453; emphasis supplied):

> The enforcement of consumer rights has become all the more challenging at a time where courts may have been shut down (if only momentarily) and many alternative dispute resolution (ADR) bodies are not equipped to fully migrate online, *revealing the fragility of a legal system over-reliant on private actions* to keep markets in check….
>
> At this juncture, there is a need to acknowledge the shortcomings of enforcement models that were built around … consumer empowerment and private enforcement as a main vehicle for remedies.

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42. BEIS (2021: paragraph 3.108).
43. Riefa & Saintier observe (2021: paragraph 1.1, footnote 31) that this report "acknowledged that the current [consumer protection] rules are inadequate to protect a whole tranche of society, the so-called 'vulnerable consumers' who 'suffer disproportionally' particularly in regulated markets".
44. In broad terms, the same demographic representation is also likely to be overrepresented in complaints processes (OECD 2020: page 13).

In relation to non-reserved legal services from unregulated providers, there are no specific entry or exit barriers (such as qualification, authorisation or registration). This allows for the presence of both fair and unfair traders. There is no meaningful protection for consumers against the almost inevitable asymmetry of information and power as between provider and consumer.

Finally, there is also a cost advantage for unregulated providers of non-reserved activities, who have fewer regulatory obligations or lower costs compared to regulated providers of the same activities. This disparity could lead to consumers gravitating towards unregulated providers where the cost of legal services is a deciding or important factor.

2.3 The structural underpinnings of the regulatory approaches

2.3.1 Introduction

For the most part, the remedies under both formal approaches focus more on taking action against the provider than on direct redress for the consumer who has been harmed.

The underlying policy for both owes more to trying to address the disparity between the provider and consumer so that the latter is better enabled or empowered to enter and manage the relationship on a more equal footing. This ignores the varied nature of the causes and effects of consumer harm discussed in Chapter 1.

Instead, both the sector-specific 2007 regulatory framework and general consumer law approaches to consumer protection are aimed more at seeking the ideal alternative state of a more knowledgeable and empowered consumer. But in doing so, both are underpinned by the same three 'structural conditions'. These conditions need to be re-examined in the cause of true consumer protection fit for the twenty-first century.

The three conditions are:

(1) *Competition:* the Competition & Markets Authority market study of the legal sector in 2016 – not unsurprisingly – focuses on competition. It assumes that competition is a good thing, and cites many instances of where lack of competition, or barriers to competition, can lead to consumer detriment (CMA 2016). The study concluded that competition was not working well for consumers of legal services.

In principle, competition in free markets is expected to improve the range and nature of product and service offerings, improve quality and performance, and to lower prices. The CMA market study therefore focused on competition as a structural mechanism for improving the range, quality and price of legal services.

(2) *Caveat emptor:* this is a longstanding legal doctrine ('let the buyer beware') applied to dealings of a consumer nature. Its effect is to place the onus on the consumer as a buyer to make full and appropriate enquiries of the seller before committing to a legally binding arrangement. This remains the case even though the seller almost always has an advantage because of the asymmetry of information or power (or both) in what the seller necessarily knows about the

product or service provided. While its influence in legal services is reduced, this Report suggests that it has not entirely disappeared.

(3) *Assumption of a fully informed, rational buyer:* this is also a longstanding concept of neoclassical economics ('*homo economicus*'). It is also regarded as a necessary component of effective market competition. With enough information, the buyer can become fully informed and so make a rational decision as between sellers, products or services. These rational buyers can then, in theory, influence and discipline the competitive market by buying only from fair traders.

The existence of these three structural conditions gives rise to the same 'consumer protection' response, which is intended to be mutually reinforcing. Statutory and regulatory interventions are focused on (seemingly ever-greater) transparency and disclosure to consumers to create rational buyers, who are sufficiently beware, and whose actions drive effective competition.

Measures to require or encourage greater disclosure to, or education of, consumers are therefore assumed to make them more likely to fulfil their function in the market as fully informed and rational buyers. In this sense, intervention seeks to encourage consumer empowerment (cf. Riefa 2020a: see page 27 above).

I shall seek to demonstrate in Chapter 3 that this type of intervention can make matters worse for consumers, not better.

This is not the place for a detailed analysis of any of these structural conditions. I would, however, note that none has escaped analytical critique.

2.3.2 Competition

This Report does not seek to argue against the role and benefits of competition in the provision of legal services.[45] Rather, it seeks to re-position the role and benefits in a broader context. Free markets, and the competition they engender, are not necessarily or always *fair* markets. Indeed, regulation is often directed at 'market failures'.

Nevertheless, effective and fair competition can have an informal role in influencing (that is, in a sense, regulating) provider actions and behaviour, as providers seek the benefit of market share and a positive reputation. The presence of other, better performing firms in the sector should increase the range of providers and provision, more of whom are likely to perform better because of regulatory requirements and the effects of competition.

In a competitive market, therefore, the poorest performing firms will leave the market because (a) their costs become too high and uncompetitive (or conversely too low to maintain a competent and attractive service) for consumers to want to use them; (b) their poor reputation results in a declining and unsustainable business; or (c) regulators

45. Cf. Gorsuch (2019: page 257): "Consistent with the law of supply and demand, increasing the supply of legal services can be expected to lower prices, drive efficiency, and improve consumer satisfaction". However, I am also mindful of Stucke & Ezrachi's observation that "politicians and policy makers have been pushing competition as a magical elixir, even when it is ill-suited for the task at hand" (2020: page viii).

remove them from the market for non-compliance or poor performance. This is as it should be.

The relevant regulatory consideration is whether, without more, competition will drive the right sort of provider and consumer behaviours and outcomes.

2.3.3 *Caveat emptor*

The underlying assumptions of *caveat emptor* have increasingly "been rejected as inconsistent with modern notions of justice, fair dealing, and sound public policy" (Weinberger 1996: page 391). This is particularly so "when contracting parties do not stand on equal footing because one possesses superior knowledge not reasonably available to the other" (1996: page 403).

This imbalance in the relationship between buyer and seller is particularly acute in legal and other professional services – and, for the vast majority of buyers, is inevitable. The very reason for seeking specialist, professional advice is precisely because the consumer does not have the necessary knowledge or experience.

In other circumstances, it is the potential for such complex context that has led to disclosure obligations (cf. Johnson 2008). Product and service complexity, and situational complexity, combined with the effects of technology and globalisation, create greater potential for asymmetry of information and power that favours the 'expert' providers. This comes at the expense of the buyers who know *that* they must beware but not necessarily of *what* they must be wary.

In sounding a cautionary note, Siciliani et al write (2019: page 207):

> In the future, the risk that consumers find themselves in a vulnerable purchasing situation may increase as firms exploit additional insights from the adoption of advanced analytical methodologies, such as artificial intelligence and machine learning empowered by big data availability. For example, firms may no longer post their prices in public (i.e. on a website) but instead set personalised prices privately, relying on algorithms able to identify consumers who are more likely to be willing to pay high prices, perhaps because they are particularly apprehensive or have relatively high search costs. The risk is that these practices might undermine the ability of consumers to collectively discipline firms.

The application of the doctrine is already less comprehensive in professional services (cf. Hughes 1960: page 10; Matthews 1991: page 739). Nevertheless, as professionals have been increasingly exhorted to act more like businesses in the past 50 years, there has been a gradual erosion of the status of professions as deserving of 'special' treatment or dispensation.

The strength of the doctrine in general consumer law is certainly eroded by implied terms and disclosure requirements. The issue for the purposes of this Report is whether disclosure is an adequate response. Can disclosure, in truth, achieve the necessary equality of bargaining position and access to information that the residual influence of *caveat emptor* presupposes?

Indeed, in the absence of any obligation of disclosure or professional ethics, it appears that the provider is still entitled to say nothing at all and rely on *caveat emptor*.[46] The doctrine very clearly remains the default position and is, for these reasons, of more consequence in relation to unregulated providers.

Where disclosure requirements are introduced, they might be partial or targeted (for instance, limited to business-to-consumer transactions), specific or targeted (as with price information), and even expressed negatively (as, in the CPUTR, not to omit or hide material information). Any obligation on providers to comply with disclosure requirements will add costs to their transactions that, in turn, are likely to be reflected in increased prices to consumers.

Further, in circumstances of partial or incomplete disclosure, the burden of *caveat emptor* is not removed from the buyer, and appropriate due diligence might still be required. The buyer's search costs are not therefore eliminated by disclosure, and the parties' joint transaction costs could easily be raised by extension and duplication of effort (cf. Weinberger 1996: page 418).

2.3.4 *Homo economicus*

Stucke & Ezrachi write (2020: page 71):

> On paper, competition works well. Assuming that we generally know what serves our own interest, and that we have the time, judgment, mental energy, and willpower to ensure that we get it, competition can indeed deliver what we want at a fair price.... With its admirable rationality and willpower, the *homo economicus* can shop, save, exercise, eat, and drink appropriately, resisting temptations that undermine its well-being and always following practices that maximize it.

These authors (both professors of law) therefore predicate the achievement and effectiveness of competition on some very important prior assumptions that are manifested in a notional actor, *homo economicus* – who is, interestingly, expressed as an other-worldly third person "its".

The individualised, optimising and rational foundations of *homo economicus* in competitive markets have been challenged by the socialised, satisficing and boundedly rational dynamics of behavioural economics (cf. Ariely 2008; Urbina & Ruiz-Villaverde 2019). This has led Pinker to write (2021: page 173): "One of the most hated theories of our time is known in different versions as rational choice, rational actor, expected utility[47], and *Homo economicus.*"

In particular, Tversky & Kahneman (1974) and Kahneman et al (1982) have shown that "individuals, when making decisions, systematically appeal to heuristics (mental short-cuts), which allow assessments based on partial data. These cognitive shortcuts are

46. Arguably, this would be the rational course for a seller or provider since there is then no risk of negligent or innocent misrepresentation: cf. Johnson (2008: pages 106 and 123-125).
47. Pinker notes (2021: page 179; emphasis in original): "In this context, *expected* means 'on average, in the long run,' not 'anticipated,' and *utility* means 'preferable by the lights of the decider,' not 'useful' or 'practical'."

used even when they have additional data that would enable a more accurate and precise evaluation" (Urbina & Ruiz-Villaverde 2019: page 68).

Further (Urbina & Ruiz-Villaverde 2019: page 69): "Richard Thaler (1980) … concludes that the neoclassical model of consumer behavior is particularly poor at predicting the optimizing behavior of the average consumer. This is not because consumers are fools: rather, they do not use all of their time attempting to make the best decisions".

In short, the "neoclassical scheme of homo economicus is clearly inadequate and deficient in portraying the complexity of human behavior" (Urbina & Ruiz-Villaverde 2019: page 85). Alternatively put, it is "simply a useful, yet unrealistic assumption about human behavior … that is only applicable where human action takes place under certain institutional preconditions" (Braun 2021: pages 231 and 232).

Nevertheless, it is arguably more important to recognise the limitations of the concept than to dismiss it. We can perhaps accept that "context rather than cognition is important in determining behaviour" (Coyle 2019: page 4). However, we "do not yet understand which aspects of context determine when people (or other entities) act in the individual rational choice mode or [make] 'behavioural' decisions shaped by social or psychological factors, or by rules of thumb" (Coyle 2019: page 10).

In particular, whether a choice driven by emotions is 'rational' "depends on whether you think that emotions are natural responses we should respect, like eating and staying warm, or evolutionary nuisances our rational powers should override" (Pinker 2021: page 190).

Pinker also observes (2021: pages 175 and 181; emphasis in original):

> Rational choice is not a psychological theory of how human beings choose, or a normative theory of what they ought to choose, but a theory of what makes choices *consistent* with the chooser's values and each other. That ties it intimately to the concept of rationality, which is about making choices that are consistent with our goals....
>
> Utility is not the same as self-interest; it's whatever scale of value a rational decider consistently maximizes....
>
> But we do always want to keep our choices consistent with our values. That's all that the theory of expected utility can deliver, and it's a consistency we should not take for granted.

Rationality is not, therefore, an objective condition, because utility and choice are subjective and driven by values. As such, the values at play when consumer decisions are made are not necessarily the ones that legislators and regulators might assume, prefer or wish to encourage.

Consequently, we should be wary of ascribing to *homo economicus* more force than the concept can reasonably and legitimately handle. Accordingly, at best, "a rational choice assumption … is increasingly seen as a starting point" (Coyle 2019; page 10).

If a structural condition of regulation is 'clearly inadequate' or at best only 'a starting point', then we should not be surprised if that regulation is not entirely up to its principal task of protecting consumers from harm.

If one of the major foundations of regulatory attention should not be "an assumption about the faculties of individuals", but instead about "the institutional environment of human action" (cf. Braun 2021: page 236), perhaps its focus should be switched elsewhere.

2.4 Conclusion

The two current formal regulatory approaches are very distinct. The sector-specific framework is a rather blunt and inflexible instrument that applies to authorised persons of 'regulated' legal services, based on their professional qualification as a lawyer but without many meaningful adjustments for the underlying risks in those services to consumers (cf. IRLSR: paragraphs 3.6, 3.7 and 8.2(1)).

The general consumer law approach is inadequately targeted to the harm likely to be caused to consumers by 'unregulated' providers. Where market competition fails to weed out incompetent and poor performers, the onus remains on consumers to take private (and usually off-putting and expensive legal) action against providers.

Virtually all consumers of legal services (whether those services are regulated or unregulated) start with the disadvantage of an asymmetry of knowledge and experience. This disadvantage is exacerbated by the doctrine of *caveat emptor*. The inroads to that doctrine made by the requirements for disclosure do not (and arguably never can) create a level playing field.

The assumption of a fully rational, informed and empowered consumer – in essence, the *homo economicus* of neoclassical economics – is a theoretical ideal that is rarely, if ever, found in the real world of consumers.

Suffice for now to observe that the potential harms to consumers of legal services are many and varied (Chapter 1), but that the current regulatory responses are not (this chapter). Worse, those responses are not primarily aimed at offering remedy or redress directly to the consumers who have suffered harm.

These current approaches are therefore not well calibrated to the nature and range of consumer harm identified in Chapter 1. Their particular shortcomings in the real world of consumers will now be explored in the following two chapters.

CHAPTER 3

CONSUMERS, CAPABILITY AND ENGAGEMENT

3.1 Introduction

One of the great challenges when thinking about the appropriate regulatory responses to consumer harm is that not only is the nature of harm varied but so is the nature of consumers themselves and how they respond to their legal predicament. This means that the effects of any harm will be experienced in a variety of ways and with a multiplicity of potential consequences.

This chapter seeks to identify, for explanatory and analytical purposes, the nature of different types of consumers of legal services. To avoid too much nuance, it reduces the types to three: the fully informed, economically rational consumer; the 'ordinary' consumer; and the vulnerable consumer.

The chapter then considers the likely consequences for these types of consumers of their legal capability. Finally, the combination of consumer type and legal capability is explored in the context of the effect produced: the empowered consumer; the self-representing consumer; the disengaged consumer; and the excluded consumer.

3.2 Types of consumer

3.2.1 The fully informed, economically rational consumer

Neoclassical economists have the concept of '*homo economicus*' – the fully informed, perfectly rational consumer – who has unlimited cognitive ability to assess alternative offers from providers in a competitive market (see paragraph 2.3.4 above).

Unfortuantely, this is a largely theoretical construct, albeit one that still holds sway in much regulatory policy. In the real world, there is so much information available that no one individual can be fully informed, or cognitively capable of processing, analysing and acting on it.

In addition, subsequent work – particularly in behavioural economics (and cf. Ariely 2008 and Maule 2013) – shows that human actors are subject to so many influences and distractions that they seldom make decisions or take action on anything even approaching a 'perfectly rational' basis.

The best we can say, probably, is that all consumers are 'boundedly rational', inevitably limited in their cognitive abilities and, being human, not in fact guaranteed (or even disposed) to be rational at all.

Perhaps the closest approximation to the fully informed, rational consumer of legal services is a market insider – an individual who is themselves legally qualified or a practitioner, another professional or intermediary (such as an accountant) who regularly instructs providers of legal services, or a procurement specialist whose role it is on behalf of others to analyse and assess the market for legal services.

This is a rarefied group of consumers. To my mind, this group offers a self-limiting and inappropriate platform for designing and assessing a regulatory approach intended to protect all consumers of legal services. In other words, the fully informed, economically rational consumer should not be the principal concern, foundation or objective for the regulation of legal services.

3.2.2 The ordinary consumer

As indicated above, 'ordinary' consumers are not (and, in reality, probably can never be) fully informed or perfectly rational. Instead, they are beset by cognitive limitations and are not guaranteed to decide or act rationally.

At best, ordinary consumers, rather than being fully informed, might approximate to the 'average consumer' of consumer protection legislation, who is described as being "reasonably well informed, reasonably observant and circumspect" (CPUTR, regulation 2(2)).

This is clearly a different standard of consumer behaviour, because they are not expected to be 'fully' informed but only 'reasonably' so and observant. Gone, then, for the 'average' or 'ordinary' consumer is the idea that they should be fully informed and perfectly rational.

Ways in which ordinary consumers might not act rationally could include the following:

- acting on a *pre-existing bias*: this could include, for example, believing that all lawyers are sharks and therefore to be avoided or, conversely, that all providers of legal services must be trustworthy and regulated (and therefore it is not necessary to check on any given provider's regulatory status);
- *inattentiveness*: far from responding positively to providers' explanations and disclosures, an ordinary consumer might just 'switch off' when important aspects of their position or the provision of legal services are being explained to them;
- *not reading small print*: again, attempts to offer full disclosure and awareness might come to naught because so many ordinary consumers do not bother to read (or cannot understand, or do not think that they can understand) the detailed terms and conditions that apply to their relationship with a provider (and see footnote 23); and
- their *attitude to risk*: consumers can be inherently or situationally either risk-averse or impulsive and over-optimistic, leading them to over-emphasise or disregard aspects of their situation or their prospective engagement of advisers.

Further, there is evidence that (Maule 2013: page 25):

> consumers often choose by taking account of a single factor. In the legal services context this could involve choosing a provider by taking account of a single factor such as price, availability or recommendation from family or friends. The use of simplifying strategies provides a serious challenge to the view that consumers are able to make informed choices between legal services providers. The research literature suggests that choice based on a single factor is often sub-optimal leading to poor outcomes.... If this is the case then providing support for consumers' choosing of a legal supplier could be crucial in helping consumers to find legal suppliers appropriate to their needs[48].

In these and other ways, even ordinary consumers could well be described as 'behaviourally vulnerable' (cf. paragraph 3.2.3 below). Indeed, in this sense, vulnerability should perhaps be seen "as an integral part of who we all are" (Riefa 2020b: page 5).

In any situation of being less than fully informed – that is, in the 'normal state' for nearly all consumers – information, disclosures or explanations provided by would-be sellers will probably never achieve their full potential in seeking to fill or significantly narrow the gap in a consumer's knowledge or understanding. Absence of asymmetry or presence of consumer empowerment simply do not follow.

The question for regulatory policy is therefore whether these well-recognised aspects of consumer behaviour should continue to be discounted in the quest to regulate on a (demonstrably false) premise that consumers are – and should be treated as capable of being – fully informed and rational.

As explained in Chapter 2, the structural conditions of *caveat emptor* and intervention through transparency and disclosure (see paragraph 2.3 above) would definitely seem to suggest that this discounting remains part of current policy. However, ordinary consumers of legal services are mainly irregular buyers of those services, with limited opportunity to learn from experience, and remain subject to significant asymmetry of information and power that the behavioural vulnerability described above can only intensify.

3.2.3 The vulnerable consumer

3.2.3.1 The nature of vulnerability

In a special report on consumer vulnerability, the CMA adopts a broad notion of vulnerability to refer "to any situation in which an individual may be unable to engage effectively in a market and as a result, is at a particularly high risk of getting a poor deal" (2019: paragraph 5).

Similarly, Mary O'Hara (in the Foreword to Riefa & Saintier 2021) writes: "A vulnerable person is usually taken to mean someone who is in need of special protection, care or support, or who is at risk of abuse or neglect".

48. For reasons that I shall explore later in this Report, I do not equate this suggestion of 'providing support for consumers' in making their choices with 'providing them with more information': see paragraph 6.2.3 below.

Almost by definition, the vulnerable consumer could not normally be described as 'average' or 'ordinary'. There is perceived to be a degree of risk or need for protection from harm. In turn, this raises an obligation on providers to be aware of those risks and needs, and to respond appropriately – whether from good professional or commercial practice, or through regulatory compulsion.

The Legal Services Consumer Panel[49] carried out some early work on consumer vulnerability. Adopting a risk-based focus, it identified a number of risk factors whose presence "could increase the likelihood of a consumer being at a disadvantage or suffering loss or detriment during a transaction or communication with an organisation" (2014: paragraph 4.1).

The 20 factors that the Panel identified are (2014: Table 1): age, low income, inexperience, low literacy, learning disabilities, cultural barriers, physical disabilities, mental health issues, English as a second language, health problems, location, being a carer, lack of internet access, leaving care, lone parent, bereavement, loss of income, relationship breakdown, living alone, and release from prison.

It is also important to recognise that vulnerability can be permanent, temporary, fluctuating and cumulative.

The issue of consumer vulnerability was raised in the Final Report (IRLSR: paragraph 4.5.3.5), and bears repetition here:

> Vulnerability can arise from disparity in knowledge, resources, power or capability as between the parties. Forced participation in the criminal justice system when charged with an offence and facing the might of the state is a common example. Similarly, being a citizen in dispute with a government department, or a consumer seeking redress from a very large retailer or manufacturer, can all be daunting.
>
> The need for legal advice and representation in these circumstances may be involuntary and urgent. Competition and transparency will achieve little to help when choice and possible future redress mechanisms are far from the citizen's mind.
>
> [Vulnerability] can also result from inherent conditions of the client (arising from, say, mental health, age, cognitive or language ability). There might also be relative vulnerability, arising from the situation or circumstances giving rise to the need for legal support (such as bereavement, relationship breakdown, loss of employment, homelessness).
>
> It is also worth noting here the observation from the SRA recently that "even the most sophisticated and empowered clients can be vulnerable when they are dealing with critical, often life-changing and distressing circumstances" (SRA 2019: page 5).

In other words, vulnerability might be categorised as:

(a) ***inherent***: arising from lack of physical or mental capacity, lack of cognitive or language abilities, or age (young or old);[50]

49. There is similarly helpful insight prepared by the Scottish Legal Complaints Commission's Consumer Panel (see SLCC 2019).
50. This type of vulnerability is partially described in the CPUTR as consumers who are "particularly vulnerable … because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee" (see CPUTR, regulation 2(5)(a)). However, 'mental infirmity' does not encapsulate all forms of cognitive difficulty or language ability, and 'credulity' is probably better represented here as behavioural vulnerability (cf. paragraphs 3.2.2 and 3.2.3 above).

(b) ***situational***: arising from, for example, being in debt, suffering ill-health[51] or bereavement, being unemployed or homeless, undergoing a relationship breakdown, 'digital exclusion' (cf. IRLSR: paragraph 4.9.1), experiencing an imbalance of power (such as being in custody) or being otherwise under stress: this might be regarded as a consumer not being vulnerable as such, but as being in a vulnerable purchasing situation, and in this sense is a reflection of the potential for any and every consumer to experience vulnerability at some point in their lives; and

(c) ***behavioural***: just as 'ordinary' consumers can be behaviourally vulnerable (see paragraph 3.2.2 above), so can consumers who are otherwise vulnerable, thus compounding their vulnerability.

Genn & Beardon also describe a vicious circle of harm between poor health and legal issues. Either is highly likely to lead to the other, where "legal problems contribute to the cycle of deprivation and poor health, adding to the entrenchment of health inequalities" (2021: page 3; cf. Pleasence et al 2004a). Benfer also expresses a similar view in relation to the United States and the call for improved 'health justice': "The legal system is a determinant that can have devastating consequences for individual or family health [and has] a more drastic effect on low-income people who do not have access to legal representation and whose health may already be compromised by other social determinants of health" (2015: pages 306-307)[52].

Similarly, Lawton & Sandel write (2014: pages 30 and 36):

> For vulnerable populations – sometimes defined in the health community as groups that are not well-integrated into the healthcare system because of ethnic, cultural, economic, geographical, or health characteristics, and whose isolation from care puts them at risk – the link between health and legal needs is especially prominent, and it grows demonstrably tighter all the time....
>
> Poor people's problems do not typically fit into a single category; rather than having legal, social, economic, or health problems, they just have problems that have multiple impacts on their lives, which, in turn, demand a multi-faceted response.

Also, again like ordinary consumers, the vulnerable will be irregular buyers of legal services, possibly with even more limited opportunities to learn because of relative inexperience or naïvety, and perhaps a greater susceptibility to being misled. This might also lead to consumers experiencing 'redress vulnerability', that is, "lacking the confidence or ability to seek effective redress because of lack of information on their rights and where to enforce them" (Dodsworth 2021: paragraph 7.3.3).[53]

The conclusion from analysing these different ways of categorising consumers is that, far from vulnerability being exceptional or in need of special attention, it is universal – in

51. Cf. paragraph 1.3.3 above.
52. The same point is emphasised by Keene et al (2020: page 230): "the 'justice gap' affects access to critical social needs, including education, housing, income, benefits, and employment. Furthermore, these needs are considered critical social determinants of health and health inequality." See also Lawton & Sandel (2014) and paragraph 7.2.3 below.
53. This is an aspect of 'silent suffering' as described in IRLSR (paragraphs 2.4.4, 2.6, 3.9, and 7.3.1). Brennan et al write (2017: page 641): "customers who do not complain are more likely to be at lower socio-economic levels, may be part of a disadvantaged group, and may have submissive personality factors".

other words that, at different times and in different ways, we shall all experience it. As Brennan et al put it (2017: page 640): "in markets where the quality of services is hard to ascertain and communicate to consumers, such as legal services, many will be vulnerable, despite not being disadvantaged by their personal characteristics".

It is therefore important that we do not regard vulnerability as synonymous with weakness (cf. Fineman 2019: page 342 and Newman et al 2021: page 232). Indeed, instead of seeing it "narrowly understood as merely 'openness to physical or emotional harm', vulnerability should be recognised as *the* primal human condition" (Fineman 2017: page 142; emphasis in original).

Consequently, although it is clear that vulnerability can arise from many sources and causes, it is not clear that vulnerability, of itself, suggests a need for a regulatory response. As Dodsworth writes (2021: paragraph 7.5): "It is not the consumer's individual vulnerability that should give rise to protection, but the legitimate expectations of the reasonable consumer in that vulnerable situation."

In other words, manifest or nascent vulnerability might not be the principal consideration, so much as the consequences or implications of that vulnerability for the individuals concerned in the particular circumstances in which they find themselves. In short, vulnerability is universal, contextual, conditional and causative. What we need to focus on is not the *condition* of vulnerability but the *consequences* of it.

3.2.3.2 Vulnerability and clustering of legal needs

We must be careful not to assume that legal issues arise singly or serially. Reference has already been made to the 'domino effect' of legal issues, such as loss of employment leading to debt, loss of a home and family breakdown (see paragraph 1.3.3 above). In short, legal needs can arise in clusters.[54]

As Pleasence et al (2004a and 2004b) reported almost 20 years ago: "individuals reporting the experience of one justiciable problem have an increased likelihood of reporting the experience of further problems" (2004b: page 302). They identified a number of clusters (2004b: pages 314-316):

(1) family problems, including domestic violence, divorce, relationship breakdown, and children problems;

(2) homelessness[55], and unfair police treatment;

(3) medical negligence and mental health; and

(4) a broad range of problems, including consumer transactions, money and debt, employment, neighbours, rented housing, personal injury, owned housing, and welfare benefits: in this cluster, relative affluence *increases* the likelihood of multiple experience of problems.

54. For example, Franklyn et al found that just over a half of those who may be considered vulnerable to disadvantage experienced more than one legal problem in an 18-month period (2017: page 5). The same point is emphasised by the OECD: see quotation in paragraph 1.2.2.2 above.

55. "The fact of homelessness is itself evidence of multi-dimensional problems ... as well as often being preceded by social, economic and/or mental health problems": Pleasence et al 2004a: page 34.

Consequently, experiencing legal issues "has an additive effect. Each time a person experiences a problem they become increasingly likely to experience additional problems" (Pleasence et al 2004a: page 31). In particular, "domestic violence was reported relatively frequently by respondents who had experienced multiple problems" (Pleasence et al 2004a: page 34).

They also comment (2004b: page 324):

> These clusters show clearly that people experience not only isolated problems, but also linked and mutually reinforcing problems. Furthermore, susceptibility to the experience of multiple linked justiciable problems is not something confined to low-income and socially excluded groups.

More recently, in the context of the Covid-19 pandemic, Newman et al have said (2021: page 240):

> many legal issues tend to co-occur. There may be immediate demand for help with employment or welfare issues but there will also be knock-on effects and accumulation of need for other issues, for example family problems, mental health issues, or housing problems. The concern, then, is that legal need is being stored up with some of these problems yet to hit. COVID-19 has impacted the underlying legal need – those being financial volatility, job security and family stability.

What is clear is that the clustering of legal issues increases the risk, incidence and consequences of vulnerability. This also emphasises the potential value of and return on early intervention in preventing the escalation or multiplication of legal needs.[56]

3.3 Legal capability

Consumers are varied but most are, in some way, vulnerable. In turn, vulnerability has many aspects. It arises in different circumstances, for different people, in different ways, at different times, and with different consequences. There is no single, simple, consistent, or agreed, definition of it. At best, consumer protection law and regulation will identify some aspects of vulnerability, but not all of them (cf. footnote 50 above).

Being someone who might be described as vulnerable, or being an individual in a vulnerable situation, does not necessarily mean that a consumer will experience harm. Both consumer and provider behaviour can contribute to the possibility or reality of harm – and to its avoidance or mitigation.

It is therefore the risk, consequence or implication of vulnerability that should perhaps exercise us most in the context of regulatory intervention. The real question is whether the nature or experience of a consumer's interaction with a legal issue or provider of legal services leads to a negative outcome or effect (cf. Hunter 2021: paragraph 9.1)[57].

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56. In this context, the Government's support for early intervention in cases involving litigants in person is encouraging: see https://www.gov.uk/government/news/interim-report-on-the-legal-support-for-litigants-in-person-grant-published (26 January 2022).
57. Brennan et al refer to this as "the interaction of personal predicaments, individual characteristics and external conditions, within a consumer context, that negatively affects that person's consumption/ citizen experience or experience of the complaint handling processes or systems to which they are exposed" (2017: page 640).

A key determinant of outcome and effect will be the consumer's legal capability throughout the interaction within a consumer context. Legal capability can be defined as "the personal characteristics or competencies necessary for an individual to resolve legal problems effectively" (cf. McDonald & People 2014: page 2). It is a multi-dimensional faculty, such that deficiency in any one dimension may limit a person's ability to resolve issues effectively.

Wintersteiger describes the conceptual model of legal capability as encompassing subjective capabilities (2015: paragraph 2.7): "the skills, knowledge and confidence that are needed to cope with day-to-day legal situations"[58]. This capability is affected by socio-demographic factors, such as (2015: paragraph 2.8; cf. paragraph 3.2.3.1 above):

> age, gender, ethnicity, household composition, housing tenure, level of education, household income, employment status, and health status. Other factors such as attitudes and motivations may also help to explain someone's level of legal capability.

There is therefore no doubt that vulnerability and disadvantage affect both consumers' legal needs and their capability to deal with them. As the OECD observes (2019: page 11), justiciable problems "disproportionately affect disadvantaged groups, and can create and exacerbate disadvantage…. Disadvantaged people can draw on fewer resources and have less capability to avoid or mitigate problems."

The issue of how to define and measure legal capability is a significant challenge in considering the effects of vulnerability and disadvantage. The OECD states (2019: page 86):

> The ability of individuals to respond effectively to justiciable problems – and, linked to this, the support that may be required to meet legal needs – varies with legal capability. The concept of legal capability centres on the 'range of capabilities' … necessary to make and carry through informed decisions to resolve justiciable problems. There is no consensus on the precise constituents of legal capability, but there is much agreement among recent accounts of the concept. All reference, to some extent, the following constituents: the ability to recognise legal issues; awareness of law, services and processes; the ability to research law, services and processes; and the ability to deal with law related problems (involving, for example, confidence, communication skills and resilience).

We should therefore perhaps expect that legal capability will vary with the dimensions of 'ordinariness' and 'vulnerability' discussed in paragraphs 3.2.2 and 3.2.3 above. In particular, we would probably expect those with higher degrees of vulnerability to exhibit lower legal capability. However, it is also the case that diminished legal capability "increases vulnerability to problem experience" (Pleasence & Balmer 2019: page 141).

Pleasence et al also found some correlation between vulnerability and legal capability (2015: page 168):

> Stress-related ill-health as a consequence of problems was particularly common for lower capability respondents, being reported on over one-third of occasions. Moreover,

58. There might be some debate over whether concerns about legal capability should be directed towards 'day-to-day legal situations' or towards more serious issues (to reflect that "the measure of severity of issues was a driver of seeking formal assistance, and those issues that last a long time tend to push people toward seeking help": Wintersteiger 2015: paragraph 3.23); and cf. footnote 70.

negative impact on education, other mental health problems, drink/drug problems, physical ill-health, family relationships, and assault/being physically threatened and having to move home were all reported more than twice as frequently in relation to problems reported by lower capability respondents, as compared to problems reported by higher capability respondents.

The characteristics of those who have lower legal capability are the characteristics of those vulnerable to social exclusion.

Following the lead of the OECD, the Legal Services Board has adopted three standardised measures of legal capability (LSB 2020: page 3):

(1) ***legal confidence***: confidence on the part of individuals that they could personally achieve a fair and positive outcome in legal scenarios[59];

(2) ***legal self-efficacy***: a belief on the part of individuals that they could personally handle difficult situations in a legal context; and

(3) ***accessibility of justice***[60]: the degree to which someone thinks the justice system (excluding criminal justice) is accessible.

Unfortunately, LSB research suggests that there are "significant levels of low legal capability in the general population" (LSB 2020: page 7). In addition, although "there isn't one clearly defined group of legally capable people", those with lower legal capability tend to be women, younger than 55, have a disability that limits daily life, or have lower household incomes (LSB 2020: page 7).

In other words, those with low legal capability are not necessarily inherently vulnerable (as characterised in paragraph 3.2.3.1 above). Indeed, even "a significant minority of people with high incomes and education exhibit low legal capability" (LSB 2020: page 3).

Not surprisingly, individuals with low legal capability are less likely to understand their rights and responsibilities, to recognise their issue as being legal in nature[61], search for information and help with their issue, or to do something if dissatisfied with the legal service received. It is also likely that this experience can become self-reinforcing, given that "lower levels of legal confidence were often … found to correlate with … negative experiences … of lawyers, courts, and tribunals" (Pleasence & Balmer 2019: page 145)[62].

In terms of the three types of consumer identified in paragraph 3.2 above, intuitively it would seem that the fully informed, rational consumer will be most likely to have high

59. A particular challenge here is that "very often, people will indicate levels of confidence about something they don't yet realise they know very little about" (Wintersteiger 2015: paragraph 3.15).
60. I understand the reference to justice here but, to me, it indicates a rather narrower concept of accessibility than I believe is needed in the context of legal capability. My preference would be to express this third element as "the belief someone has in the availability and accessibility of a just outcome to their legal need".
61. Pleasence et al's research shows that the "characterisation of problems as legal more than doubles the likelihood of lawyers being instructed" (2015: page 85).
62. Such negative experiences can also lead to consumer disengagement (see paragraph 3.4.3 below). As Balmer et al (2019) point out: "'frustrated resignation' can result from repeated unsuccessful attempts to successfully resolve justiciable problems" (page 8), and "Those who were dissatisfied with help received from lawyers in the past, saw the law as less relevant" to any current issue (page 51).

legal capability, while the vulnerable consumer (bearing in mind that vulnerability in this context is not limited to inherent susceptibility) will have low legal capability.

The focus of this Report is not just on whether legal needs are met or unmet, or access to justice served, but on whether in different circumstances *harm* is caused to consumers of the types identified in Chapter 1. Without doubt, lack or low levels of legal capability could mean that consumers are more susceptible to harm.

Further, the nature of the consumer (rational, ordinary, vulnerable) is likely to lead to differing levels of legal capability. This combination will then, in turn, lead to different degrees of consumer engagement.

3.4 Consumer engagement

3.4.1 The empowered consumer

The underlying logic of much regulation 'in the consumer interest' is to *empower* them. It does this principally by requiring market actors to address the information asymmetry between provider and consumer through transparency and disclosure requirements. In this way, the consumer is presumed to be given the necessary information to make a fully informed and rational choice of provider and service or product.

This is the foundation of the ideal of *homo economicus* (see paragraph 2.3.1(3) above), even though its limitations are increasingly recognised (cf. paragraph 2.3.4 above).

To be informed and rational, consumers must have the necessary cognitive ability to understand and process the information provided; they must also have the necessary confidence and self-efficacy to handle their legal needs and chosen advisers – that is, a high degree of legal capability (cf. paragraph 3.3 above).

In short, the empowered consumer is most likely to be the individual who acts on a fully informed, rational basis (paragraph 3.2.1 above) and has high legal capability. As we have seen, such a person is relatively rare. If the regulatory 'mission' is to convert as many consumers as possible into this category, then, given the relative distribution of consumers, this is a tall order indeed.

3.4.2 The self-representing consumer

A feature of legal systems around the world in recent years has been the increase in self-lawyering. It is variously described as self-representation, litigants-in-person and (especially in the United States) *pro se* litigants.

Evidence of the increase is longstanding (see, for example, Moorhead & Sefton 2005 and Grimwood 2016), and can lead to a need for government funding[63]. Systemic factors will tend to nudge consumers towards self-representation: these include the

63. See, for example, https://www.gov.uk/government/news/regional-and-local-support-for-those-representing-themselves-in-court-underway-in-england-and-wales (July 2021) and https://www.gov.uk/government/news/interim-report-on-the-legal-support-for-litigants-in-person-grant-published (26 January 2022).

difficulty of navigating court processes, a perception that the costs of pursuing legal action are high, and the reservation of certain legal activities to (relatively expensive) lawyers. The decision to represent oneself therefore usually arises from believing that a legal need should be pursued but that the cost or other burden of engaging legal representation is too high.

The self-representing consumer might well be described as either fully informed and rational, or ordinary, and as having a high or at least medium degree of legal capability (that is, sufficient confidence and self-efficacy to take on the burden of self-representation). It seems unlikely that an individual who is vulnerable or with low legal capability would have sufficient confidence or self-efficacy to do so.

The existence of self-representation, and any increase in its preponderance, may or may not be evidence of unmet legal need. In one sense, self-representation by definition suggests that a legal need does not go unmet. However, the position of this Report is that, as discussed in paragraph 1.2.2.2 above, a legal need will be unmet if it does not engage *any* kind of legal expertise or experience.

Self-representation, therefore, is an instance of legal expertise not being engaged and, in this sense, the legal need is unmet. Nevertheless, the absence of that engagement could be intentional or unavoidable: in the terms used in paragraph 3.4.4 below, it could arise from informed or constrained inaction.

The perils of self-representation are compounded by the implications of *caveat emptor* and the maxim that 'ignorance of the law is no excuse'. In other words, self-representing consumers are expected to bring themselves up to speed on what the applicable law and procedure is. Sudeall comments (2022: page 655):

> The belief that self-represented litigants should know what the law requires and how to navigate the legal system accordingly ... is not only unrealistic, but also dangerous. At best, it creates unnecessary frustration for pro se litigants and decreases judicial efficiency; at worst, it makes the judiciary complicit in the creation and maintenance of an unlevel playing field, reduces the likelihood that fair and just outcomes will result from the judicial process, and violates constitutional due-process requirements.

3.4.3 The disengaged consumer

In their quest for legal advice and representation, both ordinary and vulnerable consumers can face complexity of circumstance and need, uncertainty of outcome and cost, and unfamiliar jargon[64].

Greiner observes (2016: page 290):

> Economists have long known that at least two things determine whether a search for some service or good is successful (or whether it is ever undertaken): the cost of the search and the extent of the searcher's prior knowledge…. To be clear, potential clients 'pay' search costs with their time, their attention, their determination, and their mental bandwidth, as they search for institutions to help.

64. Cf. Martínez et al (2022).

Most consumers have a limited ability to absorb information because they buy and use legal services irregularly and are inexperienced in doing so. This will particularly be the case for vulnerable consumers but, as we have seen (in paragraphs 3.2.2 and 3.2.3 above), even otherwise 'ordinary' consumers can become behaviourally and situationally vulnerable.

In turn, these factors influence and then determine a consumer's legal capability – their confidence in achieving an outcome, their self-efficacy in addressing their legal needs, and their belief that a just outcome to those needs is available and accessible.

The dominant regulatory response to asymmetry of information and power is greater transparency and disclosure to consumers. The objective is an understandable attempt to level the imbalance and put consumers in a position to be as well-informed as possible in making their choices. It is intended to empower them by improving their legal capability.

The argument runs that transparency will enable consumers to make informed choices, and thereby drive greater competition among providers, leading to lower prices. Where the argument might fall down, though, is on the central notion of choice. There is no doubt that choice is intrinsically a good thing. As Markus & Schwartz explain (2010: page 344):

> Choice is what enables each person to pursue precisely those objects and activities that best satisfy his or her own preferences within the limits of his or her resources. Any time choice is restricted in some way, there is bound to be someone, somewhere, who is deprived of the opportunity to pursue something of personal value.

Unfortunately, ever-greater transparency and disclosure is more likely to lead to *information overload* and *choice-induced paralysis*. This simply exacerbates the original challenges of inexperience and cognitive limitations. In short, the laudable aim of giving consumers the ability and confidence to make well-informed choices is in fact more likely to fail than succeed.[65]

As Botti & Hsee explain (2010: pages 161 and 162):

> People are often willing to undergo extensive searches in order to find the 'best' option.... In certain circumstances, the costs associated with the time spent searching for the best option may be even greater than the benefits that option provides, resulting in faulty decisions and undesirable outcomes....
>
> Decision makers who are under time pressure to find the best option are likely to experience negative emotions such as stress and anxiety. Stress, in turn, has been found to reduce available mental resources, generate distracting thoughts, and result in poor decision-making.

The intervention or remedy of transparency means that consumers who start out with inexperience, limited time and other resources, as well as situational stress, are faced with more and more information and disclosures. In being overwhelmed, they become less confident, less capable and less satisfied.

Indeed, those consumers who approach regulated providers (with their duties of transparency and disclosure) are likely to be told that things are unfortunately complex

65. For the consequential effects of this on well-being, see paragraph 6.2.3 below.

and dependent on factors that are difficult to see in advance, and so defining the scope of engagement and pricing is also difficult. In these circumstances, it should perhaps not be surprising that most people with legal needs *do not* choose regulated providers.[66]

Whichever way they turn, in the vain hope of becoming fully informed, consumers' efforts and search costs are increased because of *caveat emptor* (it is their responsibility to find out and assess alternative providers) and by disclosure requirements (providers are required to give them ever more information). Their concerns about complexity and uncertainty of outcome and cost are fed rather than eased.

We soon reach a point where it becomes reasonable to conclude that it is logical to take no action at all and leave legal needs unmet. To put it another way, the not-fully-informed consumer does eventually behave rationally because, faced with continuing uncertainty and information overload, it is in fact *rational not to act*.

As Riefa & Gamper explain (2021: paragraphs 2.4 and 2.5):

> It is clear that the 'average consumer' is unlikely to have perfect understanding or unlimited time and be free of behavioural biases….
>
> From a practical point of view there is a limit as to how engaged we can realistically expect consumers to be. Consumers are expected to shop around not only for ongoing essential services including phones, broadband and energy, but also for high value purchases such as cars, electronics and holidays, and even for things like their weekly supermarket shop. In reality there is a limit to the amount of time a consumer has each week to spend on making comparisons, as well as a justified limit to their energy and enthusiasm for the task.

Consequently, "apathy is often the only rational response", recognising, though, that "through this disengagement, the consumer becomes vulnerable or amplifies an already existing vulnerability" (2021: paragraph 2.5).

This point of deciding not to do anything is *consumer disengagement*. Even ordinary consumers are likely to become disengaged in the circumstances described. It is not necessarily the case that the ordinary consumer lacks legal capability (though it is unlikely to be high). It is that there is too much information or too many choices for the consumer to process.

The logical 'cognitive defence mechanism' at this point becomes withdrawal or disengagement. It is a description of a consumer who is not fully informed but who nevertheless makes a rational choice not to pursue a legal need or engage a legal services provider.

The disengaged consumer might therefore begin as either an ordinary or vulnerable consumer. They are also likely to display medium legal capability, that is, enough capability to decide to withdraw from future engagement with the legal process or legal providers (but not so much that self-representation appears to be a viable option: cf. paragraph 3.4.2 above).

66. See IRLSR (2020: paragraph 2.4.1).

3.4.4 The excluded consumer

Chapter 1 identified unmet and unresolved legal need as a particular effect of consumer harm (see paragraph 1.3.1). In some cases, this will arise from consumer inaction, that is, consumers being unable for some reason, or otherwise failing, to take any or all of the steps necessary to resolve their legal issue. As a consequence, this inaction will in effect exclude a consumer from the provision of legal services.

There is survey evidence that the reasons for inaction paint "a mixed picture of rational cost-benefit analysis[67] and uncertainty or fatalism" (Pleasence et al 2015: page 20). It is important to acknowledge, therefore, that legal needs may go deliberately and rationally unmet as a result of 'informed inaction', that is, correctly deciding that taking action is unnecessary. This is the essence of the disengaged consumer in paragraph 3.4.3 above.[68]

However, the circumstances of the disengaged consumer are different to 'constrained inaction', where an individual might want to act but is constrained from doing so by lack of providers, resource or legal capability. Inaction arising from constrained capability is perhaps most likely in relation to vulnerable consumers and to those with low legal capability, and should be of most concern in the context of this Report.

McDonald & People (2014) used a slightly different characterisation of legal capability in their study in New South Wales. They focused on individuals who took no action to resolve a legal problem for one or more of the following reasons: they did not know what to do; they thought that it would be too stressful; or they thought that it would cost too much (2014: page 3).[69]

It was common for individuals to give more than one reason for their inaction (2014: page 3), but each of the three reasons was significantly more likely to be provided for legal problems of substantial, rather than minor, impact[70] (2014: page 5).

There was also some evidence that inaction is linked to the type of problem experienced (2014: pages 5-6):

> all three of the reasons for inaction were significantly more likely to be provided for rights problems. People were also significantly more likely to report that inaction for employment problems was because they 'didn't know what to do' and thought it 'would be too stressful'. Inaction for health problems was significantly more likely because people thought it 'would be too stressful', while for both credit/debt/money and government problems people were significantly more likely to report that they thought it 'would cost too much'.

67. However, rational cost-benefit analysis can also allow for "more severe problems to be channelled towards professional services and formal processes" (Pleasence et al 2015: page 66).
68. It is also consistent with Maule's observation that "people tend not to seek legal advice when they think that they can resolve the problem themselves or when it is thought to be not resolvable by legal means" (2013: page 11).
69. See also Pleasence et al who suggest that "even if people believe that something can be done to resolve a problem, action may yet not be taken because of concerns about the physical, psychological, economic or social consequences of doing so" (2004a: page 50).
70. However, there is also evidence that, despite the various challenges faced by consumers, when the issue is serious or complex, they are likely to navigate – either on their own or with help – to professional help (cf. LSB 2020; Sandefur 2020: pages 305-306, 308; Pleasence et al 2004a: page 59).

Consistent with the LSB's work on legal capability, McDonald & People also found that low educational achievement and being unemployed are indicators of disadvantage and low capability and that "one of the important ways in which legal capability is socially patterned[71] is by knowledge and understanding" (2014: page 6). Consequently, "strategies to reduce inaction may benefit from being tailored to particular groups of people" (2014: page 7).

However, this is not necessarily straightforward. As McDonald & People point out (2014: page 7):

> Notwithstanding extensive access to justice reform intended to provider cheaper, quicker and easier access to justice (e.g. small claims courts, industry Ombudsmen, neighbourhood or community justice centres and the like), certain people are constrained from acting for certain problems by not knowing what to do and by an overriding concern about the stress and cost of acting. One ironical consequence of wave after wave of access to justice reform is an expanded and particularised justice system where it is increasingly difficult to know about options for legal assistance and to gauge what type of actions are available with respect to certain types of legal problems.

It is quite possible that legal capability is also a self-limiting phenomenon – lack of self-confidence and self-belief becomes part of a vicious circle that reinforces consumer inaction. This gives rise to questions about the value of interventions designed to improve the knowledge and parity of consumers relative to providers.

In many ways, both the excluded and disengaged consumer end up in the same place – that is, with a continuing unmet legal need because their need is not addressed. However, the reasons are different. Excluded consumers want to address their needs and would otherwise make a choice to do so, but cannot make it because they lack the necessary access or capability. Disengaged consumers may or may not have the necessary capability, but they make a rational choice not to pursue their need.

3.5 Implications for access to legal services

3.5.1 A tendency to unmet legal needs?

The underlying approach to regulation, as described in Chapter 2, is largely intended to turn all consumers into the *fully informed, rational* consumer of economic theory. However, despite this, the vast majority of consumers are *vulnerable* in some way (even if otherwise '*normal*').

This vulnerability, arising from the underlying legal issue or the individual's circumstances, is more often than not exacerbated by the individual's attitude or reaction to their situation. They may lack the legal capability to act on their need and therefore feel compelled to *exclude* themselves involuntarily or reluctantly from taking

71. This point is also emphasised by Pleasence & Balmer (2019: page 145): "Legal confidence is strongly socially patterned. Respondents who reported that there was someone they could rely on when faced with problems reported significantly higher legal confidence. Higher levels of education were also associated with higher confidence…. In contrast, long-term ill-health or disability was associated with significantly lower confidence".

action. Or, confronted by information overload, they may just be overwhelmed by the situation and become *disengaged*, whether reluctant or relieved to be so.

Accordingly, the current regulatory framework is simply not delivering for the benefit of the consumers that it is supposed to support. Virtually all start their interactions with providers of legal services with some degree of vulnerability. Their challenges in dealing with those providers – despite the best intentions of regulation – can lead to further or amplified vulnerability.

While acknowledging that there is not a necessary correlation, and despite an admitted element of generalisation, Table 3.5 seeks to summarise the interrelationships among types of consumer, degrees of legal capability, and their consequential engagement with legal services.

Table 3.5 suggests that disengagement or exclusion is a highly likely outcome for both ordinary and vulnerable consumers with medium and low levels of legal capability. In other words, within the current framework of, and approach to, legal services regulation, for most consumers there is a significant likelihood that their access to legal services will be constrained and that their legal needs will remain unmet or unresolved.

This tendency to unmet or unresolved legal need can only be avoided within the regulated sector through access to legal aid or to pro bono advice and representation. Beyond the regulated sector, the unmet need can only be avoided by resorting to unregulated providers.

TYPE OF CONSUMER	LEGAL CAPABILITY	ENGAGEMENT
Fully informed	High	Empowerment
		Self-representation
	Medium	Empowerment
		Self-representation
Ordinary	High	Empowerment
	Medium	Self-representation
		Disengagement
	Low	Disengagement
Vulnerable	Medium	Disengagement
	Low	Disengagement
		Exclusion

Table 3.5: Interrelationships between consumer type, legal capability and consumer engagement

3.5.2 Unmet and unresolved legal needs

For the purposes of the analysis in this Report, I have distinguished between 'unmet legal need' (see paragraph 1.2.2.2 above) and 'unresolved legal need' (see paragraph 1.3.1 above). Although the effects of both can be the same, the origins and causes of each are different and so too, therefore, might be the remedies.

Unmet legal need arising from an individual not realising that they face a legal issue might lead to harm caused by the underlying need. It does not, however, result in harm caused *by* the legal system. Nevertheless, there are actions that might be taken to educate citizens in their legal rights and obligations, and so mitigate the harm.

Legal needs might go unmet because, even though the individual knows that they face a legal issue, they simply cannot find any legal help (because no suitable provider is available or they lack the necessary resources to access one). This is the 'constrained inaction' of paragraph 3.4.4 above.

In some circumstances, unmet need can result from consumers deliberately choosing not to seek advice. Such a decision could be based on past experience, and this could be rational or irrational, depending on the individual consumer (cf. paragraphs 3.4.3 and 3.4.4 above and footnote 62 above). As McDonald & People (2014: page 2) identify, this type of inaction can be informed, that is, deliberate and rational, and legal action might well be unnecessary.

For the vast majority of 'ordinary' and 'vulnerable' consumers, exclusion or disengagement are the most likely outcomes, leading to unmet and unresolved legal needs. Failure to address these outcomes cannot support the legitimate participation of those consumers in society. As such, it represents a more significant social and economic issue than just the ineffectiveness of legal services regulation.

3.6 Conclusion

Legal needs are not evenly distributed among the population[72], and the ability to respond to them effectively will depend on the type of consumer involved (fully informed, ordinary, or vulnerable). It will also depend on their capability and attitude, resulting in empowered, self-representing, disengaged or excluded participants in the legal process.

For consumers with pressing legal needs, and a relative lack of the access, experience, resources and legal capability required for dealing with them, the most likely outcome is unmet or unresolved legal needs. This conclusion is consistent with surveys of citizens' legal needs (such as YouGov 2020 and HiiL & IAALS 2021).

To a significant extent, this experience of not being able to access effective legal advice and representation is a product of the current framework for legal services regulation.

72. Newman et al observe that "unmet legal need has always been disproportionately experienced by those who are the most marginalised or disadvantaged within society, and particularly in relation to their interactions with society's institutions" (2021: page 231).

The consequences of increasing self-representation, disengagement and exclusion are often described as 'the crisis in access to justice'.

For me, it is a much broader issue, and the characterisation of the challenges as relating to 'justice' can lead to a narrowing of the perceived options. I shall return to this theme in Chapter 6.

The next issue to consider is the nature of the protections and redress available to those consumers who do navigate their way to legal advice and representation – whether regulated or unregulated – and the efficacy of the remedies available.

CHAPTER 4

NATURE AND VALUE OF CURRENT REMEDIES

4.1 Summary

Chapter 2 described the sector-specific and general consumer law approaches to the regulation of legal services. It concluded that those approaches are not well calibrated to the nature and range of consumer harm identified in Chapter 1.

For those who instruct regulated providers, interventions to address actual or potential harm to consumers in the provision of legal services are focused on:

(a) authorisation of legally qualified providers for reserved legal activities;
(b) consequential, but not fully risk-based, regulation of non-reserved activities;
(c) disclosure of certain information to consumers who might or do become clients;
(d) compensation for financial loss suffered by the consumer because of a practitioner's dishonesty or failure to account for client money;
(e) the Legal Ombudsman investigating an unresolved consumer complaint about a provider's service and deciding on appropriate redress.

Where an unregulated provider is engaged, only general law remedies are available. Some of these remedies require enforcement by public bodies and offer limited or no redress or recompense directly to affected consumers. Where personal remedies are available, they are focused on:

(a) any redress that might be available by way of complaints resolution, rectification or compensation under voluntary self-regulation schemes;
(b) claims through private legal action for negligence or breach of contract;
(c) private rights of action (where they exist for, say, contraventions of the CPUTR) – though even here there appears to be a high incidence of offenders going out of business with no realisable assets that could offer any financial compensation to a harmed consumer;
(d) the possibility of a compensation or restitution order under the Sentencing Act 2020 if assets are recovered after fraudulent activity is prosecuted.

When remedies under the general law are difficult or expensive to enforce, or rely on concerted action by public agencies that themselves have either constrained budgets or different priorities, they offer little or no meaningful support or comfort to consumers who have suffered harm. The current general law therefore appears manifestly ineffective in protecting the vast majority of consumers.

This chapter will now consider each type of transactional consumer harm identified in paragraph 1.2.3 above and their effects, and consider the remedies available under each of the sector-specific and general consumer law approaches. Regrettably,

consumers of legal services are not fully or appropriately supported at the moment, in relation to either regulated or unregulated providers.

4.2 Remedies for harm: regulated approach

4.2.1 Nature of remedies

Chapter 1 identified three effects of the types of consumer harm identified in that chapter: unresolved legal need, economic loss, and consequential detriment (including ill-health, stress, anger, embarrassment, delays and lost opportunities). In the discussion that follows, all of these effects are possible for every one of the harms covered. As we shall see, the remedies available do not address all of these effects.

It is worth making the opening observation that, in addition to the sector-specific remedies considered in this paragraph, the more general provisions of consumer law in paragraph 4.3 below will also apply.

Taking each of the forms of transactional harm in Chapter 1:

(1) *Scam:* Any scam perpetrated by an authorised person would be a clear breach of the professional principles in section 1(3) of the Legal Services Act 2007 and any associated codes of conduct, specifically not acting with honesty or integrity, or in the best interests of clients, or in a way that maintains public trust and confidence.

The most useful remedy for a wronged consumer is likely to be compensation or restitution. However, compensation is dependent on dishonesty being alleged and proved by the regulator and that the consumer's loss arose "in the course of an activity of a kind which is part of the usual business" of the provider. It is possible that the regulator controlling the relevant compensation fund could argue that a scam is by definition not part of usual business (cf. IRLSR: page 63), leaving the consumer with no effective sector-specific remedy.

Thus, economic loss might be recoverable, but not necessarily so; and there are no remedies for the remaining unresolved legal need or for consequential detriment.

(2) *Incompetence:* The sector-specific approach to competence is primarily through prior authorisation for the reserved activities, combined with some requirements for continuing professional development[73] and encouragement for specialist accreditation[74]. Although the provider's appropriate regulator can take action for incompetence amounting to professional misconduct[75], their powers do not extend to compensation or restitution for the client who has been directly affected[76].

73. The Legal Services Board is currently reviewing the approach to ongoing competence: see https://legalservicesboard.org.uk/our-work/ongoing-work/ongoing-competence.
74. Cf. IRLSR: paragraphs 4.5.2.3 and 5.6.3.
75. See, for a recent example, the case of a conveyancer who was fined £10,000 for failing to advise an inexperienced client and being otherwise "slapdash": https://www.legalfutures.co.uk/latest-news/slapdash-conveyancer-fined-10000-by-sdt (26 October 2021). See also SRA (2022).
76. See, for example, the SRA Compensation Fund Rules 2021, rule 12.1(a).

Equally, the Legal Ombudsman's powers of investigation and redress only apply to unresolved complaints about service and not to issues of technical competence. The harmed consumer in these circumstances must therefore find a way of funding a civil claim for professional negligence.

There are therefore no consumer remedies available under sector-specific regulation for unresolved legal need, economic loss, or consequential detriment. On a key issue of consumer harm that can clearly affect public trust and confidence in regulated legal services, consumers might well be left feeling, at best, only indirectly and weakly protected.

(3) ***Dishonesty:*** Unlike a scam, the harm envisaged here is definitely the result of activity which is part of the usual business of providing legal services. As a result, compensation for financial loss suffered by the consumer because of a provider's dishonesty or failure to account for client money should be available.

Economic loss can therefore be remedied, but there is no regulatory redress for unresolved legal need or consequential detriment.

(4) ***Under-engineering:*** Assuming that there is no dishonest intent, under-engineering could amount to a breach of the professional principles and relevant code of conduct for a lack of integrity and not acting in the client's best interests. The remedy available to a consumer may depend on whether the level or quality of service provided amounts to either or both of professional misconduct or unreasonable service.

If there is professional misconduct, the provider's appropriate regulator may choose to take action, though this will not personally benefit the consumer. If there is unreasonable service, the Legal Ombudsman could investigate and uphold an unresolved complaint, in which case suitable redress would also be determined (including compensation, rectification, or refund of fees[77]).

Accordingly, a remedy for all effects could be available here. However, it must be clear that the nature and extent of the under-treatment was determined by the provider alone and not notified to the client[78].

(5) ***Over-engineering:*** The position in relation to over-engineering is the same as for under-engineering (above), with the possibility of remedies for all effects – though it is likely that over-engineering will in fact have resolved the consumer's legal need.

(6) ***Over-charging:*** Again, over-charging is likely to be a breach of the professional principles (and, in the case of 'padding' chargeable time, possible dishonesty or acting without integrity[79]), to be investigated as professional misconduct. It is

77. See Legal Ombudsman Scheme Rules 2019, paragraphs 5.38 and 5.40: https://www.legalombudsman.org.uk/media/mvzfqf0a/scheme-rules-april-2019.pdf.
78. Cf. https://www.legalombudsman.org.uk/case-studies/no-poor-service-conveyancing-complaint/, where a solicitor had made it clear to the complainant that certain actions would not be taken and that he should satisfy himself on the relevant issue.
79. See, for example, the recent case of a solicitor who had recorded 530 chargeable hours against a probate matter (where a reasonable and proportionate amount of time was about 15 hours) by

perhaps most likely to be dealt with, though, as unresolved poor service by way of complaint to the Legal Ombudsman. If upheld, the remedy could be limitation or repayment of the provider's fee, plus interest and perhaps compensation[77].

Although over-charged, it is likely that the consumer's legal need will have been resolved; remedies for economic loss (limitation or repayment of fee) and for consequential detriment (compensation) are available.

(7) ***Sub-optimal choices:*** Most instances of provider actions that lead to sub-optimal choices for consumers will amount to acting with a lack of integrity, against the client's best interests, or in a way that will undermine public trust and confidence. As with over-charging, though, it is likely that the most helpful redress for consumers who are harmed in this way will be secured through the Legal Ombudsman.

In relation to the misleading behaviour of failing to signpost remedies and redress, recent transparency rules specifically require that a regulated provider, for example, "must publish on its website details of its complaints handling procedure including details about how and when a complaint can be made to the Legal Ombudsman and to the SRA" (SRA Transparency Rules 2018).

Remedies are therefore potentially available for unresolved legal need, economic loss and consequential detriment.

(8) ***Poor service:*** Not all instances of poor service will necessarily amount to harm to the client (cf. paragraph 1.2.3.8). However, where the Legal Ombudsman investigates an unresolved consumer complaint and determines that the provider's service has been poor or unreasonable, redress can follow. This might include a reduction or repayment of the fee, rectification or compensation for inconvenience and distress, as well as for costs incurred by the client in pursuing the complaint[77].

Again, therefore, remedies are potentially available for all three effects.

4.2.2 Value of remedies

This closer look at the different forms of harm and the response of the regulatory framework to them discloses an interesting dichotomy. It is between well-meaning *prevention* and meaningful *redress*.

The principal approach of the regulatory framework is to apply before-the-event (BTE) measures to reduce the risk of harm to consumers. Before consumers even instruct providers of legal services, those providers are required to seek authorisation for one or more of the reserved legal activities (cf. footnote 33), and to make various disclosures to potential clients about their regulatory status, the complaints process, and the cost of certain legal services. This, in its well-meaning way, is intended to prevent charlatans and the devious from being in practice and causing harm.

'dumping' hundreds of hours of unjustified time on a largely completed file in a bid to meet his billing targets: https://www.legalfutures.co.uk/latest-news/solicitor-suspended-for-dumping-hours-on-file-to-meet-billing-targets (22 November 2021).

When something has gone wrong and harm has been suffered (other than as a result of a provider's dishonesty), the regulators are still focused on providers, and on prevention or rehabilitation. They can remove providers from the regulated market or impose restrictions on their presence in it, and so hopefully prevent any further spread or replication of harm.

Well-meaning requirements imposed on providers in pursuit of 'consumer protection' to increase the amount and the transparency of information available to consumers in effect backfire. Regulatory enforcement and sanctions are applied against defaulting providers: this is only for the indirect benefit of consumers at large – and future consumers at that – not for the direct benefit of those who have already suffered harm.

Regulators cannot deliver redress directly to consumers who have been harmed by some of the worst failings of a supposedly expert community of practitioners, including for incompetence, over-selling, and over-charging – and this might be a particular shortcoming in protection where one-to-many harm has been caused and consumers should have a reasonable expectation of collective redress being available.

Indeed, there is some evidence of regulated practitioners who have been excluded from the regulated sector because of professional misconduct then setting themselves up as unregulated providers of non-reserved activities. Consumers can continue to be exposed to exactly the same risk of harm as before, but now without any oversight or redress.

This semblance of consumer protection is illusory, closer to the Emperor's clothes or a fig-leaf version of protection. For most practical purposes, it offers a well-meaning veil of safeguard against the *potential* for harm. But for the vast majority of consumers who suffer *actual* harm, the protection is meaningless because it offers no direct or relevant redress for that harm.

Any compensation for incompetence, omissions in advice or documents, or defects and defaults in agreed provision must be sought through private legal proceedings for professional negligence or breach of contract. All consumers must find a way of financing such actions, given that civil legal aid is not available and few are likely to have or to use legal expenses insurance (cf. Legal Services Board 2021a).

Despite the best intentions of preventive regulation, the buyer must still beware and pick up the pieces. While prevention might be better than cure, once consumer harm has occurred cure is the only meaningful remedy for the victim. Too often, that cure comes at a price (cost and effort) that is beyond the resources of ordinary and vulnerable consumers.

Arguably, the only real restorative power lies with the Legal Ombudsman. This is the one point at which an aggrieved consumer might feel any sense that the current regulatory framework can 'go in to bat' on their behalf and deliver cost-effective and direct *redress* for harm suffered.

Even then, the Ombudsman's jurisdiction is limited to unresolved complaints about poor service. It is also dependent on adequate resources to meet the demand for

resolution (in terms of both numbers of staff and their understanding of consumer interactions in legal services). Here, too, there have been recent struggles.[80]

4.3 Remedies for harm: unregulated approach

4.3.1 Nature of remedies

As with the regulated sector (paragraph 4.2 above), so the unregulated sector can cause all three effects that arise from the types of consumer harm identified in Chapter 1: unresolved legal need, economic loss, and consequential detriment (including ill-health, stress, anger, embarrassment, delays and lost opportunities). In the discussion that follows, all of these effects are again possible for every one of the harms covered. Again, the remedies available do not address all of these effects.

The opening observation here is that, where voluntary self-regulation exists, it will often take the form and adopt the mechanisms of the regulated approach in paragraph 4.2 above (although there is currently no access to the Legal Ombudsman). Such voluntary regulation might therefore offer certain consumers more options for redress than just those discussed in this paragraph.

However, unlike the remedies discussed in that paragraph, here they will be voluntarily assumed rather than mandatorily imposed. Those providers in the unregulated sector who pose the most risk to consumers are therefore very unlikely to have submitted to any voluntary self-regulatory scheme.

Again, taking each of the forms of harm in Chapter 1:

(1) *Scam:* There is likely to be an element of fraud or dishonesty involved in a scam. The perpetrator could therefore be subject to prosecution for the criminal activity if the case is taken up by the police and CPS. There would then be the possibility of a compensation or restitution order under the Sentencing Act 2020[81] if assets are recovered. This will be dependent on the assessment of the court and the offender's ability to pay[82] (section 135(3), though at least compensation takes precedence over any fine imposed: section 135(4)).

80. See, for example, https://www.legalfutures.co.uk/latest-news/legal-ombudsman-admits-recovery-will-take-longer-than-expected (8 November 2021), https://legalservicesboard.org.uk/news/chairs-blog-december-2021 (6 December 2021), and https://www.legalfutures.co.uk/latest-news/consumer-panel-uncertain-over-future-of-legal-ombudsman (21 December 2021). There are now proposals for changes to the Legal Ombudsman's scheme rules (https://www.legalfutures.co.uk/latest-news/legal-ombudsman-eyes-major-shake-up-of-rules-to-help-tackle-backlog (18 February 2022)), and some hope of progress in tackling performance issues (https://www.legalfutures.co.uk/latest-news/leo-boss-efforts-to-close-complaints-more-quickly-starting-to-work (7 March 2022)).
81. There is also the possibility of confiscation and repayment under the Proceeds of Crime Act 2002: see, for example, https://www.legalfutures.co.uk/latest-news/solicitors-convicted-of-fraud-ordered-to-repay-205000 (24 February 2022).
82. Experience suggests that, by the time wrongdoers reach court, there is a high probability that they will have gone (or put themselves) out of business and so have no realisable assets that could fulfil any court order for financial compensation to a harmed consumer.

While recovery for economic loss might therefore be possible, there will be no remedy for the remaining unresolved legal need or for consequential detriment.

(2) *Incompetence:* Redress for losses sustained as a result of a provider's incompetence must be sought through a civil legal action for negligence. The securing of financing, the burden of proof and the costs risks will lie with the consumer-claimant. Some of the risks might be offset by contingent fee arrangements, and court might be avoided altogether by insurer-led settlement proposals if the provider has (voluntary) professional indemnity insurance.

Alternatively, the provider might have contravened the requirements of professional diligence (CPUTR, regulation 3(3)(a)), meaning "the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers" (CPUTR, regulation 2(1)). However, the consumer's rights of redress (including rights to unwind a contract, to a discount, and to damages) must still be pursued as a civil claim in court proceedings[82] (see CPUTR, regulations 27A to 27K).

At best, then, there might be the possibility of a civil claim for compensation for economic loss.

(3) *Dishonesty:* As with a scam, there is the possibility of prosecution and then of a compensation or restitution order under the Sentencing Act 2020 if assets are recovered. Also, as with incompetence, it is likely that the provider will have engaged in one or more instances of unfair commercial practices, particularly those that are not "commensurate with either honest market practice in the trader's field of activity, or the general principle of good faith in the trader's field of activity" (CPUTR, regulation 2(1)). As before, though, rights of redress for economic loss must still be pursued through civil proceedings[82].

(4) *Under-engineering:* Instances of under-engineering are likely to amount to unfair commercial practice under the CPUTR by not exercising professional diligence (as with incompetence in (2) above), with the same consequences and relative possibility of a civil claim for compensation for economic loss.

(5) *Over-engineering:* As with under-engineering in (4) above, so over-engineering is equally likely to arise from unfair commercial practice under the CPUTR by not exercising professional diligence or, as with dishonesty in (3) above, engaging in activities that are not commensurate with either honest market practice in the trader's field of activity, or by not fulfilling the general principle of good faith in the trader's field of activity (CPUTR, regulation 2(1)).

Again, therefore, a civil claim for economic loss might be available.

(6) *Over-charging:* Under the CPUTR, the effects of over-charging are likely to be assessed in the same way as for over-engineering in (5) above, namely as failures of professional diligence, honesty and good faith. This again leads to the possibility of a civil claim for economic loss.

(7) *Sub-optimal choices:* Most of the instances of provider behaviour and practices that result in consumers making sub-optimal choices will be covered by the

specific categories of unfair commercial practice set out in CPUTR, regulation 3 (see paragraph 2.2.2 above). This includes, for example, actions that materially distort consumer behaviour, false information, confusing marketing, omissions and hidden information. Still, rights of redress must be pursued by a consumer through civil proceedings[82].

(8) *Poor service:* Barring service that is so poor or unreasonable that it amounts to incompetence (or comparable mistakes) or in some way entails dishonesty, there is no route to redress for consumers who consider themselves harmed by a provider's service. Given that the issues most often complained of by consumers are instances of poor service (such as delays and failures to progress work, and failures to communicate or keep them informed), this exposes consumers of currently unregulated services to greater risk of poor service harm, with no effective remedy for it.

4.3.2 Value of remedies

Like the regulated sector, the underlying philosophy of 'consumer protection' for the clients of unregulated providers of legal services is still on prevention and taking action against defaulting providers rather than on offering direct redress to affected consumers.

Although consumers of unregulated providers of legal services are not without remedies, the entire burden of seeking redress falls on a wronged consumer in terms of deciding to take action, funding it[83] and proving harm.

When almost half of the dissatisfied clients of *regulated* providers choose to do nothing (see London Economics 2017, paragraph 2.2), we should probably expect that the number is higher for the clients of unregulated providers[84].

This level of 'silent suffering' is disturbing (cf. IRLSR: paragraphs 2.4.4, 2.6, 3.9, and 7.3.1), tarnishes all providers in the sector, and seriously undermines public trust and confidence in legal services.

Despite the clients of regulated providers being left largely to the same challenges of seeking redress, they may be further helped by the requirements for professional indemnity insurance, the availability of compensation fund arrangements, and access to remedies through the Legal Ombudsman. These requirements do not apply under general consumer law, leaving those who have used unregulated providers at a relative disadvantage.

83. As Riefa & Saintier record, funding is not always available "because either consumer cases are of too low a value, lawyers are reluctant to take on cases that do not guarantee a win, or consumers need to pay out for after the event insurance that often eats up all monies recovered from the other side" (2021: paragraph 1.1, footnote 27).
84. This inference is drawn from the finding of YouGov (2020: page 73) that the users of unregulated providers were significantly more likely to be dissatisfied than the clients of regulated providers.

4.4 Conclusion

4.4.1 The weakness of 'front-end loading'

Consumer protection is 'front-end loaded', focusing on before-the-event measures to prevent consumers using charlatans or the blatantly unqualified or inexperienced. It also concentrates on preventing – or, perhaps more accurately, discouraging – consumers from making a purchasing decision or taking action without being aware of all the reasonably knowable or disclosable factors that should influence their decision.[85]

The weakness in this approach is that ordinary and vulnerable consumers face challenges in assimilating, processing and acting on all this information. For the most part, consumers – if they choose to take action at all when faced with a legal issue – are disengaged, and therefore do not fully absorb the information available to them (cf. paragraph 3.4.3 above). The objective of protecting them (as much from themselves as from rogue providers) fails because it is founded on assumptions of consumer rationality and engagement that do not hold in the real world.

Consequently, before-the-event protection against *prospective harm* largely fails in its objectives. Consumers are still exposed to one or more of the harms identified in this Report, and such *actual harm* can only be remedied in both the regulated and unregulated parts of the legal services sector after the event and at significant cost to consumers in time, effort and (often) money.[86]

The same issues that affect consumers of regulated legal services also affect consumers of unregulated legal services. These include difficulties created by information asymmetry, distress purchasing (or forced participation), and the credence nature of the services (cf. Malcolm 2017: page 7). It is not clear why the purchasers of unregulated services should be left in a different position – especially when they are likely to experience greater vulnerability or have lower levels of legal capability.

In short, "consumer law does not see the wider picture, i.e. in the way it fits with the lives of individuals" (Riefa & Saintier 2021: paragraph 15.1.1), and having "set out to protect consumers but applying mostly neoclassical economics as a guide for legislation, the poor, ironically, still pay more and there is still little they can do about it" (2021: paragraph 15.4.3).

4.4.2 Remedies for the unrepresented consumer

This chapter has focused on consumers who decide to engage a provider of legal services and the remedies that might be available to them if they suffer any harm arising from that engagement. In closing, it might be worth mentioning that some of the

85. It is important to acknowledge that the objective of any before-the-event regulation cannot be a 'zero failure regime' where "advice never goes wrong": although there would then be "no need for redress mechanisms", "the cost of achieving such a regime would be vastly greater than the cost of providing redress" (Malcolm 2017: page 8).
86. As Riefa emphasises (2020a: page 454): "consumers are relying on their rights *ex-post*, i.e., after the damage has already occurred, leaving them to carry the financial burden of mistakes induced by unfair traders".

regulatory or consumer law consequences discussed in this chapter might be available where a consumer decides against retaining a provider.

First, if the consumer's only reason for not engaging legal advice or representation arises from the wrong or misguided advice or assertion of a *regulated* provider, there will in the circumstances envisaged be no client retainer in respect of which a regulator might take action. While disciplinary action could still be taken against the provider for lack of honesty or integrity, or for failing to uphold public trust and confidence, this will not directly benefit the consumer who has been harmed as a consequence of not taking action. In any other circumstances, it would appear that there is no sector-specific cause or basis for action by the consumer.

Second, if a consumer's failure to take action is directly attributable to an *unregulated* provider's express advice or assertion that amounts to dishonesty or lack of professional diligence or good faith, action could be taken by the consumer under the CPUTR as for incompetence in paragraph 4.3.1(2) above or dishonesty in paragraph 4.3.1(3) above, with the same consequences and limitations. Otherwise, it is not likely that there will be any cause or basis for action.

4.4.3 A regrettable shortfall in regulation

This Report has identified three principal effects of transactional consumer harm: unresolved legal need, economic loss, and consequential detriment. The review of remedies in this chapter suggests that there are limited opportunities for redress for economic loss, and virtually none for unresolved legal need and consequential detriment. The latter includes the most common consequences of harm, namely, delay, lost opportunities, stress, anger, embarrassment, and ill-health.

In sum, neither sector-specific regulation nor general consumer law offers much meaningful protection to consumers who have suffered harm in their engagement with providers of legal services. With their emphasis on *providers*, and *protection* from *prospective* harm, neither has much to offer to *consumers* who have a reasonable expectation of *redress* for *actual* harm.

Further, other than the limited instances identified in paragraph 4.4.2 above, there are no remedies available for those consumers with *unmet* legal needs (as defined in paragraph 1.2.2.2 above). The absence of access means that, although there is identifiable consumer harm, there is by definition no regulated (or even unregulated) provider against whom any action can be taken in respect of that harm. The action in these circumstances needs to be taken, in a sense, against the system itself.

My conclusion, therefore, is to wonder whether we currently have the wrong target for the regulation of legal services. In other words, should we be focusing so much on a negative, namely, the absence or avoidance of consumer harm. Would we be better off turning our attention instead to a positive, namely, the presence of consumer well-being?

CHAPTER 5

LEGAL WELL-BEING

5.1 Introduction

It should come as no surprise that: "Legal problems routinely impact on the wellbeing of those who face them. This impact can be grave, and by acting to increase the risk of further legal, social, economic and health problems, can contribute to vicious cycles of social exclusion." (Pleasence et al 2015: page 8).

The connection between general health and legal services was raised in paragraphs 1.3.3 and 3.2.3.1 above. In the lived experience of a legal issue, it might be that ill-health has led to the legal issue arising; alternatively or in addition, dealing with the issue can itself cause or exacerbate instances of ill-health.

We have also seen that attention to the development of legal capability can bolster consumer engagement (see paragraphs 3.3 and 3.4 above). However, the contention of this chapter is that legal capability needs to be understood and positioned within a broader context of personal well-being.

Just as the focus in physical and mental healthcare can shift away from a negative (the absence of ill-health or mental disorder) to a broader and positive notion (seeking health and well-being), so legal services could similarly shift from an absence of consumer harm to a positive idea of legal health and well-being.[87] In turn, such a shift could refocus regulatory attention and remedies on outcomes that are more conducive to the less burdensome and stressful resolution of legal issues.

This chapter therefore examines the idea of, objectives for, and routes to, legal health and well-being.

5.2 Legal needs and well-being

5.2.1 What is well-being?

The idea of well-being is not new to, say, healthcare or financial services. In fact, both health and financial well-being are likely to have an effect on legal well-being, and vice versa[88]. All will contribute to an overall sense of personal and family well-being.

87. This is also in line with financial services, where financial well-being is not simply the absence of financial distress (such as an inability to meet outgoings): cf. Brüggen et al 2017: page 230.
88. In making the connection between health and law, Lawton & Sandel go so far as to say (2014: page 33): "if health is a core part of human well-being, then it should be at the center of the outcomes tracked in the pursuit of justice." Further (2014: page 39): "unresolved legal needs tend ultimately to

Our starting point might therefore usefully be to explore the extent of any 'read-across' from those professional spheres. In both health and finance, the consumer is typically at a similar disadvantage in terms of knowledge, expertise and experience, both in the subject-matter of their engagement with providers as well as the nature and frequency of that engagement.

While there is no settled definition of well-being[89], there do seem to be a number of accepted features or indicators of it. In short, it can be explained as "doing well physically, mentally, and financially" (Xiao 2015: page 3). I would add 'socially'. More comprehensively, it can be described as (Ruggeri et al 2020: page 192):

> the combination of feeling good and functioning well; the experience of positive emotions such as happiness and contentment as well as the development of one's potential, having some control over one's life, having a sense of purpose, and experiencing positive relationships.

Consistent with the theme of this chapter, this conceptualisation "goes beyond the absence of mental ill health, encompassing the perception that life is going well" (2020: page 192). Indeed, well-being is different to 'wellness', which implies "the quality or state of being healthy in body and mind", whereas well-being refers to "a good or satisfactory condition of existence" (cf. Brüggen et al 2017: page 229) or even what is sometimes referred to as 'quality of life' (cf. Xiao 2015: page 3).

Positive well-being could also be described as 'flourishing' which, again, "is more than the absence of disorder, and ... could be conceived as the opposite of mental disorder, rather than its mere absence" (Huppert & So 2013: page 849). It includes positive feeling (emotional stability, vitality, optimism, resilience, positive emotion and self-esteem) and positive functioning (engagement, competence, meaning, and positive relationships): 2013: pages 844 and 849.

Not surprisingly, much of the study and analysis of well-being originates in healthcare. In common with the general tenor of much of the intended protection of 'consumers', users of the National Health Service are ideally expected to be 'informed consumers'. A product of this information is that citizens can be enabled to promote their own health and well-being (cf. Fisher 2008: page 584).

In this sense, the goal or policy of health and well-being can be said to emphasise the empowerment of the individual consumer (Fisher 2008: page 583). There are, however, two challenges in this. The first is that "disempowering environments … arise when wellbeing, authenticity and empowerment are framed by … the influence of 'expert' knowledge" (2008: page 585). The second – consistent with the position of this Report – is that: "The notion of the ideal empowered consumer … appears to place the burden entirely onto the individual." (2008: page 596).

A feeling of being empowered might be thought to be just that: a feeling. This would perhaps emphasise the subjectivity and emotional components of well-being. While

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wash up on the shore of the healthcare system in the form of disease sparked by, or exacerbated by, the social determinants of health": cf. paragraph 3.2.3.1 above.

89. There is even a lack of consensus about whether the correct term is 'well-being' or 'wellbeing': cf. Xiao (2015) and Austin (2016). The latter (2016: footnote 1) prefers 'well-being' as connoting a dynamic process of living (*being*) well in the social world, and that is the sense adopted in this Report.

much of a sense of well-being might be founded on how individuals perceive their existence (cf. Magyar & Keyes 2019: page 389), nevertheless subjectivity does not explain the totality of well-being (cf. Ryan & Deci 2001) just as an objective view does not, either (cf. Brüggen et al 2017: page 229).

It seems intuitively right that "well-being refers to optimal psychological functioning and experience" (Ryan & Deci 2001: page 142) – it is perhaps, again intuitively, close to a state of happiness. However, subjective happiness cannot be equated with well-being because "some outcomes are not good for people and would not promote wellness" (2001: page 146).

As Austin points out, such a subjective approach would not distinguish between outcomes and preferences that are normatively different (2016: page 5). This could include goals that are:

- *offensive* (such as a belief that it is acceptable to harm or discriminate against others);
- relatively *expensive* (say, that legal advice and representation should only be given by very senior members of the professions or always paid for by the state); or
- the result of *adaptive* preferences (where, say, rich people are distraught that they are unable to secure the expensive legal advisers of their choice, while others living in poverty are delighted with any representation at all).

Ryan & Deci write that the experience of well-being arises from the fulfilment of three basic psychological needs: autonomy, competence and relatedness (2001: page 146). Nevertheless, the fulfilment of these needs is not determined only subjectively. There is also a requirement for positive *functioning* so that the outcomes that an individual values can be realised (cf. 2001: page 145).

Such a view takes us beyond a merely subjective assessment of well-being. It incorporates both objective elements (such as economic prosperity, health and standard of living) and subjective elements (such as life satisfaction and morality): Browne (2015: page 3) and Huppert (2014: page 2).

This in turn suggests that the 'underlying principles' of a framework for well-being are an interplay between (Browne 2015: page 4):

- what a person has: the resources that he or she is able to command[90];
- what they can do with what they have: what they are able to achieve with their resources, particularly what needs and goals they are able to meet; and
- how they think about what they have and can do: the meaning that they give to the goals they achieve and the processes in which they engage.

Thus, consistent with the shift from negative to positive referred to at the beginning of this chapter, Magyar & Keyes emphasise that (2019: page 389) "well-being is not simply

90. I would emphasise here that, in my view, it is not so much the *possession* of resources or attributes that is important as being able to *access* them. As Austin points out (2016: page 3): "it is not resources themselves that are valuable, but what they enable a person to be and to do in their lives".

the absence of malfunction [such as disease, disorder, or problems]; rather, well-being consists of the presence of assets, strengths, and other positive attributes".

Although empowerment implies 'agency', that is, the ability to make choices and act, I agree that we should not simply equate well-being with the economists' notions of 'welfare' and 'utility' (cf. Thompson & Marks: page 8 and Austin 2016: page 4). There is more to it than that.

In addition, and in line with the earlier critique of the rational actor implicit in the concept of *homo economicus* (see paragraph 2.3.4 above), 'choice' does not imply a freely choosing individual actor who is "somehow or another disembedded from the social relations and networks in which they are immersed" (cf. Hoggett 2001: page 52).

A key part of well-being arises from the feelings of connection and relatedness that result from personal relationships (Ryan & Deci 2001: page 154; Huppert & So 2013: Table 1). Browne tells us that this is "because social support reduces stress, provides a buffer for negative events, and enhances self-esteem" (2015: page 3). A 'normal' consumer would not therefore disregard the effects of their decisions and choices on their social reference groups.

The following summary by Huppert pulls the various threads together (2014: page 2):

> Sustainable wellbeing includes the experience of functioning well, for instance having a sense of engagement and competence, being resilient in the face of setbacks, having good relationships with others, and a sense of belonging and contributing to a community.

It is therefore necessary to conceptualise well-being as a pluralist state "whereby well-being is constituted by being well-off in multiple domains of life" (Austin 2016: page 5). Further, an understanding of well-being must take account not only of current circumstances but also an individual's assessment of their future situation – which also means that well-being is a dynamic and changing state (cf. Brüggen et al 2017: page 230).

5.2.2 Well-being and circumstances

Well-being does not arise from just the subjective feelings that an individual has about their life and situation. Other external, objective or observable factors and circumstances also contribute to an individual's well-being. Huppert offers a broad sense of them (2014: pages 18-21):

> Relative income explains more of the wellbeing variants than absolute income, at least in high-income countries…. Material disadvantage, such as poor housing quality, unaffordability of a one-week holiday, and difficulty in making ends meet[91], is strongly associated with low subjective wellbeing….

91. Brown et al found, for instance, that "unsecured debt, as measured by outstanding (non-mortgage) credit, has a greater negative influence on psychological well-being than secured (mortgage) debt" (2005: page 659). More than this, individuals and families with 'constrained credit' were more likely to use higher cost and lower quality financial services such as pay-day loans (Friedline et al 2021: pages S35 and S42). This suggests that, once again, those who struggle for financial security are likely to find themselves disadvantaged in other ways, too.

> Insecurity also has a powerful effect on wellbeing, particularly job insecurity … and unmanageable debt…. Another aspect of insecurity associated with wellbeing is fear of crime (e.g., not feeling safe walking alone locally after dark), and this effect is greater than the effect of actual crime statistics on wellbeing….
>
> Being employed is related to subjective wellbeing, and unemployment is strongly negatively related to various measures of subjective wellbeing…. Although low wellbeing can lead to unemployment, there is clear evidence … that the experience of unemployment leads to low subjective wellbeing …, and there is evidence that the loss of wellbeing far exceeds that expected from the reduction in income from unemployment….
>
> Numerous studies show a relationship between low subjective wellbeing and poor self-reported health…. Although people may adapt to some degree to chronic illness, complete adaptation does not seem to occur…. Poor objective health and disability are also associated with lower subjective wellbeing, although this relationship is weaker than that of self-reported health and subjective wellbeing….
>
> Some studies have found that an individual's relationship with their partner and family is the single most important determinant of wellbeing…. In general, social trust (trust in other people) is strongly associated with high life satisfaction and happiness….
>
> The reported quality of public services, and trust in key public institutions such as government, the police, and the legal system, is associated with higher life satisfaction…. Perceived discrimination is associated with lower life satisfaction, lower self-esteem, and depressive symptoms…. Perceived discrimination is also the main factor underlying the lower subjective wellbeing of many immigrant communities.

What is not always entirely clear, however, is causation rather than correlation. As Ryan & Deci write (2001: pages 151-152): "That there ought to be an association between health status and well-being seems intuitively clear.... However, the relation seems to be more complex than one might expect. Some people with objectively poor health have high [subjective well-being], whereas, conversely, some people with low well-being have no signs of somatic illness."

As well as physical and mental health, Austin's analysis of the UK data from the European Social Survey in 2014 shows the effects on well-being of economic circumstances – especially by reference to the global financial crisis (GFC) of 2007-12. The consequences of this crisis were obviously felt differently by individuals, but also had national and systemic impact.

We should probably expect future research into the economic effects of the Covid-19 pandemic and the current (2022) cost-of-living anxieties to show similar trends.[92] For that reason, it is worth setting out Austin's observations in some detail (2016: pages 6-9):

> [There was] a statistically significant increase in material insecurity during the economic crisis among the UK population as a whole [such that] economic crisis was a constraint on well-being.... [Further,] effects in this domain were not evenly distributed across the

92. For example, Friedline et al 2021 echo in relation to the 'Pandemic Recession' many of the observations made by Austin in relation to the 'GFC Recession'. Further, Newman et al observe that (2021: page 231) "the perceived impact of the pandemic on social welfare law needs ... is not simply a case of increased legal need among those population groups who have traditionally experienced social welfare problems, but rather a situation in which there are a newly fragmented and diverse range of legal needs, as the pandemic has affected people from several different walks of life".

> population, but concentrated among the less well-off[93]. Material insecurity was higher among the less well-off group ... and also increased more among the less well-off. Economic crisis compounded inequality and social injustice....
>
> Another direct economic effect of the crisis was the impact on employment. Employment is valuable in many ways, including its contribution to social connection, self-respect and material security.... There were large increases in unemployment during the crisis, particularly among young people.... During hard times, there were statistically significant decreases in the proportion of people enrolled in education, and for those in work, fewer reported that they were learning new skills. This suggests that economic crisis was a constraint on people's capability to pursue self-development in the form of education and meaningful employment....
>
> The data show statistically significant declines in health during the economic crisis among the population as a whole, and across income groups. There are likely to be multiple causes of deteriorating health, and this analysis does not distinguish between physical and mental health issues. However, unemployment, financial stress and cuts in health spending and disability support payments ... are likely to contribute.... Overall, the data show that economic crisis diminished people's capabilities to lead healthy lives....
>
> The data show statistically significant increases in social isolation during hard times.... There are multiple other ways in which economic crisis might be expected to harm social relationships. For example, a reduction in disposable income may reduce people's ability to participate in social activities such as going out with friends, attending clubs or classes that cost money, or getting a bus or train for social visits and activities. Whatever the mechanisms, the data support the idea that economic crisis harmed social well-being.
>
> Taken together, the evidence strongly supports the hypothesis that economic crisis posed various external constraints on flourishing [including] widespread downgrading of goals and aspirations in the UK, away from higher agency goals such as creativity and adventure, towards basic security goals such as social order, stability and personal safety – a sort of 'hunkering down'....
>
> Overall, then, there is strong evidence that economic crisis in the UK had negative effects in multiple domains of well-being.

Paradoxically, however, this evidence of negative effects in *objective* well-being was not replicated in feelings of *subjective* well-being (Austin 2016: pages 9-10): "The data show that average happiness and life satisfaction scores were not affected during the period of hard times. The trends are flat, with no statistically significant variation at the population level or within income groups."

This leads Austin to suggest that an agreeable subjective state (feelings of well-being) is only one among a plurality of important ends that people value (2016: page 11). Resources and capabilities are also necessary conditions for well-being (though neither is sufficient), and context, circumstances and outcomes are also important. To reiterate the point from paragraph 5.2.1 above, well-being requires both positive feeling and positive functioning.

93. For this clustering effect, see further paragraph 3.2.3.2 above.

5.3 The benefits of well-being

By focusing on individual well-being, it might be tempting to assume that the benefits would accrue principally to the individual. However, this would fail to recognise the wider social, societal and economic benefits that arise from individuals functioning well.

Magyar & Keyes identify from a variety of studies and research the following benefits, or social utility, of well-being (2019: page 401):

- business profitability, productivity and employee retention[94];
- delayed onset of physical disability and mortality in older adults;
- the expression and experience of emotional states that facilitate and improve cognition and immune system function;
- a protective factor against depression and risk of suicide;
- civic responsibility;
- the provision of emotional and material support to others;
- higher levels of inter-generational transition of skills and resources; and
- local community involvement and volunteering.

If legal services regulation recognises its role in the development and maintenance (or deterioration) of general consumer well-being in such a way that these benefits can be realised, the consequences for individuals and society are manifest.

When it comes to interventions intended to improve well-being, Huppert observes (2014: page 35):

> It is likely that for people experiencing great hardship, for example in terms of social isolation, or health or economic deprivation, changing the external circumstances could have a large effect on improving subjective wellbeing. On the other hand, people whose external circumstances (described earlier as their 'objective wellbeing') can be regarded as average or above-average, frequently report very low levels of subjective wellbeing, and in these cases the more effective strategy may be to focus on improving their internal resources.

Similarly, describing well-being as "perhaps the most critical outcome measure" for policy-makers, Ruggeri et al suggest that interventions that seek to increase well-being may be more effective than those that seek to reduce harm (cf. 2020: pages 202 and 205).

In the terms of this Report, therefore, interventions that focus on improving individual capability or information might benefit only the second of Huppert's categories, namely the average or above-average – the 'ordinary' consumer (cf. paragraph 3.2.2 above). Those described earlier as 'vulnerable' or lacking in legal capability are likely to need more external or systemic change or support to improve their well-being.

94. This is consistent with Ruggeri et al's statement that "higher life satisfaction has been linked to better national economic performance" (2020: page 193).

5.4 The essence and importance of well-being

This chapter has identified that the essence of an individual's general well-being is 'doing well physically, mentally, socially and financially'. It has both objective and subjective elements, and is the product of feeling good and functioning well. As such, it is embodied (a product of the individual's innate characteristics and current state) and embedded (a product of the individual's social and institutional relationships): cf. Fineman 2017: page 143.

The description in paragraph 5.2 above suggests that a positive state of general well-being accordingly requires:

- higher relative income and manageable personal debt;
- security (particularly of home and employment) and a sense of personal safety;
- good physical and mental health;
- social trust (positive relationships with family and friends); and
- trust in public institutions and services.

While much of this is specific to the individual and personally contingent, all of these factors can be influenced by the state and, in some instances (such as personal safety and trust in public institutions and services), will be the direct result of public policy and administration. At any given time, they will influence – possibly even determine – the resources and mindset that an individual brings to bear in dealing with life's developments (including legal needs).

However, it is an inevitable condition of life that these factors will change over time: they are never all equally present in any one of us, and they are never equally distributed among us. Some of our embodied characteristics (such as gender, ethnicity and permanent disability) could stay with us for life; others (such as physical strength, cognitive ability and health) will evolve with age and biological maturity.

Change in embodied characteristics will show (Fineman 2017: pages 144-145)

> the inevitability of human dependence on others and on society and its institutions. They also illustrate the inevitable nature of inequality in social relationships. Physical or emotional dependence on others is particularly evident in infancy and childhood, but is also often found with severe illness, disability and advanced age. This form of dependency ... is universally experienced, an inherent characteristic in the human condition.

This quotation also emphasises that "of necessity, human beings are social beings" (Fineman 2017: page 145). Well-being cannot be the product of either embodied characteristics or embedded ones: it can only be the product of both. Importantly, our institutional and social relationships will not only also change over time but will critically shape our lives and well-being, too.

Fineman explains (2017: pages 145-146):

> Institutional relationships affecting individual outcomes are also evident in the expanding sets of social relationships found in educational, employment, financial and other institutions upon which we must rely as we proceed through life. Predictably, every society is composed of individuals differently situated within webs of economic, social,

> cultural, and institutional relationships that profoundly affect our destinies and fortunes, structuring individual options and creating or impeding opportunities.... [We] are all, and always, dependent upon societal structures and institutions, which provide us with the assets or resources that enable us to survive, and even thrive, within society.

The resultant 'resources and mindset' of any current state of well-being that I referred to above in turn determine the resilience that individuals can then demonstrate in dealing with the various challenges in their lives. In other words (Fineman 2017: page 146): "Although nothing can completely mitigate our vulnerability, resilience is what provides an individual with the means and ability to recover from harm, setbacks and the misfortunes that affect our lives."

Fineman elaborates (2017: pages 146-147):

> Importantly, resilience is not something we are born with, but is accumulated over the course of our lifetimes within social structures and institutions over which individuals may have little, if any, control – whether these institutions are classified as public or private, or are called family, market, or state. Resilience is also cumulative. The degree of resilience an individual has is largely dependent on the quality and quantity of resources or assets that he or she has at their disposal or command. A resilient individual can take advantage of opportunities knowing that if they take a risk and the desired outcome fails to transpire, they have the capacity to recover.

Further (2017: page 147):

> Resilience-conferring institutions operate both simultaneously and sequentially in society. That they are sequential is significant. The failure of one system in this sequence to provide necessary resources, such as the failure to provide an adequate education, affects an individual's future prospects in employment, building adult family relationships, aging and retirement. Given that institutions farther down the line are constructed in ways that are contingent on an individual's successful gathering of necessary resources in earlier systems, it is often impossible to fully recover from, or compensate for, resource deprivations.

The OECD also observes (2021: pages 73-74):

> Resilience is an integral part of legal capability. Legal processes and the resolution of legal issues can be long, expensive and frustrating even for those with substantial financial resources and sound legal capability. They are much more challenging for disadvantaged people. While resilience may be difficult to formally develop, there is little doubt that the combination of appropriate support when confronted with legal issues (such as provided by a [community service organisation]), appropriate, targeted and timely legal information and education, and more intensive legal support when required will contribute to a person's resilience in the face of legal issues.
>
> However, what happens after the (theoretical) resolution to the problem is also relevant in contributing to the resilience of people. Resilience will be enhanced if the user experiences a justice system that is accessible, effective and trustworthy – and importantly, one that, having made a decision in relation to the person's rights, is able to enforce that decision and deliver the outcome for the person. A failure at this step in the process will erode trust and confidence in the system and erode the expectations of disadvantaged people in particular.

In sum, well-being and resilience are the result of both personal and institutional factors, including those for which the state is responsible. The presence of positive well-being and its associated resilience will therefore determine how, and how well, an individual can respond to their legal needs.

In addition, though, changes in the embodied or embedded elements of well-being can improve or detract from resilience, and themselves give rise to new legal needs. For example, an injury, loss of employment, or relationship breakdown, could all lead to emergent legal needs at the same time as the individual's well-being and resilience are consequentially compromised.

In this context, the Government's policy agenda for 'building back better' and 'levelling up' (HM Government 2022) provides a clear connection between policy intention and well-being. As implementation of these policies proceeds, there should be an inevitable improvement in general well-being across the population.

It is probably obvious that overall well-being is founded on other described and specific components of well-being (such as general health and well-being, financial well-being, social well-being). This overall state will be key as we now turn to a conception of 'legal well-being'.

5.5 Towards 'legal well-being'

In the Final Report, I identified the legitimate participation of citizens in society as one of the two main foundations of the public interest (IRLSR: paragraph 4.2.1). In this sense, "the conditions for a just society come to be defined as the recognition of the personal dignity of all individuals" (Honneth 2001: page 43).

Put differently, this dignity arises from "the reciprocal recognition through which individuals come to regard themselves as equal bearers of rights from the perspective of their fellows" (2001: page 49). The converse of this is "the denial of rights and ... social exclusion, where human beings suffer in their dignity through not being granted the moral rights and responsibilities of a full legal person within their own community" (2001: page 49).

The connection between personal well-being and higher-level concerns of the public interest is well expressed by Curran & Noone (2007: page 89):

> The legal system is integrally linked to notions of the rule of law in democracies. People's capacity to seek assistance when in legal difficulty, to enforce their entitlement, to seek redress, and to participate and generate change in civil society are also interconnected to a realization of other aspects of well-being including health, housing, and employment opportunities.

Honneth emphasises that the recognition of an individual as a full legal person is important to the moral order of society and the achievement of legitimate participation. He connects it to self-respect, self-esteem and self-realisation. I would therefore also assert that this is important to individual well-being, in the sense that legitimate participation is compromised in the absence of personal well-being.

The dimensions of confidence, self-efficacy and belief in 'the system' that underpin legal capability, as discussed in paragraph 3.3 above, arguably emphasise only subjective dimensions of well-being. On this view, legal capability would be a necessary but not sufficient element of a broader notion of legal well-being. Focusing on it could lead to other crucial aspects of well-being being missed.

Although confidence and self-efficacy (aspects of respect, esteem and realisation) are critical to legal capability, well-being and participation in the legal system are founded on more than legal capability. They require more than a sense of self. As Honneth puts it (2001: page 51): "the scope for self-realization is dependent upon preconditions not available to subjects themselves, since they can be acquired only with the cooperation of their fellows". This reflects the *embedded* nature of well-being – that it is as much a social as solitary mission.

As conceived in this Report, 'legal well-being' is a component of general well-being. In other words, if an individual facing a legal need has positive legal well-being, their general sense of well-being will not be compromised. However, the converse is also true.

An individual's legal well-being is also reciprocally affected by their wider sense of well-being and, as seen in paragraph 5.4 above, they can be simultaneously compromised by life events, such as physical injury, loss of employment, and relationship breakdown.

Taking general well-being as the foundation for legal well-being, the following factors seem to me to be specific indicators of 'legal well-being':

(a) *Ease of access to legal advice, representation and document preparation*: individuals who have legal rights and obligations but who are not able to pursue or defend them when they judge that doing so is in their best interests, will necessarily find their sense of well-being undermined. It will affect their perception of legitimate participation as well as their feelings of personal dignity and recognition. Further, trust in public institutions and services (cf. paragraph 5.4 above) is not possible if individuals have no meaningful access to the legal system.

(b) *Access to funding for legal needs*: this might come from personal means, wider family and other relationships, or an ability to borrow; it might also come from legal aid or pro bono sources. In all circumstances, though, whether funded privately or publicly, availability of finance and the cost-effectiveness of legal services will be critical to a sense of legal well-being.

(c) *Ease of enquiry*: base levels of legal understanding in relation to the presenting legal need, as well as knowledge about how to find, engage and use providers, might have been determined by general education, previous or shared experience, public legal education, or ability to search for information. Clearly, public legal education and disclosure requirements have a role to play in offering an individual a degree of comfort and assurance that contributes to well-being (where ignorance, inexperience or difficulty of enquiry can lead to a deteriorating sense of well-being).

(d) *Ease of engagement*: a positive and seamless experience of using a legal services provider will engender assurance and trust, and contribute to legal

well-being. Difficulties caused by infrequent, inadequate or thwarted communication, the use of unfamiliar language or jargon (cf. Martínez et al 2022), or challenges in physical or technological accessibility will detract from it.

(e) *Availability and ease of claiming redress*: knowing that redress is available for any experienced harm can support an individual's sense of well-being. Similarly, knowing where and how to apply for redress – without experiencing barriers or difficulties in doing so – will also positively affect well-being. In this context, having to navigate a multiplicity of regulators, with different rules and processes, as well as a distinction between 'conduct' and 'service' complaints, will contribute little to maintaining a consumer's sense of well-being.

(f) The preceding factors should then result in *a sense of recognition* that the individual is respected and their dignity valued (whatever their condition or circumstances)[95], and their positive and legitimate participation in society assured.

All aspects of legal well-being are therefore dimensions of doing well physically, mentally, socially and financially. Some of the relevant factors are matters of resource (usually a product of relative income and manageable debt, and social relationships: cf. paragraph 5.4 above), while others are aspects of legal capability (self-confidence, self-efficacy, and a belief in the availability and accessibility of a just outcome: cf. paragraph 3.3 above).

Together, these elements of legal well-being contribute to the resilience of an individual in being able to address their legal need. Where well-being or resilience is in some way lacking, disengagement or exclusion is likely to result (cf. paragraphs 3.4.3 and 3.4.4 above) and the underlying legal need will remain unmet. The promotion of general well-being, and of legal well-being in particular, are therefore crucial to the effective resolution of legal needs.

Not all aspects of vulnerability and disadvantage can be removed. Harm cannot be eradicated. Regulation cannot proceed on the basis that capability can always be built or material resources redistributed in order to remedy asymmetries, disempowerment or inequalities (cf. Honneth 2001; Hoggett 2001).

In describing how legal need and its resolution does not arise in the abstract or in isolation – particularly for those who might be feeling marginalised – Newman et al write (2021: page 237):

> a basic level of resources and support is required in order to enable people to engage with sources of advice. Economic and physical resources are needed in order to travel between different services, invest time in advice-seeking and relevant research, source relevant forms or print paperwork.... Simultaneously, social and cultural resources are also needed in order for people to be able to understand the legality of their problem and where to seek help, as well as to rely on others for things like childcare and moral support.

95. In this context, it is perhaps telling to note that those seeking compensation from the NHS for medical negligence are reported to feel that the NHS "failed to acknowledge them as people", and that the compensation process is an "especially stressful ... difficult, and in some cases inhumane, experience": Opinium Report, *The Value of Compensation*, reported at: https://www.legalfutures.co.uk/latest-news/medical-negligence-claims-process-can-be-inhumane-experience (12 January 2022).

To regard vulnerability as a variation or deviation is to suggest in some way that vulnerable consumers are not 'normal' or 'ordinary', and that they are somehow failing or falling short of expectations. As Fineman writes (2017: page 147):

> While sometimes a lack of resilience can be deemed an individual failing, often it is a function of unequal access to certain societal structures or the result of unequal allocations of privilege and power within those structures. Too often, we take those who are deemed to be failing and segregate them according to some characteristic or another, such as poverty, illness or age, and then classify them as 'more vulnerable' to harm or disadvantage. However, labelling some individuals and herding them into 'populations' defined as differently or particularly vulnerable (and therefore somehow inadequate) stigmatises those individuals.

Lack of resilience can arise from a number of causes, of which vulnerability might be one. Focusing on vulnerability risks diverting attention away from other factors that could build resilience. In other words, adjusting for actual or potential vulnerability may not be sufficient.

By focusing instead on supporting the development of resilience and legal well-being we are offered an alternative perspective on how the goals and mechanisms of regulation might best be framed.

5.6 Conclusion

General well-being requires an individual to feel good and function well – physically, mentally, socially and financially. Legal well-being can support this through specific resources and feelings of assurance, comfort and trust that facilitate the engagement of providers of legal services in the pursuit or resolution of legal needs and the experience of using them.

The idea of promoting the legal well-being of consumers is different to protecting them from harm in their engagement of legal services providers. Rather than the absence or avoidance of harm, well-being is directed to the *opposite* of harm. The objective is not simply to remove or mitigate the risk of harm arising by requiring providers to respond in certain ways and face sanctions if they do not.

Rather, it is to enable more direct and supportive responses for consumers in being able to address their legal needs and when things have gone wrong. Unlike at present, where the emphasis is on dealing with providers (cf. paragraph 4.4 above), attention to well-being would offer consumers more assurance and comfort that the system 'had their backs' in offering support to deal with their legal needs and in their engagement of providers.

Instead of focusing on managing the *risk* of harm, attention should be given to achieving direct and positive outcomes for consumers for the *effects* of harm. As Fineman explains (2010: page 269; emphasis in original): "the counterpoint to vulnerability is *not* invulnerability, for that is impossible to achieve, but rather the *resilience* that comes from having some means with which to address and confront misfortune".

This Report supports Fineman's notion of a universal tendency to vulnerability, rather than vulnerability as 'a variation from the norm' that requires special treatment. However, such an approach does not fit naturally in a policy and regulatory framework that takes as its baseline the fully informed, rational and independent consumer of neoclassical economic theory.

In Fineman's view, "our bodily fragility, material needs, and the possibility of messy dependency they signify cannot be ignored in life" (2010: page 263). If that is so, she argues, these factors should not be absent from our thinking about equality, society, politics and law.

The current rationale of legal services regulation assumes that consumers, through disclosure of information, other transparency and public legal education, can be placed on an equal – or at least improved – footing in their relationships and dealings with providers of legal services. Despite the inevitable asymmetry of information and power that exists in such relationships, the goal is still to position the consumer as an independent, equal and self-sufficient contractor.

Such a rationale ignores the reality – and inevitability – of cognitive and experiential difference, resource inequality, embedded relationships, and the necessary dependency of a client on a provider. Nevertheless, if we abandoned or modified the goal of regulating for the case of the 'textbook consumer', that does not mean that the alternative goal is the highest possible well-being for consumers.

In my view, a well-being objective should support the improvement of consumers' ability to function as users of legal services providers as well as their resilience in doing so. As a result, not only is their own personal participation in society improved, the returns to society as a whole are also enhanced – in reduced economic and social 'friction' caused by avoidable stress and ill-health, unemployment, homelessness, excessive debt, welfare costs, fractured family and other relationships, and so on.

Chapters 6 and 7 will examine how this objective might be achieved.

CHAPTER 6

FOUNDATIONS FOR REFORM

6.1 Introduction

There is no easy or obvious solution to the issue of addressing consumer harm or securing well-being in the provision of legal services. Too little regulation will leave consumers exposed to harm from providers. Too much could impose costs on providers that result in reduced provision, and so expose consumers to possibly greater harm from unmet need and unresolved legal issues.

It is inevitably a question of balance. As Riefa & Saintier put it (2021: paragraph 1.2.2; emphasis supplied):

> regulation has an important role to play in achieving justice for vulnerable consumers but [we] also highlight how important it is for regulators to find the right balance between intervention and market autonomy as well as *ensuring that the tools selected for the tasks are able to deliver* for their intended targets.

In general, I agree with Riefa's statement (2020a: page 459): "Now, more than ever, consumer law needs to protect the vulnerable, and public enforcement mechanisms need to be able to prevent harm rather than repair it." However, I believe that it needs three particular qualifications in the context of legal services.

First, the focus of policy or regulatory intervention should not primarily be on vulnerability and the avoidance or remedying of harm, but on the expansion of competitive and innovative provision and on the improvement of legal well-being. Second, therefore, the tools cannot be founded principally on disclosure to consumers or sanctions on providers. Third, the 'public enforcement mechanisms' must extend to sector regulators.

The advantage that the consumers of currently regulated legal services have – and that is much vaunted by the established legal professions – is in fact only marginal. All consumers of legal services who suffer harm in their engagement with the providers of those services are too often left to their own initiative and resources to take private action against recalcitrant providers – even where the public enforcers and regulators already know that specific harm has been caused (and especially if collective redress would be a more appropriate approach to take).

6.2 Challenging current assumptions

In order to consider a revised regulatory approach for some or all legal services, I believe that we must first revisit some of the assumptions on which the current framework is based.

6.2.1 Vulnerability as an exception

Chapter 3 explored vulnerability and legal capability, and the relationship between them. Building on Fineman's work[96], MacDowell offers a revised basis for a different starting point (2018: page 76; emphasis supplied):

> Fineman advocates for a new view of the human legal subject: an embodied individual who faces a life trajectory inevitably marked by biological vulnerability (including infancy, old age and death, and the possibility of illness) and the other multiple forms of harm that can befall one during a lifetime (including social, economic, and environmental harm). These shared vulnerabilities interact with one another to produce additional, complex forms of vulnerability, which vary among individuals and social groups. Fineman notes that *vulnerability is thus universal, constant, and complex*. But vulnerability is also, paradoxically, particular in nature. This is true because "our individual experience of vulnerability varies according to the quality or quantity of resources we possess or can command." Moreover, because it cannot be eradicated, human vulnerability requires a strong state to "mediate, compensate, and lessen our vulnerability through programs, institutions, and structures."

MacDowell's focus is more on approaches and processes that can help citizens avoid harm in addressing their substantive legal needs[97] than in the principal concern of this Report, namely, the potential harm arising from engaging providers of legal advice and representation.

However, there is a cross-over, to the extent that new approaches to substantive legal needs can also involve the use of support other than regulated lawyers (such as paralegals, social workers[98] and mediators). The question of whether consumer harm might arise from that use then becomes relevant (see, in relation to mediators for example, IRLSR: paragraph 4.6.2).

The conclusion in Chapter 3 is that vulnerability as such should not be the determining characteristic for regulatory protection or intervention. Instead, legal capability and well-being offer a sounder basis for assessing the need for and use of legal services providers. This accepts that all forms and causes of vulnerability (even for those who might be described as 'ordinary' rather than 'vulnerable' consumers) will have consequences for legal capability and well-being.

However, whatever the basis for identifying the determining characteristics, vulnerability and compromised legal capability are not exceptional or particular. Following Fineman,

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96. See Fineman (2008); see also paragraphs 3.2.3.1 and 5.4 above.
97. This includes less formal, more simplified, less impartial, more problem-solving and 'delegalised' approaches to legal proceedings. This could mean, for example, that a family court's role would be reconceived from "a legal experience involving the severing of legal ties to one of managing ongoing relationships within families engaged in a process of reconstituting themselves" (MacDowell 2018: page 85). In this context, Himonas & Hubbard refer to court form reform, online court assistance programs, and courts' self-help centres (2020: pages 264-268).
98. Himonas & Hubbard offer an illustration of how the need for such support arises and can be beneficial (2020: page 275): "A social worker works with the elderly. The elderly face not only 'social work issues' such as 'loneliness, fear, anxiety, illness, mental impairment and disability claims, and health care financing' but also 'legal issues such as financial planning, wills, guardians, and advance directives.' The social worker [should be] authorized to help with at least some of these legal issues, depending on ... evaluation of risk and benefit."

they are prevalent, universal, constant and complex. In turn, rather than focusing on vulnerability, this should nudge us towards considering how to shape and use regulation to support a more positive state of legal capability and well-being for all consumers of legal services.

6.2.2 The doctrine of *caveat emptor*

Given that all consumers are, at some point, in one way or another, and to some degree, vulnerable or lacking in legal capability, I believe that the default position or foundations for regulation to address the potential for harm to consumers in their experience of legal services cannot be either any vestiges of *caveat emptor* or the notion of a fully informed, rational consumer.

Hughes has observed that the very definition of those activities that qualify as 'professions' is "occupations in which *caveat emptor* cannot be allowed to prevail" (1960: page 54). It is time to recognise this sentiment fully in legal services, and whether or not a profession is involved.

Certainly in relation to providers of unregulated legal services, apart from the limited incursions of general consumer law (as discussed in paragraph 2.2.2 above), *caveat emptor* still remains the ultimate default position for consumers of those services. Such exposure in transactions in which there is an inherent and inevitable imbalance of knowledge and power between consumers and providers cannot lead to anything other than reduced legal well-being for the former.

Rather than apply *caveat emptor* to any engagements of legal services except to the extent that specific provisions disapply or override it, we should now take the opposite approach.

6.2.3 Transparency, choice and the idea of a fully informed, rational consumer

6.2.3.1 Disclosure and transparency

I do not dispute the value of disclosure and transparency requirements, and I am certainly not advocating that they should be removed. However, this Report has sought to demonstrate that they do not – and, more importantly, cannot – fulfil the objective of making a sizeable proportion of consumers fully informed and rational.

Indeed, the evidence of widespread consumer disengagement suggests that such requirements do not even reach the lower threshold of creating 'reasonably well-informed, reasonably observant and circumspect' consumers who are better capable of making their own choices (cf. paragraph 3.2.2 above).

Such a view would counter the "growing fixation on personal responsibility, individual autonomy, self-sufficiency and independence" in contemporary politics (Fineman 2017: page 142). It would be consistent with the conclusion in Chapter 5 that vulnerability is not an exception but the universal norm. It does not require exceptional treatment but instead needs to be regarded as the foundation from which all else follows.

Fineman elaborates that what is needed is (2019: pages 342 and 355-356):

> a state that is responsive to universal human needs and for the reorganization of many existing structures, which are currently based on a conception of legal order that unduly valorizes individual liberty and choice and ignores the realities of human dependency and vulnerability....
>
> Our contemporary legal subject is posited as an autonomous and independent being whose primary demand is for liberty or freedom from state interference.... This enlightenment vision of legal and political subjectivity has ... formed the basis for the rational, self-interested agent in economic theory.
>
> [Instead], a legal subject that is primarily defined by vulnerability and need, rather than exclusively by rationality and liberty, more fully reflects the human condition.

Consequently, it is time for policy-makers and regulators to accept that "the rational response of consumers to the profusion of complex information is to stop shopping around and disengage from the market. Such an approach by consumers will naturally have a dampening effect on competition" (Riefa & Gamper 2021: paragraph 2.5).

In other words, an alternative approach would accept the rationality of consumer disengagement. The consequence of this acceptance is a recognition that "a much larger group of consumers can be made vulnerable when the rational response to information proliferation is to disengage" (Riefa & Gamper 2021: paragraph 2.5).

Botti & Iyengar summarise it in this way (2006: pages 26):

> First, the presence of more rather than fewer options makes [consumers] more likely to decide against choosing, even when the choice of opting out has negative consequences for their future well-being. Second,... people choosing from more extensive choice sets are less satisfied with their decision outcomes ... and pay more for purchases that make them less happy.[99]

However, my conclusion here is not that more choice is to be resisted, but that it is not safe to assume that disclosure and the opportunity to exercise choice will, *without more*, lead to informed decisions by consumers.

6.2.3.2 Competition and choice

Part of the policy difficulty is that competition and choice are assumed to be desirable. In addition, consumers – when asked – are also likely to say that they would prefer to make their own choices. Indeed: "The idea of the autonomous individual is an idea that underlies the 'reasonable man' of the law, the 'rational self-interested actor' of

99. These negative consequences arising from too many available choices are also affirmed by Markus & Schwartz (2010: page 351): "Choice overload can produce paralysis, poor decisions, and dissatisfaction with even good decisions", by Maule (2013: page 25, on the 'complexity effect'), by Schwartz & Cheek (2017: page 108): "they can produce paralysis, overwhelming choosers so much that they fail to make any decision, ... produce subjectively worse outcomes, magnifying regret and dissatisfaction ... [and] produce objectively worse outcomes, in part because the cognitive burden created by having to evaluate too many options undermines decision-making", and by Stucke & Ezrachi (2020: pages 97-108), who also caution: "don't expect competition to magically deliver the right level of choice, especially when companies are profiting from our choice overload" (2020: pages 117-118).

economics, and the 'authentic self' of counselling and clinical psychology" (Markus & Schwartz 2010: page 346).

This further encourages intervention to increase choice and the capability to exercise choice (and, by implication, to improve well-being[100]). But, as Botti & Iyengar suggest (2006: pages 27 and 35; emphasis supplied):

> [T]here is a discrepancy between people's preferences for increased choice and their actual reactions to the provision of choice. Specifically, although increased choice is perceived as desirable, in some circumstances, the provision of choice either inhibits [consumers'] likelihood to make a choice or detrimentally affects their experienced well-being after the choice is made. For policy makers, both the tendency to avoid choice making and the decrease in [consumers'] welfare represent undesirable outcomes, especially when there is a clear social goal to get people to choose something rather than nothing. These unwanted outcomes can be explained by three causal factors – information overload, unclear preferences, and negative emotions....
>
> An increase in the number of choices may raise the cognitive costs involved in evaluating the relative attractiveness of each option so much as to impair rational decision making....
>
> *[T]he presumption that people are never worse off, and are usually better off, as a result of making their own choices may not necessarily be true*.

Schwartz & Cheek take this note of caution a stage further, suggesting that people will "report wanting more choice when thinking about decisions in the abstract, but when actually making decisions, they often prefer having fewer options from which to choose" (2017: page 113). This has particular implications for policy decisions, given that surveys about hypothetical future states (such as 'What would you want to do if ...?') would yield different responses to concrete present states (such as 'Now that this has happened, what do you want to do?').

In the context of this Report, the exercise of choice in relation to a provider of legal services is largely "instrumental or utilitarian, such that the choice is a means to an end ... or a trade-off among different alternatives" (Schwartz & Cheek 2017: page 109). Consequently (2017: pages 113-114):

> because utilitarian choices are more focused on the outcome rather than the process of choice, people do not feel the need for as much choice. Indeed, people may be happy to have someone else make such decisions, provided the outcome is satisfactory. Furthermore,... people are more likely to find large choice sets unappealing and overwhelming when they have little familiarity with or knowledge about the choice domain, when the choice is relatively complex and difficult, and when they are relatively uncertain about their preferences.

My purpose here is not to argue against competition in the legal sector. On the contrary: I support it – as well as the general belief that competition will tend to drive greater discipline in the quality and price of the products and services on offer. In fact, I wish to argue for an increase in competition by opening up the sector even further to new entrants (though cf. Stucke & Ezrachi (2020) in footnotes 45 and 99).

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100. Markus & Schwartz suggest that "choice is viewed as essential to autonomy, which is absolutely fundamental to well-being" (2010: page 344), while acknowledging that the relationship between choice and well-being is complex (2010: page 345).

The issue for me at this point is not the *availability* of (increased) choice, but the burden on consumers of *making* their choices. Maule (2013: page 49; and see also footnote 113 below) notes that lack of thinking capacity (considered further in paragraph 6.4.3 below) leads consumers

> to struggle when dealing with complex problems. They are likely to be 'cognitive misers' who try to minimise the use of scarce mental resources even in important situations where deeper analytical thought is appropriate.... These tendencies are likely to become even more pronounced when people are fatigued by the demands of solving complex legal problems.

To conclude this topic, I adopt four questions that Schwartz & Cheek propose for policy-makers to consider when regulating for greater choice (2017: pages 114-116):

1. *Do people want more choice?* Echoing Schwartz & Creek above, Maule suggests (2013: page 25):

   > People have a general belief that having more options to choose between is better.... However, when it comes to making a decision having too many options actually disrupts choice.... Too much choice also increases the likelihood that a person defers making a decision and reduces confidence and satisfaction they have in that choice. This phenomenon has been called 'the paradox of choice' and plays out in many everyday situations.

   However, as also seen above, there may be different responses from consumers depending on the hypothetical or concrete nature of the question – in other words, timing is important. Choice, in and of itself, is not necessarily a good thing. Nevertheless, closing the gap between met and unmet legal needs *requires* more providers in the sector which, in the abstract at least, will necessarily increase the consumer's range of choices.

2. *Will more choice improve the quality of decisions?* Traditional rational choice theory suggests that greater choice will facilitate maximising utility and the ability to meet personal preferences, whereas research suggests that choice overload can lead to worse decisions: "Moreover, if having too many options creates choice paralysis, people might not make any decision, and ... having a suboptimal plan may be much better than not having one at all" (Schwartz & Cheek 2017: page 115; and cf. Stucke & Ezrachi 2020: page 99). In my view, though, the prospect of this paradox of choice is not a reason not to encourage greater competition. We should also remember the role of 'simple' choice-making through the use of heuristics (cf. paragraphs 2.3.4 and 3.2.2 above).

3. *Will more choice improve well-being?* The evidence of "choice paralysis and choice overload suggests that when choice is overwhelming, people can both make worse decisions for their present and future well-being ... and feel more regret and self-blame about decisions that prove less satisfying" (Schwartz & Creek 2017: pages 115-116; and see Maule 2013: page 25 quoted in paragraph 3.2.2 above). In most circumstances, therefore, more choice is not guaranteed to improve legal well-being. However, what could improve it is the confidence that consumers can have in whatever 'safety net' is in place once they have made a decision – whatever the basis on which they have made it.

4. *Will more choice impose too much of a burden?* This merits a longer extract by way of summary and conclusion (Schwartz & Creek 2017: page 116):

> When people have to make more choices or choose from among more options, the cognitive cost of decision-making increases. Some people may be able to absorb this increased cost fairly easily, but for others it may outweigh the potential benefits of increased choice. Recent research on poverty, for example, suggests that the material scarcity experienced by poor people imposes a serious cognitive burden ..., and as a result, increasing choice may place an even larger burden on people who are in the most vulnerable situations and would suffer most from the consequences of choice paralysis. Increases in choice that seem straightforwardly positive to people in comfortable financial positions may therefore not have such simple consequences for people who are already struggling to make ends meet.

The final sentence of this quotation is 'loaded' for policy-makers and regulators, who are likely to be in such 'comfortable' positions. It is a clear reminder that regulatory interventions designed for the benefit of fully informed, rational consumers, by those whose professional life frequently involves making judgements from a position of insight, long experience and financial comfort, are more likely than not to fail in realising their intended effects.

6.2.3.3 Consumer empowerment

Much of current regulatory theory and practice – especially when based on markets, competition and economics – assumes that empowering consumers in the decisions they make is a good thing. And so it may prove to be for some consumers.

However, the laudable goal of consumer empowerment may just backfire. Empowerment will not always be what consumers truly want, expect or experience from their engagement with the legal system and providers of legal services. As Maule observes (2013: page 31): "Some have argued that many of the actions that people take are based on a desire to manage emotions, rather than maximise the value of outcomes or achieving goals. Thus people will have a preference for options that help sustain positive mood states and reverse negative mood states". Put another way, consumers are likely, in any event, to prioritise and maintain a positive state of well-being over making the 'right' or rational decision.

In this context, we should also do well to remember this cautionary note from Genn (1999: pages 99-100; emphasis in original):

> What people need when they go for advice will depend on the type of problem that they are experiencing and, importantly, their own personal competencies (e.g. confidence, verbal skills, literacy) as well as their emotional state.... For many ..., the provision of information and guidance about how to take a problem forward did not meet perceived needs.[101] What was wanted was someone to take over and deal with the problem – to make difficult phone calls or to write difficult letters.[102] Moreover, some respondents

101. Cf. Pleasence et al 2015 in footnote 102 below and Sandefur 2020 in footnote 108 below.
102. Pleasance et al found in their survey of almost 4,000 adults' experience of legal problems that about a third (34%) of respondents wanted advisers to make decisions and act to help them in the way the adviser thought best (2015: page 108). The survey covered a wide range of problems, including

were so emotionally drained by the worry about the problem that even if they would normally feel competent and confident, at that particular time and in those particular circumstances they were not able to manage dealing with the problem. They did not want to be *empowered*, they wanted to be *saved*. When respondents commonly talk about abandoning or giving up because of 'the hassle' involved in trying to deal with a problem, this simple colloquialism actually obscures what is in many cases an important form of paralysis.

The psychological or mood states that Genn (and others) describe contribute to reduced general and legal well-being. Perhaps, then, we should shift our regulatory policy emphasis away from empowering consumers and towards saving them – from both their underlying legal need and from 'the hassle' involved in dealing with it.

6.2.4 The role of public legal education

I also do not dispute that public legal education (PLE) is a good idea. As Wintersteiger points out (2015: paragraph 2.6), "legal capability is the goal of public legal education interventions".[103] If legal capability is a key component of legal well-being and a determinant of the effective engagement with and use of legal services, then any action to improve it must be a good thing.

However, we need to recognise and accept the limitations of PLE. Thus, Wintersteiger also acknowledges that there is a substantial knowledge deficit in the UK: "Most people lack effective knowledge of legal rights, and many people misinterpret or misunderstand their rights" (2015: page 3), with a 'profound ignorance' in the realm of consumer law (2015: paragraph 3.9).

Pleasence et al emphasise the same theme (2017: page 837): "studies of the public's understanding of law point to a substantial knowledge deficit. The deficit appears greater in some areas of law than others, in part a function of salience. After all, there is less reason for individuals to possess knowledge with no clear bearing on their lives."

Further (2017: page 838): "all this is of concern, as poor understanding of law and process may prevent people from acting to protect their rights (or discharge responsibilities), prevent people acting to protect against the likelihood of particular eventualities and militate against good outcomes."

More than this, though, is that "there is often a real difference between what people claim to know and what they do actually know, and that this lack of knowledge seems to be difficult to improve – even when a problem occurs" (Wintersteiger 2015: paragraph 3.14).

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consumer issues, employment, neighbours, housing (owned and rented), money, debt, welfare benefits, education, clinical negligence, relationship breakdown, domestic violence, and care proceedings. For the potential role of legal expenses insurance in 'taking the burden away', see paragraph 7.2.4 below.

103. Later work indicates that the evidence for whether or not this goal is being met is 'patchy' and 'weak', and that robust evaluations "require significantly more resources and expertise than can be found at the level at which most PLE programmes deliver": Wintersteiger et al (2021).

Part of the reason for this could be that people assume that the requirements of the law coincide with their beliefs and therefore address legal questions according to their own notions of fairness: in other words, people "tend to assume the law concurred with what they thought it ought to be" (cf. Pleasence et al 2017: pages 839 and 840).

Wintersteiger's reference above to ignorance in relation to consumer law is picked up by Pleasence et al. Consumer issues are the most common form of justiciable issue faced by citizens and on which they express the greatest confidence in their knowledge of the law. This confidence is misplaced (2017: page 855):

> the profound mismatch between people's actual and professed understanding of the law in the case of consumer law is likely strongly influenced by the practice norms of retailers. Respondents' beliefs about consumer law, while strikingly wrong, are also strikingly in line with retail practice, where cancellations of orders for late (or even on-time) delivery are routinely accepted, refunds are consistently provided for 'mistake' purchases and defective products are ordinarily replaced with new ones.

But even addressing the knowledge deficit through PLE is no guarantee of improved outcomes, for two reasons. First, because "[one] consequence of the tendency of beliefs about the law to align with social attitudes is that ... erroneous beliefs may prove resistant to being dislodged" (Pleasence et al 2017: page 841).

The second reason is that "without a reasonable sense of subjective empowerment, an individual is unlikely to be able to implement knowledge or take action when faced with a legal problem" (Wintersteiger 2015: paragraph 3.51).

As the Final Report recorded (IRLSR: paragraph 4.3.4), Fernandes et al (2014) found that financial education interventions explained only about one-tenth of 1% of the variance in financial behaviours, with even weaker effects for interventions directed at low-income individuals.

This is supported by Ambuehl et al (2017: page 2):

> A large and growing literature finds mixed evidence that financial education interventions affect behavior.... Discussions of their welfare effects are typically informal and often colored by paternalistic judgments and preconceptions – for example, that ... a better understanding of financial concepts necessarily promotes better decisions. Yet it is also possible that particular interventions alter behavior through mechanisms that involve indoctrination, exhortation, deference to authority, social pressure, or psychological anchors. If so, their benefits are unclear....

There is consequently no straightforward or inevitable return on effort and investment in public education that demonstrably results in improved understanding and action.

We cannot reasonably expect PLE to remove the scope for consumer harm in legal services, whether arising from underlying legal needs or from the use of providers of legal services to address those needs. While the benefit of PLE is not challenged here, it cannot close the gap of information asymmetry. Like disclosure, PLE (either on its own or in combination), cannot carry the weight of consumer empowerment. It is necessary to improved legal capability, but not sufficient to improve overall legal well-being.

There can be no doubt that (Pleasence et al 2017: page 858):

> public ignorance of law is ubiquitous, can act to undermine efforts to navigate the legal framework of everyday life, impacts on the outcome of legal issues and imposes burdens on legal institutions. It strikes at law's efficacy, efficiency and legitimacy.

Nevertheless, the implication cannot be that the removal of ignorance through PLE can shoulder the burden or even be the principal means of addressing this consumer deficit.

6.2.5 Lawyers are always best

The final assumption to be challenged is the longstanding notion that, in any circumstance involving the resolution of a legal need, a lawyer will always represent the best choice and lead to the best outcome.

For as long as there is a monopoly[104] for lawyers over the practice of law (and whether that is the result of legal or regulatory requirements, or a matter of fact observable in the sector), it will remain difficult to prove that there is more than a limited market for the services of 'non-lawyers' or that they are as effective in the provision of legal services as lawyers. As Sandefur rightly observes (2020: page 289):

> consumption patterns reveal limited information about what services people would prefer: people can only consume goods or services that are actually available, that they know are available, and that they can afford.... When something (e.g., legal advice) can usually be offered by only one type of provider (e.g., lawyers), people cannot reveal their preferences for other kinds of providers.

Trabucco observes that (2018: page 480): "Information concerning misconduct or sanctions against non-lawyer representatives ... are difficult to find or simply do not exist, mostly because they lack oversight by a professional regulator."

Equally, though, in the absence of that evidence, it is also difficult to prove that lawyers are more effective. It is, for the most part, an assumption advanced by those who have a clear professional and economic interest in doing so.

To the extent that such evidence is available, it would appear that the findings are balanced.[105] In other words, lawyers and non-lawyers are no more and no less effective

104. This is not a reference to an absolute or strict monopoly but more a shorthand expression for market dominance: even in systems that are assumed to confer a legal monopoly, there are still exceptions and exemptions – or even a Nelsonian blind eye (cf. Steinberg et al 2021) – that mean that those who are not fully qualified and authorised lawyers nevertheless offer legal services for reward (cf. Trabucco 2018: page 469).

105. See for example: (1) for English alternative business structures: Centre for Strategy & Evaluation Services 2018 ("SRA data finds that 32% of all reported allegations against ABS firms are assessed by the SRA as 'amber' or 'red', compared to 39% for all firms"); (2) for the Utah regulatory sandbox participants (see paragraph 1.2.4 above): Office of Legal Services Innovation 2022 ("To date, entities have reported seven complaints to the Office, approximately 1 complaint per 2411 services delivered…. The ratio of harm-related complaints to services was approximately 1 complaint per ~4220 services"); and (3) in Ontario: Trabucco 2018 ("There is also scant evidence that lawyers are more effective or trustworthy than non-lawyer providers of certain legal services" (pages 480-481), and "the professionalism and competence of regulated paralegals is about equal to, and certainly no less than, that of lawyers [such that] the lack of evidence of any greater issues of professional misconduct

than each other. Further, given that the non-lawyers tend to specialise or narrow their area of legal focus, they can often know more than a generalist qualified lawyer. This has led a New York Court of Appeals Chief Judge to observe: "Sometimes an expert non-lawyer is better than a lawyer non-expert."[106]

I do not deny for a moment that there are circumstances where the advice and representation of a fully qualified lawyer will beyond any doubt be in the best interests of a citizen and, indeed, of the broader public interest. Nevertheless, we must be careful not to universalise these cases into a 'rule' that therefore only lawyers should be allowed to offer legal services for reward.

The circumstances need to be contextualised. Recently, Zorza & Udell wrote (2016: page 1288):

> The core goals of unauthorized practice laws are as valid as ever. Non-lawyers must not hold themselves out as lawyers or undertake activities they are unqualified to perform. But while the core goals remain valid, a changing society and legal practice may necessitate significant alterations to the structure and operation of these laws.

I agree, but there are two important consequences implicit in Zorza & Udell's statement. The first is that non-lawyers certainly must not undertake activities they are unqualified to perform. However, in order to reflect the changing society and legal practice to which they rightly refer, there is no obvious policy reason for not letting non-lawyers undertake activities that they *are* qualified to perform.

As Trabucco puts it (2018: page 479): "The question relevant to non-lawyer legal service providers is not whether non-lawyers are as good as lawyers but instead, whether non-lawyers can (and do) provide quality services in the matters in which they provide those services." We need to identify the conditions in which this is the case and provide protection for consumers accordingly.

The second consequence is that qualified lawyers must also not undertake activities that *they* are unqualified to perform. A professional qualification gained some years previously, or professional experience gained recently in different areas of legal practice, should not be the basis for an unchallengeable authorisation to provide unrelated legal services[107] (cf. IRLSR: paragraphs 4.5.2.2, 5.5.3 and 5.6.3).

In case this paragraph might, in its support of greater market participation (albeit regulated) by currently unregulated providers, be read as an attempt to reduce lawyers' work and incomes, let me also say that I agree with the following assessment by Zorza & Udell (2016: page 1313; emphasis in original):

> A robust non-lawyer practitioner segment would enable attorneys to practice at the top of their license. This would mean that the attorneys could rely more on the skills that really do require ... years of law school.... While that *might* mean less earning power for lawyers,

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worthy of a discipline hearing involving paralegals compared to lawyers ... weakens lawyers' continuing arguments against independent non-lawyer legal services provision" (page 482)).

106. Chief Judge Jonathan Lippman, recorded in Zorza & Udell (2016: page 1262).
107. For example, in a survey of knowledge about consumer, housing and employment law in England & Wales, Pleasence et al found that while lawyers scored better than other respondents in housing and consumer scenarios, only 7 of 18 (39%) answered all rented housing questions correctly and none answered all of the employment or consumer questions correctly (2017: footnote 76).

> it might also present a marketing opportunity for lawyers, since many people might initially seek non-lawyer professionals for triage, and as a result of the triage process, be referred to lawyers. This referral process already happens at many self-help centers. It is conceivable that people living in low and middle-income communities would find this to be a better gateway to lawyers than the options that are currently available.

Cynics might suggest that it is in fact easier for lawyers to undertake work that does not require their expertise – especially if they are in a position to exclude alternatives from the market, and are able to charge lawyer rates for that work. This is a good example of the consumer harm of 'over-engineering' identified in paragraph 1.2.3.5 above.

The reality is that, whether from confidence, ignorance or frustration, consumers frequently do turn to 'non-lawyers' for advice and representation in response to a legal need. There is also evidence from the United States that "even when lawyers are *free*, if legal advice from nonlawyers is available, people are more likely to use these advice services than the services of fully qualified attorneys" (Sandefur 2020: pages 295-296; emphasis supplied). We should ask: Why?

There is another sense in which lawyers might not always be best. Sandefur's work shows that where problems are not relatively complex (as distinguished from the more complex for which lawyers often are the best provider: cf. 2020: page 312 and 313, recorded in paragraph 8.6.1 below), the practical specialisation and experience of the alternative provider can include a more inclusive service to consumers than they would normally expect from a law firm (see, for example, footnote 98 above).

The value of such a 'wraparound' approach is illustrated by Steinberg et al in relation to domestic violence clients and includes (2021: page 1345)

> locating safe shelters, operating a twenty-four-hour hotline for emergencies, driving or walking survivors to appointments, and assisting with child and family welfare services. The holistic aspect of [this role] is critical to highlight, since lawyers typically do not offer these services, and yet they are invaluable to survivors who face a host of issues, many of them not specifically legal in nature.

The specialisation of such alternative services lies not just in technical law, but in navigating the relevant procedures and institutions, as well as the broader range of support that is available to consumers facing a specific (or even multiple) set of legal and other needs.

Sandefur's analysis has also found that (2015: page 929) "lawyers' impact comes more from managing relatively simple legal procedures than from deploying the complex theories or doctrines that are the stuff of formal legal education". This would suggest that lengthy and expensive legal education, qualification and accreditation is not the *key* factor in offering meaningful help with most consumers' legal needs.

Perhaps more importantly – at least in the context of litigation and advocacy – she observes that (2015: page 929):

> Lawyers' impact also reflects their relationship to the court as professionals who understand how to navigate a rarefied interpersonal world....
>
> [This] points to an illuminating distinction between forms of competence and effectiveness. Doing professional work with technical competence may sometimes require relatively low levels of professional expertise, but a need for relational expertise may

> shape the effectiveness of that competence, particularly when non- or paraprofessionals try to carry out their work in contexts dominated by professionals, such as courts.

In the end, it may be that regulation should focus less on the technical content of the law and more on the practical experience and familiarity with the procedure and processes of a given area of legal practice. In that context, the role of 'non-lawyers' may assume a greater relevance in supporting effective advice and representation for consumers.

In economic terms, regulatory policy for legal services consequently needs to address a systemic resource-market inefficiency that is a consequence of the current distinction between regulated and unregulated providers.

This distinction creates barriers that prevent the full adjustment and alignment of resources in the legal services market that would otherwise be possible. Some currently unregulated providers have sufficient expertise and experience to address certain consumer needs. These are often in specialised or focused areas of practice, and often at a higher level of technical competence and service quality than is available from many lawyers.

Hadfield explains (2017, Chapter 3):

> All of us would rather have our problem solved by a specialist (so long as he or she is actually solving problems and not just implementing long-held routines) than by a jack of all trades.
>
> This was Adam Smith's core insight in his 1776 masterpiece *The Wealth of Nations*: what distinguishes human from other animal societies is the phenomenon of specialization and the gains specialization brings. This is why the division of labor is so valuable.... Although Smith did not speak the modern language of the economics of information, this is what he meant: specialization captures the benefits of increasing returns to information.
>
> The specialization that a division of labor makes possible only makes economic sense for an individual specialist, however, if that individual can coordinate his activities and engage in reciprocal and cooperative exchange with others.... This insight was the source of another of Smith's famous aphorisms: "The division of labor is limited by the extent of the market"...: the greater the reach of the market, the more refined the division of labor can be and thus the greater the returns to specialization that can be reaped.... The more extensive our markets and systems of exchange, the more we all can benefit from increasing specialization....

In short, lawyers should not be the only specialists in the market and, the more specialists there are, the better the outcomes will be. The existing structural and regulatory barriers can prevent or disadvantage 'unregulated' providers from operating in the market, as well as reduce the confidence that consumers might otherwise have if they could engage any provider who is 'regulated'.

It is time for regulation to reflect a new reality and allow all consumers to engage with confidence with all providers of legal services, whether professionally qualified or not.

6.2.6 Summary

In summary, in considering a different approach to legal services regulation that enhances consumers' access to legal services as well as their sense of legal well-being, we should:

(a) question the continued role and applicability of the doctrine of *caveat emptor* (paragraph 6.2.2);

(b) revise assumptions about the roles of transparency, competition and consumer choice, and the idea of a fully informed, rational, empowered consumer (paragraph 6.2.3);

(c) be clear about the role and limitations of public legal education (paragraph 6.2.4); and

(d) accept that lawyers are not always best placed to offer legal advice and representation in response to consumers' legal needs, and consequently embrace a regulated role for providers of currently unregulated legal services (paragraph 6.2.5).

6.3 Policy considerations

This Supplementary Report has sought to show that the current approaches of consumer law and sector-specific regulation, with their emphasis on transparency and disclosure, and on sanctions against providers, do not best serve the needs and expectations of consumers. This is true irrespective of whether consumers are 'ordinary' or 'vulnerable', since the legal capabilities and well-being of all consumers are not being enhanced to the desired levels.

As Reich puts it (2016: page 150):

> improved information and market transparency are of little help to vulnerable consumers when the goal is to enable them to lead self-determined lives.

Disclosure and transparency cannot address all three elements of legal capability identified by the Legal Services Board (see paragraph 3.3 above). Consequently, self-determination, consumer empowerment, confidence, self-efficacy, or any other description of legal capability cannot be achieved through limited or insufficiently targeted regulation.

Indeed, I argue in this Report that what is now needed is a broader, positive goal of 'legal well-being' (see Chapter 5).

6.3.1 Current limitations

The LSB has recently declared (2020: page 17):

> [The] legal services sector needs to improve at recognising and taking account of the significant variation in legal capability so that services and interventions are designed accordingly. This involves addressing the barriers that currently impede people navigating the journey to resolving legal issues. We want to achieve the following goals:

- We want the legal services sector to provide information so that people can easily find information about their legal issue and choose the best route to resolve it.[108]
- We want the legal services sector to make it easier to search for and obtain services that meet the needs of users.
- If people receive a poor service, we want it to be easy to complain.

It is all very well to want the 'legal services sector' to offer these outcomes, but all of them still assume understanding and effort on the part of consumers. Further, it must currently be achieved within a regulatory framework that is fixed around an essentially one-size-fits-all approach determined by legal activity and professional status (rather than reflecting the needs, circumstances and risks of the 'consumer' of that activity).

Such a framework does not adequately address the nuanced risks and needs that the LSB's goals imply (see Finding 5 of the Final Report at IRLSR: page 54). Regulation also applies differently depending on the regulatory status of the provider (see Chapter 2).

In summary, the current framework, with its distinction between regulated and unregulated providers, with neither approach truly helping those most susceptible to harm in ways that are meaningful to them, is simply discriminatory against the vulnerable. Indeed, in many senses, the framework is itself *creating* vulnerabilities and *undermining* legal well-being.

By not recognising the pervasiveness of lack of access to legal services, vulnerability, low levels of legal capability, the magnitude of the task of addressing consumers' knowledge deficits, or the reality of consumers' reactions to information or choice overload, the current approach is itself contributing to sub-optimal legal well-being. It is time to recognise this and adopt a different approach.

6.3.2 Net gains

I accept that imposing regulation on providers who are currently unregulated might drive up their costs. These increased costs will most likely be passed on to consumers, who might not then be able to secure this source of advice and representation in the future.

However, this legitimate concern needs to be tempered by another. It is likely that the costs of regulatory compliance and providing redress will fall hardest on the lowest-quality providers against whom the most complaints and claims will be made by dissatisfied consumers (cf. Malcolm 2017: page 19). I can see no compelling reason to protect such providers from these consequences. The net gain to consumers should more than offset any loss of low-quality providers arising from an extension of regulatory obligations explicitly intended to protect consumers from them.

Of course, the cost of regulation is an important consideration. But it cannot be the determining factor. A preoccupation with getting 'something for nothing' or 'on the

108. However, the evidence suggests that consumers do not want more legal *information* so that they make their own choices; they want legal *advice* on how best to handle their issue: cf. Sandefur (2020: pages 291-293).

cheap' cannot serve us well. Worse, it will disproportionately disadvantage the poorest and most vulnerable in society.

We should also do well to remember that it is often the low-paid in society (particularly in public services) that we most rely on, and who themselves look after the most vulnerable members of our society. Yet it will often be those same people who experience low levels of legal capability in dealing with their own affairs.

If we fail to support those low-paid workers or the vulnerable when they need help to assert or defend their legal rights, or make it difficult for them to do so, we add friction into the economy and into society. We impose the burden and consequences of that friction on those least able to deal with it.

We cannot possibly 'build back better' in these circumstances. That is probably why BEIS recognises (2021: page 83):

> Consumer confidence will be critical to economic recovery across markets. It is therefore necessary to consider opportunities to strengthen and update consumer rights now, balancing this with proportionate requirements for businesses, who must continue to develop innovative products and services.

6.4 Building blocks for a new approach

6.4.1 Introduction

As we contemplate options for addressing the shortcomings of the current regulatory approach, I believe that a number of factors will be relevant.

The current sector-specific approach affirmed by the Legal Services Act 2007 confers too much privilege (or at least emphasis) on legally qualified providers of reserved legal activities (see paragraph 2.2.1 above). Consequently, this does not provide a sufficiently sound basis for extending regulation to unregulated providers.

If "the public's experience of civil legal problems occurs mostly beyond the sight of legal institutions and professionals" (Pleasence & Balmer 2019: page 141)[109], then we should not expect too much of regulation that is derived from, aimed at and overseen by those legal institutions and professionals. Another approach is needed.

The variety of legal needs, of consumers, of the circumstances of need, and of options for addressing those needs, suggests that only a nuanced approach will be fully effective, and this will require both targeted and multidimensional elements.

As recorded in the Final Report (IRLSR: Chapter 2), in the four years explored by the YouGov (2020) survey, almost two-thirds (64%) of those surveyed had experienced a legal issue. The issues faced were most likely to be in relation to a professional service or defective goods (26%) or anti-social neighbours (14%), followed by buying or selling property, making or changing a will, and employment issues (all on 11%).

109. The same point is expressed by Wintersteiger (2015: paragraph 3.18): "Very few legal problems ever reach the door of legal or advice services…. [Only] 6% of people overall use a lawyer, and a further 4% use the advice sector". See also YouGov 2020 and IRLSR: paragraphs 2.3 and 2.4.

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

In seeking help, therefore, YouGov respondents approached a wide variety of 'advisers', some of whom were legally qualified but the majority of whom were not.[110] This willingness of citizens to contemplate a much broader advice base than lawyers[111] again suggests that constructing a regulatory framework for legal services that addresses and includes almost exclusively only those who are legally qualified is not sufficiently inclusive or protective.

This disparity in regulation is also intensified by many law firms simply not offering services in the areas of consumer need, in effect encouraging or even forcing citizens into the arms of 'non-lawyer' advisers.[112] To the extent that consumers are seeking to resolve a legal issue, they might nevertheless need the protection offered by someone who is regulated in the context of legal services, even if that someone is not a lawyer.

This evolving background, reflecting the changing society and legal practice to which Zorza & Udell refer (cf. paragraph 6.2.5 above), points to a need for a different approach. As Pleasence & Balmer put it (2019: page 141):

> Policy must be grounded in an understanding of the many options people face when dealing with civil legal problems, of the reality of people's behavior in resolving problems, and of the reasons for underlying patterns of options and behaviors.

They cite the example of government and agency policy in Australia which is (2019: page 146)

> now directed toward better targeting legal-assistance services (to reflect patterns of experience and capability), outreach (to enable obstacles to access to be overcome), timeliness of assistance/intervention (to prevent vicious cycles of experience), joined-up services (to facilitate people's journeys to and through assistance services), appropriateness of services (to match legal capability), and community legal education (to increase legal capability).

Targeting is almost impossible to achieve with a one-size-fits-all structure, and one that knowingly excludes from regulation a significant and growing source of 'non-lawyer' providers of legal services.

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110. This variety in the number, types and combinations of 'justice journeys' was also replicated recently in a similarly large-scale study of more than 10,000 people in the United States: see HiiL & IAALS (2021: page 105), which identified 820 unique journeys in resolving legal problems.
111. Cf. Sandefur 2020 in paragraph 6.2.5 above.
112. Typically, these areas include those where the relative profitability is unattractive for private practice, such as housing, welfare benefits, and low-value consumer issues. Pleasence et al elaborate (2015: page 68; emphasis supplied): "The range of services that law firms offer acts to restrict the range of problems they are instructed about; and the range of services offered is influenced by factors linking directly to problem type, such as profitability, prestige and professional norms. There is therefore *a mismatch between the focus of law firms' work and legal problem prevalence*." Increasing the number and type of regulated providers could therefore be a route to addressing this mismatch; and cf. Himonas & Hubbard 2020 in footnote 98 above, Steinberg et al 2021 in paragraph 6.2.5 above, and Shin et al 2010 in paragraph 7.2.3 below.

Against this background, I shall now seek to identify the most important factors in considering reform.

6.4.2 Recognise and accept consumers' constraints

If all consumers are, at some point and to some extent, vulnerable or lacking in sufficient legal capability, it is to my mind a mistake to build a new regulatory approach that seeks to distinguish vulnerable consumers from others.

The answer cannot lie in "a two-speed consumer protection system, with a regime available to the average consumer and another for vulnerable consumers" (Reifa & Saintier 2021: paragraph 15.1.1). In fact, we need to avoid any approach that seeks somehow to define the 'ordinary' or the 'vulnerable'.

As Riefa & Saintier say (2021: paragraph 15.1.2):

> trying to define the vulnerable consumer is a rather futile exercise. First, because defining vulnerability is an almost impossible and complex task. Second because it is not disputed that vulnerabilities can be transient and will affect consumers in many different ways at different points. As a result, the concept is far too slippery to tackle in a meaningful way. Besides, there are also many factors (not simply pride or ignorance or misunderstanding of one's condition) that would prevent consumers from self-identifying as vulnerable to get additional help, if this was one of the ways to go about solving the problem.

Following this line, 'vulnerable' consumers should not be regarded as "a separate group of consumers that requires additional protection compared to that already afforded" by consumer law or regulation (Riefa & Gamper 2021: paragraph 2.4).

In any event, there is an argument that, if vulnerable consumers need protection, then all should gain and not just the vulnerable (2021: paragraph 2.4):

> when vulnerable consumer groups are well catered for then all consumers tend to benefit from improved service, including clearer and more accessible information, greater ease and ability to make choices, more tailored and/or useful products, and quick and simple access to redress when required. This in turn improves consumer engagement and means more consumers are likely to participate in the market, thus increasing businesses' market share.

Adopting a broader view of near-universal vulnerability or compromised legal capability (cf. paragraph 6.2.1 above) would recognise that addressing the needs of vulnerable consumers can make markets work more effectively for all consumers. This could lead to a more inclusive approach to "ensure that all who need protection can actually receive it" (Riefa & Saintier 2021: paragraph 15.1.2).

Accepting that we are all vulnerable at some (and different) points, the same approach and protection is needed for all consumers. This would also avoid the need to separate out different categories of consumer for different regulatory treatment. It would also provide scope for a shift in emphasis from a negative (the avoidance of harm) to a positive (the encouragement of legal well-being).

Such a conclusion reinforces the recommendation in the Final Report (IRLSR: paragraph 5.4.1) to focus regulation on the minimum necessary intervention rather than seeking to affirm and enforce higher aspirational professional standards.

6.4.3 The role of timing and trust

If one accepts that disclosure obligations can lead to disengagement (cf. paragraphs 3.4.3 and 6.2.3 above), the route to greater engagement cannot lie in increased disclosure.

In light of consumers' limited time, attention and processing capacity, Malcolm's caution should be borne in mind (2017: page 20):

> consumers could be thought of as having a limited supply of informational attention and regulators should aim to ensure that this is directed to the areas that will generate the greatest consumer benefit (or reduce the greatest amount of consumer risk) overall. Otherwise there is a danger that consumers use up their time and attention in comparing between advisers on issues that actually make very little difference to the average consumer.

Indeed, regulation that presumes informed, rational choices relies on consumer thinking that is "analytical and deliberative and often associated with concentration and feeling that one is in control" (Maule 2013: page 15). Consequently, "these activities use up mental energy and scarce thinking resources" and the amount of such thinking that is "possible at any point in time is limited and becomes more problematic when people are tired[113] or busy doing other things" (Maule 2013: page 15).

This gives rise to two consequential issues: the relevance *at the time* of what is being communicated; and if full information is not the goal (or even possible) what it is that the consumer is then being invited to place trust in.

6.4.3.1 Timing

Reference has already been made in the context of PLE to the critical role played by timing when addressing citizens' legal needs (see Pleasence et al 2017 in paragraph 6.2.4 above).

Consequently, it is understandable if, at the point of purchase, consumers will focus on buying issues (such as a provider's expertise, reputation, price, speed) rather than on matters relating to redress if something were to go wrong (such as how to complain, access to an ombudsman or other process for consumer dispute resolution, or professional indemnity insurance): Malcolm (2017: pages 21-22).

113. Maule picks up this point later in his report (2013: page 30): "Many legal services consumers are likely to be in a state of fatigue brought about by the amount of mental and physical activity required to manage the situation and worry about the problem and how it will turn out. Research shows that fatigue leads people to rely to an even greater extent on simple forms of ... thinking due largely to the limited amount of energy available".

The point at which information is given, and the context in which it is given will be critical to whether or not the consumer is, in fact, 'informed'.[114] Too much of the wrong sort of information at the wrong time is more likely to lead to disengagement and not fulfil its goal of disclosure and transparency. In particular, disclosure of how to make an after-the event complaint (and to whom) does not seem to help the consumer with a prior decision to make.

Arguably, therefore, one of the most valuable elements of intervention to support consumers and enhance legal well-being would be to take out of the equation at the point of engaging legal advice and representation the (in reality unasked) question 'Will I be protected if something goes wrong?' This can be achieved by offering meaningful protection to *all* consumers in that eventuality.

6.4.3.2 Trust

In any relationship where the provider has an advantage over the consumer, the latter will wish to rely on the provider to treat them fairly and not abuse that advantage. That reliance is usually described as 'trust', and should lead to consequences. As Dodsworth puts it (2021: paragraph 7.6.1): "The implication that the consumer places trust in the relationship is considered sufficient to justify a higher duty towards consumers".

Tang et al (2008: page 156) emphasise that trust is "a crucial enabling factor in relations where uncertainty, interdependence, and fear of opportunism exist". This certainly describes the circumstances of legal services. It therefore begs a question: trust in whom, or in what? Is it necessary to trust each and every provider in a market, or is it sufficient for trust be placed in a proxy such as a regulator or quality mark?

Tang et al compare the protection available to consumers under *caveat emptor*, seal-of-approval accreditation (such as quality marks), and mandatory standards. Their conclusions on this are worth recording in detail (2008: pages 169-170; emphasis in original):

> Under a caveat emptor regime, retailers can … imperfectly signal … protection or no protection. Under seal-of-approval programs, retailers can send an unambiguous signal …. Under mandatory standards, there is no need to send signals because of the high level of government intervention….
>
> We find that the extent to which retailers influence consumer trust depends crucially on the clarity and credibility of the signal retailers send. Seal-of-approval programs increase the credibility of the signal …, leading to a higher level of consumer trust than the caveat emptor regime.
>
> The mandatory standards regime is the most *effective* way of enhancing consumer trust. But we find that it can be less *efficient* than the seal-of-approval programs regime in terms of social welfare, in particular for cases in which few consumers are sensitive … and when their potential loss is small. This is because mandatory standards regimes lead to higher retailer costs and, as a result, higher prices. This, in turn, leads to a social welfare loss, which may outweigh any benefits from better … protection. Effectively, seal-of-approval programs allow customers to self-select whether to deal with a firm that protects … or a

114. This echoes Pleasence et al's observation about salience (2017: page 837, recorded in paragraph 6.2.4 above).

> firm that does not protect … (and correspondingly has a lower price). Thus, in general, adopting a mandatory standards regime for nearly all types of consumer information is not a socially optimal approach to protecting [consumers]….
>
> In a dynamic setting, firms would have additional strategies for communicating trust to their customers, including using the value of a brand name as a bond that would be forfeited if trust is violated, or signaling trust through potential lost sales in a [repeat sales] setting. But such strategies will not be available to many retailers, particularly in settings with infrequent interaction or short/nonexistent purchase histories.
>
> Building on this point, it is important to note that none of the approaches above is a necessary or sufficient condition to build trust….

If *caveat emptor* is not a reliable foundation for legal services regulation (see paragraph 6.2.2 above), and mandatory standards are thought to be too burdensome or expensive to give rise to net gains in the sector (cf. paragraph 6.3.2 above), then what Tang et al describe as 'seal-of-approval' approaches would appear to offer an intermediate source of trust and consumer protection.

Consumers' trust would not then need to be based on the (unrealistically achievable) self-confidence that comes from being fully informed or on the equally unfair consequence of *caveat emptor* to be personally responsible for ignorance in a complex sector where knowledge and power are stacked against them.

6.5 Conclusions

This chapter has emphasised that the way forward to a more appropriate and targeted approach to legal services regulation will require some of the current fundamental assumptions to be challenged and replaced.

In particular, we must now accept that consumer vulnerability is universal and not exceptional, and that the historic doctrine of *caveat emptor* can no longer play a role – however residual – in our thinking about regulation. Further, transparency and disclosure requirements, competition, public legal education, and qualified lawyers cannot carry the load of delivering legal advice and representation to all who need them.

Instead, we must recognise and accept consumers' limitations and constraints when they make decisions about whether or not to use providers of legal services. And we must then make it safe for them to exercise that choice, whenever they do so, and in whoever's favour they make it.

CHAPTER 7

A WAY FORWARD

7.1 Introduction

Returning to the foundations of regulation in the public interest (IRLSR: paragraph 4.2), one of the objectives identified there is to enable the legitimate participation of citizens in society. Such participation is not possible if citizens are not able to access legal services or to act with confidence in their dealings with providers of legal advice and representation.

The analysis in this Report seeks to show that the current regulatory framework does not provide a sufficient basis for consumers to secure access or to act with confidence. First, because of the well-known regulatory gap arising from the distinction between reserved and non-reserved legal activities, current regulation still focuses essentially on the practice of law rather than the provision of legal services.[115] It does not therefore do enough to encourage increased provision of competent and regulated legal advice and representation.

Second, even in its regulation of lawyers and other authorised persons who are within scope, the current framework leaves too much of the onus on consumers for before-the-event enquiry and seeking after-the-event remedies.

Confirming the findings and recommendations of the Final Report, I still believe that the way forward is to open up the sector by extending regulation to a broader range of providers in a way that protects consumers from the harms identified in Chapter 1 and enhances their overall well-being when dealing with life events that have a legal component.

As Wintersteiger observes (2015: paragraph 3.25): "Where there is a greater supply of legal services, there tends to be higher level of recognition of a problem as legal". Further, "the broad lack of awareness of advice sources compounds the problem of lack of recognition of legal dimensions of issues, since basic advice would serve to help someone identify and diagnose a legal problem" (2015: paragraph 3.35).

In other words, it is more likely that legal capability and legal well-being could be improved by an increase in the number of providers in the market who are able to offer

115. This is reflected in Perlman's (2015) description of current regulation as the 'law of lawyering' rather than the 'law of legal services'. The importance of the difference is captured by Waye et al's observation that: "The provision of legal services is thus broader than engaging in the practice of law" (2020: page 48). Although the gap created by the difference is perhaps at its widest in England & Wales, their observation nevertheless remains valid even for other jurisdictions (such as Australia and the United States) where the scope of non-regulated legal services is narrower.

support to citizens with legal needs but who are subject to some form of sector-specific regulatory oversight. This could also increase consumer confidence, trust and protection.

Accordingly, there are two pillars to my proposed way forward. The first seeks to address the consumer harm of unmet need (paragraph 1.2.2 above) by supporting systemic or structural change in the market. This is considered in paragraph 7.2.

That this is a structural issue is confirmed by the OECD (2021: page 17; emphasis in original):

> Taken together, results of legal needs surveys suggest that in broad terms, there is a gap between the main public justice services and services that would be best suited to meet the everyday legal and justice needs of society.... Research also suggests that many people face a range of barriers to access justice, such as cost, complexity, lack of language skills, remoteness and discrimination.
>
> Justice services also often remain fragmented or inadequate. In many jurisdictions there is no fully developed continuum of options for identifying, anticipating, preventing and resolving legal issues, often owing to weak referral and triage systems among the institutions involved. The focus on court and litigation-centred 'silo' models can further undermine the ability of justice systems to enable access to justice for all....
>
> Historically, however, many justice pathways have been designed from a provider perspective. Codes and procedures regulating litigation, for example, are still often written from the court's perspective. In contrast, *people-centred pathways* imply 1) understanding people's needs and 2) securing a level-playing field for access to justice through the development and implementation of policies and services that provide remedies to legal issues and remove barriers to access.

The consequence of this is that "the commitment to leave no one behind in accessing justice, and transformation towards a people-centricity of justice, may include shifts in existing structures ..., strategies, systems, processes or policies. These *changes could be political in nature in nature and require a reform mindset*" (2021: page 21; emphasis supplied).

The second pillar would acknowledge that expansion of provision under the first pillar would be a positive development, and that the usual positive forces of competition could perform their valuable role of market discipline on that increased provision for the benefit of consumers.

However, the second pillar recognises that competitive forces alone should not be relied on to fulfil both the public good and consumer protection elements of the public interest in regulation (cf. paragraph 1.1 above). It suggests that further regulatory assurance is needed to protect consumers from the transactional harms identified in paragraph 1.2.3 above.

Consequently, paragraph 7.3 proposes some additions to the current regulatory tools, as well as some changes to the application of others, in order to generate the desired consumer assurance and protection.

7.2 Structural change

I noted in paragraph 1.2.2 above the well-researched and documented extent and consequences of unmet legal need. It is in itself a manifestation of consumer harm that has implications, not just for the individuals concerned, but for wider society. There are potential social and economic benefits from addressing and resolving legal needs that will reduce burdens and costs on the health system, welfare budgets, social housing, employment, and so on.

Despite the number of qualified lawyers, unmet legal need persists. There is also evidence that, over time, as the number of qualified lawyers has increased significantly, more law firms and their lawyers have concentrated on legal services to the (usually more profitable) commercial sector rather than to consumers: see paragraph 1.2.2.2 above. The answer to unmet need does not lie in more qualified lawyers.

What is also clear is that we cannot spend, educate or volunteer our way out of unmet need.[116] In short, the answer also does not lie in more legal aid, more public legal education, or more pro bono advice services. It is not that these things are not helpful in addressing unmet need, but that they cannot – alone or in combination – address sufficiently the sheer volume of persistent and increasing unmet legal need.

There is, therefore, more need and scope for other, structural, interventions relating to allowing or requiring currently unregulated providers (including lawtech) to come within the scope of regulation, as well as promoting health justice partnerships and legal expenses insurance.

7.2.1 Extending the scope of regulation

The only conceivable way of making any serious and sustainable inroads into tackling unmet legal needs is to increase the number of providers who have the expertise and capability to meet them. There is now a significant literature, as well as extensive practical experience of practitioners, that supports the value of consumers being served by those who are not fully qualified professionals.

This experience particularly exists in law (in this jurisdiction and elsewhere around the world), and in healthcare. The time has come to take a different approach to these 'unregulated' and 'para-professional' providers, and stop trying to shoe-horn them into a regulatory framework designed for a different purpose and a different era.

I observed in Chapter 2 that, unlike sector-specific regulation, general consumer law presents no barriers to entry or exit for 'unregulated' providers. Other than the statutory requirements discussed in paragraph 2.2.2 above, there are no other mandatory obligations on unregulated providers of non-reserved legal services.

116. Cf. Himonas & Hubbard: "For decades [we have] sought to bridge the access-to-justice gap through incremental improvement, such as volunteerism (i.e., pro bono work) and legal aid.... Empirical results conclusively demonstrate that we can neither volunteer ourselves across the gap nor rely on public services" (2020: pages 264 and 268).

It is true that those unregulated providers could adopt voluntary self-regulation and the obligations that this would bring (cf. IRLSR: paragraph 5.3.1). However, it is unlikely that the providers most likely to cause harm to consumers or their legal well-being would do so; and they could always withdraw from such schemes whenever they wished and without regulatory consequence.

One of the main objectives of the Legal Services Act 2007 was to make significant changes to the historical structure of professional self-regulation in the legal sector. If self-regulation is not thought acceptable for the 'established' market for legal services (delivered by legally qualified providers), it is difficult to see why it should be thought acceptable for the potentially more harmful sub-market of unregulated providers.

There is evidence that the existence of entry and exit barriers can raise service quality (cf. European Commission 2018: paragraph I.A.1). There is a legitimate question, therefore, of whether introducing some barriers for the currently unregulated sector could benefit consumers.

In this context, there will usually be objections about 'dumbing down', reducing the quality of regulated provision, and increasing the risk to consumers of incompetent and unethical provision. However, it is sadly the case that these risks already exist among *regulated* providers, so it is not a matter of particular risk from the unregulated (cf. paragraph 6.2.5 above).

Also, since these risks can already occur in the unregulated market, with nothing that sector-specific regulation can presently do to address them, ignoring the problem by keeping unregulated providers beyond the scope of that regulation seems illogical. Far better to have the unregulated within the tent and be able to deal with them than knowingly to turn a blind eye.

It is also worth bearing in mind that 'currently unregulated' means, in effect, not legally qualified. However, not being legally qualified is not conclusive of an individual's lack of competence or experience in the delivery of legal services, such that allowing them to offer those services in a newly regulated environment would necessarily carry higher risk.

There are, for example, many voluntarily regulated individuals (such as paralegals, will-writers and mediators), as well as employed staff in law firms and similar, who are not necessarily legally qualified but whose competence and practical experience in legal matters is often at least as good as – and sometimes better than – that of their fully qualified counterparts or colleagues (cf. Sandefur 2020: pages 304-305).

There is also a view that extending regulation to 'unregulated' providers will result in a potential reduction in overall supply, to the detriment of consumers. This also needs to be challenged (cf. paragraph 6.3.2 above). Characterising reform as an *extension* of regulation tends to assume that the *existing* burdens of regulation are applied to new providers. This is presumed to increase costs, and so to lead to a reduction in the overall number of (formerly unregulated) providers continuing in the regulated market.

Alternatively, the requirements for entry into the regulated sector could be removed, reduced or changed. This might be characterised as 'reregulation'. The change in

barriers to entry could encourage currently unregulated providers to enter the regulated sector. In this way, the number of regulated providers could increase.

In part, this increase in numbers is likely to be due to experienced individuals, without a legal qualification but currently employed within the regulated sector, choosing to establish their own practices or businesses within the newly extended regulated sector (Rostam-Afschar 2014).[117] Reregulation, in this sense, de-risks their entrepreneurial wish to offer a competing service and removes their current inability to do so within a regulated setting.

An increase in availability of advice and representation across the market, with appropriate protections in place for consumers, should lead to an overall increase in citizens' recognition of legal issues and so in their legal well-being (cf. Wintersteiger in paragraph 7.1 above).

Once the notion of extending regulation to the unregulated is accepted, the question arises of the appropriate 'hook' on which this objective can be achieved. In other words: to whom is the regulation to apply and in what circumstances?

As conceived here (and consistent with the short-term recommendations in IRLSR: Chapter 7), regulation would apply to those who are currently not subject to the 2007 regulatory framework, even though they are providing legal services, and are doing so as part of a business. The principal goal here is therefore to protect consumers in relation to non-reserved activities carried out by those who are not regulated as lawyers. Unlike the 2007 framework, the hook could not, and should not, be reserved legal activities or legal qualification.

Fortunately, the Legal Services Act 2007 does provide some of the building blocks for a regulatory hook. Accordingly, regulation could be extended to apply where:

(i) there is a legal activity (defined in section 12(3)(b), (4) and (5));

(ii) the activity is not a reserved legal activity (as defined in section 12(1) and (2));

(iii) the activity is carried on by a person who is not an authorised person for the purposes of the Act (see section 18); and

(iv) the activity is carried on in the ordinary course of business[118].

117. Such a consequence is supported by the experience in Ontario: "When regulation began, over 2000 already-existing paralegal practices entered the licensing scheme: consumers had already been using their services" (Sandefur 2020: page 293).

118. This aims regulation at commercial contexts (that is, not at advice given by friends and the like), though it would extend to situations where a fee is not paid (as, for instance, with pro bono advice offered by otherwise commercial entities). Given that not all organisations providing legal services are businesses with a profit motive (e.g. law centres) or will necessarily be charging consumers directly a fee for legal services (e.g. some lawtech), this requirement is also intended to focus regulation on the nature of the provider rather than the nature of the transaction. See the Annex for draft amendments to the 2007 Act.

7.2.2 Lawtech

As with the Final Report (see IRLSR: paragraph 4.9), a detailed review of lawtech initiatives and developments, and their implications for legal services regulation, remains beyond the scope of this Supplementary Report.

However, it is heartening to see that the Legal Services Board has adopted the distinction in the Final Report between 'supportive' and 'substitutive' technologies, and has acknowledged that "Covid-19 has accelerated the uptake of technology within the sector" as well as the "risk that the current scope of regulation does not align with the greatest risks to consumers" (LSB 2021b: paragraphs 35, 13 and 14).

There has been much activity in lawtech since the Final Report was published. There appear to be converging factors, some of which are driven by longer-term societal, technological and sector trends, and others which are driven by short-term responses to the pandemic.

In relation to the first, Waye et al observe (2020: page 44):

> The global growth in the delivery of online legal services has been fuelled by a convergence of factors common to many knowledge-based professions currently undergoing digital disruption. These factors include increased demand for accessible and affordable legal services, the development of new low-cost business models designed to standardise and thus commoditise legal service delivery, improvements in technological capabilities and market liberalisation.

These factors are well-rehearsed and extensively described. For both consumers and providers, they offer opportunity and risk. The regulatory challenge, as the LSB (2021b) rightly describes it, is 'striking the balance'.

Writing before the pandemic, Sandefur et al remarked that (2019b: pages 9-10 and 14):

> There is a substantial mismatch between the services tools offer and what is known about the assistance wanted or needed by the ... public....
>
> Besides information and lawyer referral, the most common service offered by existing tools is the creation of documents ... but for the most part the tasks of document creation come rather late in the game in the life cycle of a justice problem – once someone has already figured out that some kind of legal problem exists on which she could take some sort of formal action. Since most [people] facing justice problems do not recognize legal aspects of their problems, existing tools are not useful for most problems....
>
> [People] who are vision impaired, have low literacy, or are not proficient in English are poorly served by most existing tools....

This mismatch will require a shift in approach, because (2019b: pages 15-16):

> development of digital tools is usually provider-driven, reflecting the interests and beliefs of those offering the service, rather than the wants and needs of the intended user populations. Established techniques exist for creating tools through user-centered, user-driven, and collaborative design. However, with a few notable exceptions, these techniques have not often been used in the development of existing tools....
>
> Most tools do not offer diagnosis of the legal aspects of people's problems, suggest possible routes of action, or provide other services that would help move a problem toward resolution....

> Digital legal technologies hold promise to empower individuals and communities to identify, understand, and take action on their justice problems and to use the rights that are theirs under law. At this stage in the growth of this field of activity, realizing that promise is not a technological challenge, but rather a social one.[119]

Legal services regulation of lawtech therefore manifests itself as an aspect of the social challenge. The Legal Services Board acknowledges the increasing consumer risk in the use of lawtech (LSB 2021b: paragraph 78):

> applications that provide legal advice on unreserved legal activities are currently regulated to the same extent as a person providing advice would be, i.e., they are not subject to specific legal regulation and the recipient of the advice is only protected by general consumer law. However, the risk to a consumer may be greater when they use an application rather than deal with a person. This is because the consumer may not be able to tell if the application is designed for his/her jurisdiction or if it is being used properly. A misleading app available on the internet could be accessed by many more people than an ill-equipped human adviser. This means that the potential for harm is much greater.[120]

Consequently, the right balance requires a matching of consumers' need and providers' services, and an approach to regulation that protects and advances consumers' legal well-being without having an unnecessarily chilling effect on product and service development and market innovation.

Two principal methods suggest themselves:

(1) continue the current 'extra-regulatory' use of waivers and sandboxes (cf. IRLSR: paragraph 4.10)[121]; and/or

(2) extend regulation to currently unregulated providers (cf. IRLSR: paragraphs 4.6.1, 4.7.2 and 7.3.1) to include providers of legal services wholly or partly through lawtech: this could be achieved through the extension of regulatory scope considered in paragraph 7.2.1 above.

There is also a case for considering appropriate but mandatory technology insurance (or a hybrid of both indemnity and technology insurance) to provide cover for technology failures that might have the potential to cause significant and swift harm to many consumers because of the one-to-many nature of technology-based products and services. Such products are already available in the market and should be affordable (cf. IRLSR: paragraph 4.9.2).

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119. This point is emphasised by Newman et al's note that (2021: page 246) "those experiencing homelessness, mental ill-health and addictions were also less likely to engage with technology, preferring face to face advice and hearings in person".
120. The Legal Services Consumer Panel has also expressed concern about "regulatory gaps that could be exploited by providers and cause consumers harm, e.g. recent/new market entrants with a completely tech-based service model" (LSCP 2019: page 12). In addition, "not everyone can access online resources [which] is why litigants [should be able to] opt out ... if they have a language barrier, disability, or lack access to the internet" (Himonas & Hubbard 2020: page 278). The industry working group on electronic execution of documents also emphasises the importance of options for vulnerable parties: see Industry Working Group (2022: paragraph 164).
121. See: SRA Innovate (https://www.sra.org.uk/solicitors/resources/sra-innovate/), and Lawtech Sandbox (https://technation.io/lawtech-sandbox/). Similar initiatives can be found, for example, in Utah (cf. paragraph 1.2.4 above and see https://utahinnovationoffice.org) and Ontario (https://lso.ca/news-events/news/latest-news-2021/law-society's-access-to-innovation-project-is-acce).

There must be a strong opportunity and future for lawtech to play a role in supporting citizens who wish to pursue their legal rights and duties. However, lawtech is one part of the tapestry of legal services and must not fall to the same weight of expectation as that often applied to disclosure, PLE and pro bono services.

Experience of the use of lawtech is growing, though the most innovative developments are probably confined to sandboxes. In my view, the time has come to extend formal regulation to include providers of legal services through lawtech.[122]

7.2.3 Health justice partnerships

We have seen that a precondition to effective participation in the legal system is physical and mental well-being (in the sense that functioning well needs to be accompanied by feeling good: cf. paragraph 5.4 above). This leads Benfer to emphasise that "poor health outcomes inhibit a person's ability to use resources to his or her advantage and in the pursuit of public participation. True justice, liberty, and freedom do not exist where they are reserved for the limited portion of the population that has the capability to exercise them" (2015: page 335).

Consistent with the known relationship between legal services and health, and a focus on well-being, structural connections in the form of health justice partnerships would present an additional route to addressing legal needs earlier and more effectively. As Benfer points out (2015: pages 306-307): "The legal system is a determinant that can have devastating consequences for individual or family health. The legal system exacerbates, and in some cases causes, poor health in many ways".

Keene et al suggest that (2020: page 232):

> by embedding legal services within an institution that families have regular contact with, and through interdisciplinary collaboration between medical and legal providers, [health justice partnerships] may be able to identify health-harming legal needs in patients who may not have sought legal assistance because they were unaware of their legal rights, faced difficulty locating legal services, could not afford to pay for these services, or held negative views of the legal system.

Shin et al (2010: page 5) offer a US-based, but transferable, view of the sheer breadth of support available from what they call medical-legal partnerships (MLP):

> Under the MLP model, attorneys work with front-line health center staff to screen for health-related legal problems, such as family matters (divorce, custody/visitation, domestic violence), housing problems (eviction, habitability, utility advocacy), special education advocacy, immigration issues, disability issues, end-of-life care, employment instability, receipt of public benefits (health insurance, disability/supplemental security income, Social Security Income), food security concerns, and additional problems and situations that lead to stress and cause or exacerbate health problems. Working with social workers and case managers, MLP staff help to secure housing assistance, Social Security Income, public

122. Such a conclusion is supported by emerging evidence of the potential for consumer harm arising, for instance, from a "lack of trust and visibility of interactive self-help tools that are being developed, for example, chatbots [and] web-based platforms that can generate customised documents/forms using information from user responses to a questionnaire": see https://www.sra.org.uk/sra/research-publications/regulators-pioneer-fund/ (3 March 2022).

> insurance, early intervention programs for children with special needs, and other public benefits.

Further (2010: page 8):

> by redressing the complex social issues faced by their patients – including, for example, those associated with housing access, substandard housing conditions, employment problems, limited income and domestic violence – legal advocacy can benefit the patients directly. Such benefits translate into reduced medical [costs], less stress, increased access to preventative medicine, and improved general well-being – all factors associated with better health outcomes.

There is clearly a virtuous circle to be developed here[123] which, combined with the economic gains to individuals, families, the National Health Service and society generally, should make a compelling case for action.

Genn & Beardon offer a persuasive assessment of the value of health justice partnerships (2021: page 12):

> Health inequalities have been described as 'wicked problems', difficult to shift. This report shows the growing evidence base on the role of Health Justice Partnerships and their potential for mitigating health inequalities. The issue is no longer whether Health Justice Partnerships are an effective intervention; the issue is how to get a Health Justice Partnership in every local authority – whether in general practices, hospitals, allied health services, or offered as part of social prescribing programmes. To achieve maximum opportunity to address the wider determinants of health, the provision of social welfare legal advice and support should be embedded into 'care pathways'. In this way advice and support can not only address immediate health harming legal needs but offers the potential to intervene at an early stage, thus avoiding difficulties from escalating and reducing the stress and poor health and costs associated with spiralling crises.

I therefore commend and support the development of health justice partnerships as a way of securing improved well-being. This is a broader question for health and social care policy. The challenge for regulation is that, consistent with the idea of minimum necessary intervention (cf. IRLSR: paragraph 5.4.1), it should not place barriers in the way of legal advice and representation through such partnerships by requiring it to be delivered *only* by legally qualified, regulated professionals.

7.2.4 Legal expenses insurance

To the extent that the cost of legal services is a barrier or impediment to citizens seeking legal advice and assistance (cf. paragraph 3.4.4 above), unmet or unresolved legal needs might be reduced if citizens had fewer financial concerns, and negative consequences for legal well-being might be avoided with the greater availability and use of funding through legal expenses insurance (LEI).

123. See paragraphs 1.3.3, 3.2.3.1 and 5.4 above, Genn & Beardon (2021), Keene et al (2020), and Benfer (2015). Retkin et al also recognise that "if legal problems are not addressed and resolved, patients are less likely to benefit from medical resources" (2013: page 151). In many ways, the case is identical to that in healthcare, where health inequality can also manifest itself as unmet medical need, limited access to treatment and under-served communities: see Turabi et al (2022).

Brüggen et al point out (2017: page 231) that, in the realm of financial services and encouraging adequate long-term planning for retirement, automatic enrolment into pensions schemes is now a structural approach adopted by policy-makers. In the same way, encouragement of greater take-up and use of legal expenses insurance could be a longer-term structural approach to meeting emerging legal needs at an acceptable cost.

The Legal Services Board's recent report on LEI recorded that many consumers found that the process of buying insurance was itself "stressful and overwhelming". Consequently, insurance was often "a grudge purchase, deemed a necessary evil, rather than something entered into with enthusiasm", despite the peace of mind – or, in my terms, improved well-being – that it might provide (2021a: paragraph 3).

One of the identified reasons for low take-up of, and enthusiasm for, LEI is the view of many consumers that they would not identify a legal need or seek legal support anyway (2021a: paragraph 4): if there is no assessed need for legal services, the value of insurance cover naturally declines markedly. Combined with an assumption that LEI cover was not affordable, or a lack of trust in the policy paying out when a claim was made, it is perhaps not surprising that the LEI challenge is considerable.

Although consumers might be aware that they have LEI cover through their house or motor insurance policies, many of them assume that it is restricted to legal issues arising from the asset (i.e. house or vehicle) covered by the main policy (2021a: paragraph 8). Although wrong, such views will inevitably colour consumer perceptions of the value of LEI as an add-on, as well as to whether or not the LEI cover will be used when a need arises.

The LSB describes the typical coverage of LEI policies (2021a: page 5):

> Although the coverage of policies varies, LEI linked to home insurance generally covers property/tenancy disputes, neighbour disputes, personal injury, employment disputes, tax issues and disputes involving wills and probate. However, issues such as debt, mental illness, divorce, criminal proceedings (including domestic violence), and immigration are issues that are not usually covered under a standard Home LEI policy.

In the context of this Report, it would appear that LEI is less likely to cover those issues that will disproportionately affect vulnerable or disadvantaged citizens. However, this is not a reason for not exploring and encouraging greater uptake for issues where cover is available.

In terms of reduced stress and improved legal well-being, the LSB also record (2021a: paragraph 13; emphasis supplied) that many consumers are "content with the idea of the insurer choosing a lawyer on the policyholder's behalf – they felt these companies would be better placed to do this and in fact *liked the idea of this burden being taken away from them*".[124]

Similarly, consumers "found it reassuring that someone else would decide whether or not it was worth starting legal proceedings and save them the hassle[124]" (2021a: paragraph 4.5.1). However, the more cynical response was that assessing a 'reasonable

124. On the question of burdens and hassle being taken away, see Genn (1999), quoted in paragraph 6.2.3.3 above.

prospect of success' "gave the insurance company an opportunity to get out of providing the service that had been paid for and ran the risk of further eroding trust in the product" (LSB 2021a: paragraph 4.5.1).

Despite a degree of consumer unfamiliarity with LEI and scepticism about insurance and insurers, there could be greater scope for encouraging the take-up of LEI, even as an add-on to other insurance policies[125]. From a policy point of view, consideration needs to be given to the best way and time to nudge consumer behaviour in this direction.

It seems unlikely that a mandatory or opt-out solution for LEI (in the vein of auto-enrolment for pensions) would gain much traction. While efforts to educate and inform citizens would undoubtedly be worthwhile (cf. LSB 2021a), the questions of whose responsibility this would be, and at what cost to whom, would need to be addressed. And, as with PLE, I remain circumspect about the timing and efficacy of such initiatives for those who most need the information (cf. paragraph 6.2.4 above). Nonetheless, LEI should be considered as a policy option, and this may be an area where targeted PLE could be beneficial.

7.3 Protection for transactional harm

Increasing the range of legal services providers by expanding the scope of regulation would legitimise the provision of legal services that currently fall within the 'unregulated' sector. However, although this could reduce the consumer harm that derives from unmet need (paragraph 1.2.2 above), it could also increase the potential for consumers to suffer the transactional harms identified in paragraph 1.2.3.

When the scope of application has been determined, attention can then turn to whether particular regulatory interventions are required to limit or manage that potential for transactional harm. As discussed in the Final Report, these interventions can take place before-, during-, and after-the-event (see IRLSR: paragraphs 5.2 to 5.4).

But the potential risk of harm does not inevitably mean that significant regulatory intervention is necessary. Consistent with the general approach of 'minimum necessary intervention' in the Final Report, and with the better regulation principles of proportionate, consistent and targeted action already incorporated by sections 3(3) and 28(3) of the Legal Services Act 2007, a risk-based approach should be adopted.

In this context, the specific regulatory interventions that I wish to consider in this section of the report include: a single entry point, registration and prohibition orders, wider enforcement of the Consumer Rights Act 2015, consumer dispute resolution, standards, supervision, professional indemnity insurance and compensation funds.

In terms of consumers' legal well-being, these interventions can be assessed for whether they can effectively achieve one or more of the following objectives:

125. It should also be noted that consumer concern about duplication of cover (especially where it is available as an add-on to a number of policies) also leads to reluctance to agree to it. However, there appears to be less enthusiasm for LEI as a stand-alone purchase.

(a) consumers' interactions with providers in the sector are less daunting and uncertain;

(b) a common set of explicit expectations about what providers should do to manage their relationships and interactions with clients and consumers;

(c) clarity about which providers are regulated in their provision of legal services, and who is not permitted to offer such services to the public;

(d) relative ease in pursuing complaints or redress against providers who fail to deliver what should be expected; and

(e) a degree of reassurance that remedies can be enforced with minimal effort and risk on the part of consumers.

7.3.1 A single entry point

The entry points for consumers to access legal services can be many and varied, reflecting the diverse ways in which citizens approach their paths to justice or justice journey (cf. paragraph 6.4.1 above). From this perspective, what might be needed is "simple and well-known gateways to legal services, as well as pathways that are tailored to certain types of legal problems and targeted to certain types of people" (McDonald & People 2014: page 7).

This would be a matter for the market (and, perhaps, in the context of legal aid provision, for the government). In relation to legal services regulation, a single point of entry refers to three very different things, all of which were discussed in the Final Report.

The first would be a single regulator of legal services, rather than multiple regulators of legal and allied professions (see IRLSR: paragraph 6.2). The second would be a single public register of all providers of regulated legal services (IRLSR: paragraph 4.8.3, and paragraph 7.3.2 below). The third would be a common single gateway to making complaints against registered providers of legal services (IRLSR: Recommendation 26 and page 173, and paragraph 7.3.4 below).

Each of these single entry points would reduce the burden on consumers in navigating the domain of legal services providers, either in their selection of an appropriately regulated source of advice and representation or in seeking a remedy if something should go wrong. As such, they could limit cognitive overload and the effort required to take appropriate action and, in doing so, enhance their legal well-being.

7.3.2 Registration and prohibition orders

The analysis presented by Tang et al (2008), and discussed in paragraph 6.4.3.2 above, suggests that a 'seal-of-approval' approach probably presents the most cost-effective option for securing consumer trust. For legal services, such a seal of approval does not need to come from entry barriers in the form of expensive and burdensome before-the-event authorisation. The approval could also come from during-the-event accreditation (see IRLSR: paragraphs 4.5.2.3, 5.4 and 5.6.3).

However, I believe that the most cost-effective approach to offering a seal of approval (that is, confidence to consumers) would be public registration. The Final Report recommended a single public register for all providers of legal services (IRLSR: paragraph 4.8.3). In the short term, however, the current framework could only be applied to those who are regulated under it, leaving those who are presently unregulated beyond the scope of registration.

Accordingly, the Final Report also made a short-term recommendation for a parallel approach applying to the unregulated sector, including a public register (IRLSR: paragraph 7.3.1.2; see also the Annex to this report). In time, the two approaches could be brought together, leading to a single, sector-wide, register.

For me, mandatory public registration would represent the minimum necessary intervention, leaving the regulator to determine whether, for certain services, providers or consumers, the evidence of risk suggests that the minimum intervention needed to go further and include, say, specific standards (see paragraph 7.3.5 below) or requirements for accreditation (see IRLSR: paragraphs 4.5.2.3, 5.4 and 5.6.3).

I therefore support the plans of the Legal Services Board to work on the development of a single register, as well as contributing to any initiatives from the Ministry of Justice to address unregulated provision (as confirmed by a paper to a recent Board meeting[126]):

6. We believe that establishing a centralised, cross-sector database of standardised regulatory information, which can be accessed and used for a range of public-facing purposes would support the regulatory objectives. Specifically, it offers an effective means of providing the wider market, and consumers, with objective, and accessible, regulatory information. It can also help to ensure that regulatory information is of good quality, up-to-date, and standardised (as much as possible). Such a model would also support interoperability between systems, such as [digital comparison tools] being able to use the regulatory information contained within it to develop their own tools.
7. Such a database can serve a range of purposes: it can be directly accessible to consumers who are looking for regulatory information, and accessible to third parties who can use the regulatory information to develop their own consumer-facing products.

I continue to see a process of comprehensive mandatory registration and related public disclosure as critical to reducing the burden of enquiry on consumers in their search for and engagement of appropriately regulated providers of legal services. Part of the path to enhanced legal well-being is the ability to have genuine (rather than merely assumed) confidence in the choices they make and the protections that will flow from them.

A public register of those who are regulated to provide services is sometimes referred to as 'positive registration'. In contrast, 'negative registration' is a reference to a scheme that allows individuals to be barred from pursuing regulated activities.

Examples of negative registration can be found in the Disclosure and Barring Service (DBS), the registers of persons prohibited from acting as a pension scheme trustee[127]

126. See https://legalservicesboard.org.uk/wp-content/uploads/2021/10/05.-Paper-21-50-Single-Digital-Register.pdf.
127. See https://www.thepensionsregulator.gov.uk/en/document-library/enforcement-activity/prohibition-of-trustees-.

and from working in regulated financial services activities in the UK[128], the register of education professionals prohibited from teaching[129], and the register of estate agents prohibited from operating[130].

The Final Report raised the issue of prohibition orders and barred lists for legal services (IRLSR: paragraph 4.8.3.3). Alongside the public register of legal services providers, the regulator could maintain – also for public inspection – a 'barred' or 'prohibited' list of individuals and entities who have been removed from the register or who are otherwise considered unsuitable to be placed on the register or to be involved with a legal provider as an owner, manager, or employee.

The UK Law Commissions declared themselves in favour or such prohibitions in the health sector, for reasons that are worth setting out in full (see Law Commissions 2014: pages 67-68):

> 5.49 Proponents of barring schemes argue that they are a proportionate and cost-effective alternative to full statutory regulation, and ensure higher levels of public protection than voluntary or self-regulatory arrangements. Whilst there is a danger that some degree of public confusion and misunderstanding may arise if negative, 'barring' lists are maintained by the regulators alongside the positive lists constituted by registers of professionals, such misunderstanding is unlikely to be significant and could be addressed by public information campaigns. In any event, we think that the potential advantages of negative registers outweigh the drawbacks....
>
> 5.51 .... There would be common criteria for imposing a prohibition order, including:
>
> (1) a breach of a code [of conduct] (where one has been issued);
> (2) an order is necessary for the protection of the public or otherwise in the public interest; and/or
> (3) certain convictions, cautions or banning decisions.
>
> 5.52 In terms of sanctions, we think there should be a binary system which simply determines whether or not a person is barred (including interim barring). The schemes should not allow for the use of conditions or warnings. We also consider than an individual to whom a prohibition order relates should be able to apply to the regulator for the order to be set aside....
>
> 5.53 It should be a criminal offence for a person included on a barred list to work as a relevant professional, or perform the activity or work in the relevant occupational role prescribed by the regulations. [Powers should be given] to specify any information that must be included in any individual prohibition order or register of prohibited persons, and to make provision about the publication of information relating to a prohibited person.

In 2016, the Professional Standards Authority published a detailed evaluation of the feasibility of prohibition order schemes for unregulated health and care workers. It contains many valuable insights and considerations to be taken into account that are relevant to such schemes generally (see PSA 2016).

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128. See https://www.handbook.fca.org.uk/handbook/EG/9.pdf.
129. See https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/752668/Teacher_misconduct-the_prohibition_of_teachers_.pdf.
130. See https://en.powys.gov.uk/article/3992/Public-Register-of-Orders.

Whereas positive registration schemes can be funded through registration fees, registers of prohibited persons pose different issues in relation to covering operating costs. To my mind, the issue resolves to this:

(a) The introduction of mandatory registration that would extend to presently unregulated providers would offer assurance to consumers and the public that in future there would be a single, accessible reference point to establish whether a current or prospective provider of legal services was regulated (if on the register) or not (if not on the register). Through registration fees, such a scheme could cover its costs of operation.

(b) If a registration scheme for unregulated providers is not supported, then the only alternative way in which consumers might be better protected than they are now from rogue unregulated providers would be for a prohibited list to be created for those providers in respect of whom the regulator[131] judges that a prohibition order is necessary for the protection of the public or is otherwise in the public interest. Such a list would probably have to be funded by central government, and would still rely on suspicious or cautious consumers being aware of and consulting the list. It is therefore less effective as a form of protection than the register within (a), and imposes costs on the taxpayer.

My preference remains for mandatory registration of all relevant providers of legal services. In my view, the marginal cost of providing a list of prohibited providers for public access and inspection alongside a mandatory registration scheme would mean that both could be maintained from registration fees, to the benefit and assurance of the public, consumers and legitimate providers.

7.3.3 Wider enforcement of the Consumer Rights Act 2015

Chapter 2 described the current position under which sector-specific regulation applies only to authorised persons under the Legal Services Act 2007. It cannot apply to currently unregulated providers, and so the only statutory remedies then available to consumers arise under the Consumer Rights Act 2015. Although the rights under the 2015 Act are also available to consumers who use authorised persons, the sector-specific regulators are not able to take action under that Act.

With the extension of sector-specific regulation proposed in the Final Report and confirmed here, both sector-specific provisions and the 2015 Act would then apply to all regulated providers of legal services. In those circumstances, it would be beneficial for all consumers of legal services if approved regulators under the 2007 Act were to be added as 'regulators' for the purposes of enforcement of the 2015 Act (cf. Schedule 3 to the Consumer Rights Act 2015).

Such a change might also open up additional opportunities for an approved regulator to pursue collective redress on behalf of multiple consumers who have suffered one-to-many harm.

131. Within the current regulatory framework, this would probably have to be the Legal Services Board.

7.3.4 The role of consumer dispute resolution

Zorza & Udell suggest that (2016: page 1310): "a consumer protection system of regulation could potentially focus on post-error enforcement, rather than on accreditation, examination, and other systems that tend to create barriers to entry and raise costs". For reasons that could make regulation less intrusive and market-dampening, as well as more cost-effective, combining consumer dispute resolution with mandatory public registration does appeal in principle.

We have already seen (and as acknowledged by BEIS) that remedies that rely on private action by consumers through the courts do not offer a readily accessible solution for most consumers for most forms of harm (see paragraph 2.2.2 above). It is not surprising that many recent initiatives in the sphere of consumer protection and redress have therefore focused on alternative dispute resolution (ADR), assuming that this must be a better route to a solution.

Graham explains (2021: paragraph 10.6):

> The future for consumer disputes lies in ADR, rather than the courts. It is already the case that most consumer disputes are dealt with by ADR, rather than the courts and the workload of these bodies seems to be increasing. From a consumer perspective, there are some good reasons for this. First, consumer disputes are not confined to complaints about legal entitlements but encompass wider issues such as delay, poor service, etc. ADR can encompass these issues whereas courts cannot, unless they can be seen as part of the legal obligations of a provider. Secondly, ADR typically offers some form of advice and assistance both initially and, in the case of Ombudsmen, as a case proceeds. The court system does not. Thirdly, ADR is generally free and less formal than the courts…. Finally, ADR seems to work reasonably well for those who access it.

In common with many other approaches to ADR, we have reached a point where these methods are increasingly mainstream and the principal route to redress: they are no longer 'alternative'. For this reason (and in line with Gill et al 2016: footnote 5), I prefer instead to refer to 'consumer dispute resolution' or CDR.

While CDR might work reasonably well for those who access it, there are nevertheless questions about whether enough of the right people – particularly the vulnerable – do in fact access it (see paragraph 2.2.2 above).

There is also a fundamental issue about the nature of the result delivered by CDR (Graham 2021: paragraph 10.6):

> the systematic use of informal resolution techniques raises the question of whether these techniques can provide substantive justice…. It has been suggested that ADR schemes generally produce fewer good outcomes for claimants than the courts and thus function as a pacification device.

These comments emphasise the importance of Sandefur's point in a different context about achieving "results that satisfy legal norms" (see paragraph 1.2.2.2 and footnote 7 above). They also resonate with Genn's observation that the outcome of mediation (and, by implication, other non-judicial resolutions of disputes) "is not about *just* settlement, it is *just about settlement*" (2010: page 117; emphasis in original).

Some will therefore assert that CDR changes the emphasis "from finding a just solution towards finding an acceptable solution" (Graham 2021: paragraph 10.2.2). It raises the question of whether this is a failure of justice, or a pragmatic compromise to mitigate the risks of any greater cost, delay and stress of making a formal civil claim.

Despite the adoption of CDR mechanisms, it seems clear that they are not yet a universally available or entirely satisfactory way of resolving consumer disputes or of leading to redress for consumer harm. Nevertheless, the reality is probably best expressed by Gill et al (2016: page 463):

> consumers will be increasingly likely to experience justice as the justice provided by CDR rather than that provided by the courts. As such, CDR mechanisms must not only provide efficient, cheap and convenient conduits for the resolution of disputes, but must also become guardians of the public interest and express the values of fairness and justice that would formerly have been the purview of the courts.
>
> If, as seems likely, the courts end up as an infrequently used alternative to CDR (rather than vice versa), CDR mechanisms will take on a heavy mantle as the primary guardians of individual justice in relation to [consumer-to-business] disputes.

If consumers are going to be directed towards CDR, in whatever form, by statute or by regulation, the expectations must be clear and managed. CDR is not a 'magic wand' but, if established and managed effectively, may yet provide a less stressful route to the restoration of legal well-being.

If more emphasis is to fall on after-the-event action, then the ability to make a complaint against a provider, have it investigated and, where appropriate, be offered meaningful redress for the harm suffered will usually be the most useful approach. But the current structure throws up an initial hurdle.

The distinction between 'conduct' and 'service' complaints is unhelpful and uninformative to the majority of consumers. The former are dealt with by front-line regulators and the latter by the Legal Ombudsman. Complainants have to judge into which of these categories their issue falls (although the provider complained against should be expected to point them in the right direction).

As in so many areas of consumer activity, legal services are no different in that "the low value of most claims requires an accessible, low-cost and high-convenience forum for resolving disputes, while the power asymmetry between consumers and large, repeat-player businesses requires a less adversarial procedure" (Gill et al 2016: page 439).

There are two critical issues in relation to CDR. The first is what the appropriate dispute resolution scheme is in relation to any given consumer transaction (and there may be more than one). The second is whether or not the provider in question is obliged to submit to any such scheme.

Since the implementation in 2015 of the EU Consumer ADR Directive[132], traders must notify consumers of an approved CDR provider if they are unable to resolve a dispute.

132. Through the Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015 S.I. No. 542 and the Alternative Dispute Resolution for Consumer Disputes (Amendment) Regulations 2015 S.I. No. 1392.

However, unless otherwise required, traders are not obliged to submit to that CDR scheme.

In legal services, for those providers who are regulated under the Legal Services Act 2007, the mandatory CDR scheme[133] is that run by the Legal Ombudsman (LeO), and regulated providers are obliged to submit to LeO's jurisdiction (section 125). This will cover complaints about professional service (but not about professional misconduct[134] – though a complaint about professional misconduct cannot exclude an ombudsman's consideration of a service issue: section 127(2)).

For providers of legal services who are not regulated under the 2007 regulatory framework, there is no mandatory CDR scheme. However, providers can choose a CDR provider approved under the 2015 Regulations (including, for instance, the Institute of Professional Willwriters). Unlike their regulated competitors, though, unregulated providers are still free not to submit to the chosen scheme, leaving consumers at a disadvantage.

In a market where the majority of consumer complaints and dissatisfaction tend to relate to poor service (see Legal Ombudsman 2022, which reports that 55% of consumer complaints relate to poor service), such a distinction in after-the-event remedies places a premium on (1) the client's choice of provider (regulated or unregulated) and (2) the voluntary participation of unregulated providers in, and compliance with, an essentially self-regulatory arrangement.

Given that the underlying legal and service issues could be the same in both the regulated and unregulated settings (and not limited to the legally qualified), the level of importance and risk to the consumer will be identical. The scope for – and consequences of – harm are also the same. But the reality of protection and the opportunities for redress are not the same, giving rise to different outcomes and consequences for consumer well-being.

This disparity cannot achieve one of the principal objectives of CDR, that is, increasing consumer confidence. This suggests that the 'typical goals' of CDR suggested by Gill et al 2016 need to be revisited in the unregulated sector. These are (2016: page 452):

> improving efficiency in dispute resolution, increasing access to justice, ensuring that disreputable traders do not flourish at the expense of legitimate traders, and ensuring that appropriate procedural and quality safeguards are in place to secure consumer and business trust.

In my view, the question of whether or not there is mandatory access to a CDR scheme (or, in effect, only the provider's elective submission to one) should rest on the nature of the legal service in question, not the status of the provider – especially when consumers are likely to assume that all providers of legal services are regulated.

133. See the Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015 S.I. No. 542, regulation 8 and Schedule 1.
134. See the Legal Ombudsman Scheme Rules 2019, Chapter 2 and note 3: https://www.legalombudsman.org.uk/media/mvzfqf0a/scheme-rules-april-2019.pdf.

My preference therefore remains for an extension of mandatory CDR jurisdiction to include currently unregulated providers of legal services. This would offer greater consistency of protection for consumers across the sector. The role of a legal services ombudsman was explored in the Final Report (IRLSR: paragraph 5.3.2).

Given current concerns about the efficacy of the Legal Ombudsman, it need not in my view follow that an extended jurisdiction must incorporate LeO; but any alternatives would – at least in the short term – need to be overseen by one or more of the Ministry of Justice, the Legal Services Board, or the Office for Legal Complaints (distinct from its continuing oversight role in relation to LeO).

Alternatives to extending LeO's jurisdiction could be considered. This could include allowing the OLC to approve alternative CDR schemes for providers to adopt, in a way similar to approved providers under the 2015 Regulations (cf. footnotes 132 and 133 above). The important point is that, unlike the position now for unregulated providers under those Regulations, submission to the scheme should be mandatory.

A further alternative that the OLC might offer could be found through annual certification under BS18477: see further paragraph 7.3.5 below.

If an alternative to LeO is contemplated, I would echo the following points about CDR schemes made by Brennan et al (2017: page 642):

> adopting an inquisitorial rather than an adversarial approach enables complaint handlers to redress the balance of power between the organization and the consumer…. [Schemes] which adopt strict legal criteria as opposed to a fair and reasonable … perspective may be less able to cater for the needs of vulnerable consumers…. [There] is a danger that consensual dispute resolution (such as mediation, where outcomes cannot be imposed by the third party) does not do enough to give confidence to consumers that the power imbalance between them and an organization will be redressed.

Similarly, Graham (2021: paragraph 10.6) offers the following thoughts:

> For ADR schemes, there are things that can be done to improve their treatment of consumers in vulnerable circumstances…. First, they must ensure multiple, accessible channels for consumers to bring a complaint, for example, making sure that their website is fully accessible. Secondly, ensuring staff are properly trained to be sensitive to the indicators of vulnerability and/or have software which will help them to identify consumers in vulnerable circumstances. Thirdly, it is often useful to have specialists who can deal with people in especially vulnerable situations. It may also be useful to have special arrangements either for groups of consumers or categories of issues where consumers might be particularly vulnerable.

Given the view in paragraph 6.4.2 above that vulnerability is universally experienced, CDR schemes should perhaps take this as the starting point for their design rather than incorporating 'special arrangements'.

Finally, online dispute resolution (ODR) can assist both judicial determination of disputes and CDR. However, in the present context it is important to record that the digital context can add to the potential for consumer harm – particularly for those who are vulnerable, such as the visually impaired or those who are digitally excluded either by supply (poor broadband) or personal circumstances (disability, or inability to pay for or use technology): cf. Himonas & Hubbard 2020: page 278 (in footnote 120 above).

In conclusion, my view is that only mandatory CDR, appropriately designed and administered, can adequately offer investigation and redress relating to harm arising from the actions of legal services providers and so improve consumers' legal well-being.

7.3.5 The use of standards

When a third party (such as an ombudsman or CDR provider) is empowered to make judgements about a provider's service to a consumer, it is helpful to have an accepted statement about the expected standards of conduct or service. This offers a more objective benchmark or expectation against which provision in any given circumstances can be assessed.

There are two important questions in relation to standards. The first is, Which standards should be adopted? (with a subsidiary question of, Who should set or approve them?). The second is whether they should be mandatory or voluntary.

In professional services, such standards are often set by a code of conduct or practice. Where a code of conduct applies to members of a particular group (such as those with a particular professional title), compliance is usually mandatory. Serious instances of misconduct can lead to exclusion from the membership group and then to the loss of a right to practise.

Similarly, in the absence of mandatory regulation, codes of conduct can be adopted voluntarily as an aspect of self-regulating organisation. The LSB can give advice on such codes and voluntary arrangements (under section 163 of the Legal Services Act 2007). These can then be part of a more formal, but still voluntary, scheme of regulation. Although the Act allows the OLC to make voluntary scheme rules (section 164), these powers have never been used.

On the question of voluntariness, I have already referred (in paragraph 7.2.1 above) to the probability that those unregulated providers who pose the greatest risk to consumers are the ones who are most likely not to submit to any voluntary or self-regulating jurisdiction.

A combination of registration and a common code of conduct could offer the minimum necessary enforceable standards designed to protect consumers from harm or promote their legal well-being (or both). As with CDR, it is not necessary to restrict the source of the actual standards applied in any given circumstance: a regulator could approve any statement of standards that met at least its required minimum.

As an alternative to formal regulation or sector-specific schemes, Hunter refers to British Standard (BS18477) *Inclusive Service Provision. Requirements for identifying and responding to consumer vulnerability*. She writes (2021: paragraphs 9.1 and 9.3.1):

> This standard helps service providers to recognise and support individuals who may be vulnerable, thereby reducing their risk of harm….
>
> BS18477 provides guidance on how to identify people who may be in vulnerable situations by listing risk factors for vulnerability, which may indicate that a person is struggling. As many vulnerabilities are situational, they tend to be invisible at first glance and difficult to identify. Besides, consumers are unlikely to volunteer information about

personal difficulties, and many do not think of themselves as 'vulnerable'. In consequence, staff guidance on how to spot verbal or behavioural indicators that an individual may be experiencing difficulties, and how to encourage disclosure, is vital to achieving positive outcomes.

As recognised in paragraph 6.4.2 above, such an approach could benefit more consumers than only those who are identified as vulnerable.

BS18477 also offers an annual audited certification process, so that organisations that meet its requirements can signal their implementation of it to consumers and so offer additional confidence. This would be another form of a 'seal-of-approval' approach: see paragraph 6.4.3.2 above.

Businesses that have implemented BS18477 have identified six key benefits (Hunter 2021: paragraph 9.3.1):

(1) allows the organisation to protect its reputation and build consumer trust;

(2) gains a competitive advantage by meeting consumers' needs and following a quality process;

(3) ensures compliance with consumer protection regulations through active consideration of consumers' needs and actions;

(4) supports employees in identifying potential vulnerabilities and in responding confidently;

(5) demonstrates that they are 'doing the right thing', by explicitly supporting social justice and those who may be disadvantaged; and

(6) reduces costs, and increases staff confidence and retention, by identifying, understanding and addressing consumer vulnerabilities quickly and efficiently.

BS18477 only sets out guidance and a basis for audited certification. It does not offer a CDR scheme. As suggested in paragraph 7.3.4 above, therefore, if it were to be recognised by the OLC as an alternative expression of standards, it would need to be in the context of access to LeO or any alternative scheme for mandatory complaint investigation and redress for which the Standard provided a basis for assessing the legitimacy of the complaint.

While I am in favour of codes of conduct, there is merit in making any mandatory codes subject to two limitations:

(a) any code that was intended to apply, say, to all registered providers of legal services should be explicitly aimed at only those requirements that are judged necessary to maintain the minimum necessary standards of competence, quality, service and ethics; and

(b) any more specific, special or targeted codes should only be imposed on a mandatory basis if they can pass a high threshold of addressing identified risks in particular areas of practice, or for particular types of provider, or for particular types of consumer.

As I see it, the purpose of codes of conduct is not so much to prescribe the standards and behaviours required of practitioners as to manage the expectations of practitioners,

clients and regulators (including CDR providers) about the basis on which actions and outcomes might be assessed after the event.

7.3.6 Supervision

There are a number of instances in the current regulatory framework where the provision and performance of reserved legal activities that would ordinarily require personal authorisation can be undertaken by an unauthorised person "under the supervision of" someone who is.[135]

The assumption of such supervision is that a qualified and regulated lawyer can oversee the work of someone who is not legally qualified and thereby assure competence and quality for the consumer. However, there are two ways of looking at this. One is to believe that it will result in active delegation, oversight and intervention as appropriate. The other is that it only ensures that there is a regulated person to take responsibility and be accountable to a regulator.

The evidence suggests that the reality is closer to the second view. As Zorza & Udell write (2016: pages 1272 and 1274, in relation to US non-profit settings, but which I believe are generalisable by both jurisdiction and practice area):

> in many settings supervision is attenuated. The law is relatively undeveloped on the nature and level of supervision required and delegation of authority that may be allowed, and it does not typically specify any particular obligation of a supervisor beyond remaining fundamentally accountable.... Supervision relies on training, the exercise of discretion by non-lawyers to bring difficult issues to the supervising attorney, and the supervisor's final review of actions taken....
>
> Few lawyers receive training on how to train and supervise non-lawyers, and law schools do not cover the subject.

While supervision is expected, particularly by solicitors, of a number of different people in both client-facing and support roles, much of the explicit official guidance is focused on supervising trainees. But under the current arrangements, accountability seems to be emphasised rather than effectiveness.

In other words, as long as there is an authorised person in the mix, their professional ability as a practising lawyer to supervise the technical content of someone else's work is assumed rather than assured. And their managerial ability to delegate, train and supervise is rarely tested.

Zorza & Udell again describe the concern (2016: page 1282, this time in the context of for-profit settings):

> The current regulatory framework holds the lawyer accountable for any failure to adequately supervise work done by non-lawyers. While this is a fundamental and valuable element of the attorney-client relationship, it would benefit from close re-examination.

135. See for example, Legal Services Act 2007, Schedule 3: paragraph 1(7)(b)(ii) (exercise of rights of audience when assisting in the conduct of litigation); paragraph 3(3)(b) (carrying on reserved instrument activities); and paragraph 4(2)(b) (carrying on probate activities). In addition, section 190(3)(b)(ii) of the Act extends legal professional privilege to employees of an ABS who act at the direction and under the supervision of a relevant lawyer.

> The existing framework does not define the number of non-lawyers that a lawyer can responsibly supervise, specify the tasks expected of a supervisor, or provide guidance regarding what might constitute negligence by a supervisor. Nor does it establish whether certain assumptions exist about standards of care for supervisors or non-lawyers. These ambiguities might allow reliance on non-lawyers to expand in some contexts where supervision by attorneys is attenuated, while chilling expansion in others. Nevertheless, it also tends to reduce public dialogue about whether better options might be possible, and whether they would allow greater expansion of roles for non-lawyers.

Supervision should be a key tool in the provision of legal services, whether of lawyers or 'non-lawyers', in law firms or elsewhere, and in for-profit or non-profit settings.

Current experience suggests, though, that formal supervision by an authorised person is too much of a 'fig leaf' of assurance, and unfortunately cannot be relied on to guarantee consumer or public confidence in the competence or quality of the services delivered under supervision.

Requiring supervision of someone who is not legally qualified by an authorised person (usually a lawyer) is no guarantee of competence or service quality. Expanding regulation to the currently unregulated on the basis that there should be a requirement for supervision by a qualified lawyer would be no more than the same fig leaf. Indeed, in many cases, the 'non-lawyer expert' will know more than the 'lawyer non-expert' (cf. paragraph 6.2.5 above), suggesting that the supervisory relationship would be more effective if it operated the other way round.

In summary, supervision is an important element of competence and quality assurance to clients. However, it is more important to be clear about what it entails and what it must assure, rather than to be prescriptive about the qualifications or status of those who are allowed to undertake it. Supervision must also not be used as an alternative to the proposal for extended and direct regulation of 'non-lawyer' providers in paragraph 7.2.1 above.

Such a shift of regulators' attention and enforcement is necessary before supervision can, in any circumstances, either adequately address the potential for consumer harm or offer meaningful assurance to contribute to consumers' peace of mind and legal well-being.

7.3.7 Professional indemnity insurance and compensation funds

Professional indemnity insurance (PII) and compensation funds can provide a degree of assurance and comfort to both clients and providers. Clients can feel that their legitimate claims can be met, and providers that their obligations can be covered (in whole or part), despite any current financial challenges the provider might be facing.

The Final Report referred to the role of indemnity insurers as 'quasi-regulators' of providers (IRLSR: paragraph 4.5.2.2):

> Based on their claims data or as a condition of cover, insurers might require evidence of appropriate risk assessment and management for the practice (including the firm's need for continuing competence and internal processes to address the identified risks). They are also in a position to advise regulators on specific and emerging risks.

> Also, if insurers perceive that regulators are not taking sufficient action in response to risk, they will most likely price the increased risk into their insurance products. It is therefore in everyone's interests – clients, providers, and regulators – for risk to be effectively identified and responses to be appropriate and robust.

The question, of course, is whether the assurance provided by PII comes at a cost that is too high for the market to bear. However, I have heard nothing in the period since the Final Report was published that causes me to revise my assessment at that time (IRLSR: paragraph 5.3.1):

> I understand concerns that any requirement for indemnity cover will drive up the costs of becoming a registered provider of legal services, and might deter currently unregulated providers from continuing in practice. However, there are a couple of factors that give me cause for optimism.
>
> First, the cost of solicitors' indemnity insurance is in part driven both by the breadth of the cover they require and their insurers' need to meet other terms (such as run-off cover, and inability to cancel policies for non-payment of premiums or non-disclosure).
>
> Inappropriate or challenging minimum terms can make the legal market difficult for indemnity insurers.... A balance needs to be struck by providing sufficient cover and protection that does not drive insurers out of the market, potentially leaving providers without cover and clients without redress.
>
> [More] targeted conditions based on the relative risks of legal services actually provided by practitioners should mean that firms will be more likely to focus their practices and comply with more targeted regulatory obligations. Over time, the claims history of firms should therefore support better pricing of risk and indemnity premiums by insurers.
>
> Second, for those providers whose business is more narrowly focused, particularly on a specialist legal service, there could well be a clearer relationship between their practice risk and (relatively lower) indemnity insurance premiums. There is already some evidence of this in the market, with indemnity premiums for licensed conveyancers typically being lower than for solicitors.
>
> That said, if the regulator assesses that indemnity cover at a certain level is an appropriate and proportionate requirement, those who are not willing to bear the consequential cost should probably not be in the market, and for good reason.

In summary, therefore, PII can be a key tool in the regulatory armoury, and can be specifically targeted to assessed and experienced risk. On that basis, it should only be required where the risk profile of the practitioners or the services offered is such that the need for PII exceeds the 'minimum necessary intervention' threshold. It should not be a blanket market requirement (such as a condition of registration) for all registered providers irrespective of risk.

In line with the Final Report (IRLSR: paragraph 5.3.1), I continue to remain open-minded about whether contributions to a compensation fund should be a condition of registration. However, unregulated providers of estate administration services can currently assume direct custody of client's money or other assets. Client and public assurance in respect of at least those services suggests – in line with the views expressed above about PII – that the requirement for compensation or fidelity bond arrangements should probably be seriously considered. The need exceeds the 'minimum necessary intervention' threshold and the risk to consumers is high.

I accept that compensation funds are not uncontroversial or devoid of problems (see IRLSR: Viewpoint 2, pages 62-63), and – like PII – are certainly not free of cost implications. However, I would again (cf. IRLSR: paragraph 5.3.1) refer supportively to the experience of the Professional Paralegal Register, which manages to secure both PII and compensation fund contributions at a cost-effective level, and does not deter registered providers from the sector.

7.4 The timing of reform

The Final Report addressed the question of the timing for reform (see IRLSR: Preamble and paragraph 7.1). I remain of the view that short-term reform is required. None of the consumer issues addressed in this Supplementary Report have eased in the 22 months since the publication of the Final Report. If anything, the online use of legal advice and support has increased: indeed, it is being positively and financially encouraged to increase by the Government[136].

These developments are important because of the challenges of online provision previously identified by Wintersteiger (2015: paragraph 3.33): "The most severe problems tended to push people to use the Internet, increasing levels of use by 10% between the highest and lowest severity of problems".

In addition, the Government's agenda for 'building back better' and 'levelling up' (cf. HM Government 2022) cannot possibly be realised without individuals and businesses having confidence that they can establish and enforce their legal rights.

The converse is arguably even worse: any inability on the part of citizens to find or access reliable and protected advice, any lack of confidence or capability, or any emotional and economic 'friction' caused by uncertainty or inability to create, identify or defend their rights, lost productivity, fractured relationships, and avoidable costs and stress, will undermine the agenda. In short, positive legal well-being could not be achieved.

7.5 The proposals and their role in promoting legal well-being

It is well known and, I believe, widely accepted, that legal needs arise from and contribute to wider issues of personal ill-health, stress, and family tension. They also lead to consequential burdens on society in the form of health and welfare services, unemployment, homelessness, broken families, and more.

This Report also identifies that such personal issues and societal consequences can arise, not just from the underlying legal needs themselves, but also from citizens seeking – or from their failure or unwillingness to seek – legal advice and representation. This is the nature of consumer harm addressed in this Report.

136. See https://www.legalfutures.co.uk/latest-news/investment-in-lawtech-companies-doubles-but-firms-lag-behind (15 July 2021) and https://www.legalfutures.co.uk/latest-news/legal-regulators-secure-government-cash-for-innovation-projects (16 September 2021).

The difficulty faced by many consumers is summed up in Keene et al's description of the process of trying to find a lawyer as "challenging, expensive, and consuming of scarce emotional energy", and of citizens "being too overwhelmed by the challenges that they were navigating to reach out for legal help" (2020: page 236).

If those who need help are then failed in access to it or their experience of it, through the forms of harm identified in Chapter 1, their problems are compounded, are less likely to be resolved easily, satisfactorily or at all, and are detrimental to their overall well-being.

Consistent with the Final Report, the conclusion of this Supplementary Report is that the current framework for the regulation of legal services:

- has inadequate and distorting scope (the regulation of lawyers rather than legal services); and consequently
- starts from the wrong place (reserved legal activities and professional titles);
- focuses too much on the wrong issues (qualification, authorisation and misconduct); and
- places too much emphasis on disclosure and consumer empowerment.

The issues arising for attention from this chapter are, therefore:

(1) an extension of the scope of regulation to allow a greater number of regulated providers that is more likely to address cumulative and persistent unmet legal needs;

(2) legal services regulation should enable (or at least not inhibit) the effective introduction of health justice partnerships;

(3) policy objectives should encourage the take-up of LEI;

(4) a single point of entry for regulation, registration and unresolved complaints;

(5) a register of regulated providers of legal services, and a list of prohibited providers, available to the public to inspect;

(6) the registration of currently unregulated providers to extend to those who provide legal services wholly or partly through lawtech;

(7) the provision of appropriately designed mandatory CDR;

(8) the adoption of at least minimum standards or code of conduct;

(9) greater attention by regulators to the effectiveness of supervision (rather than on the fact of it or accountability for it); and

(10) consideration of the requirement for minimum effective levels of professional indemnity insurance and compensation fund contributions.

This combination of changes would contribute to a significant improvement in access, confidence, capability and well-being of consumers in addressing their legal needs.

7.6 Conclusions

I believe that the proposals in this chapter are consistent with the following important considerations identified by Zorza & Udell (2016: page 1291):

- The purpose of regulation is to benefit the public. Prohibitions are warranted only insofar as they protect consumers and increase access to justice. The public is now deeply skeptical of professions that self-regulate in the interests of the profession itself.
- Regulation need not be an 'either/or' matter, but should take into account the breadth of circumstances. It may now be appropriate to allow 'intermediate' categories of legal practice by non-lawyers that would not otherwise be handled by admitted attorneys, and that were inconceivable when the structure of regulation was put in place.
- Some activities that might traditionally have been considered the 'practice of law' might not warrant continued prohibition under the unauthorized practice laws. For example, because many people now have access to higher education, non-lawyers may be better positioned to provide informational services than they would have been in the early twentieth century.
- Advances in technology may provide new opportunities for non-lawyers to assist people with legal matters....
- Niche practice areas that are currently not being adequately handled by private attorneys[137] may offer opportunities for practice by non-lawyers, especially for the specific tasks that are relatively repetitive, or that depend on technical knowledge.

That the United States faces substantially the same challenges with unmet legal need and with the purpose, scope and methods of legal services regulation creates an opportunity for mutual learning and sharing of insights and best practice. It also provides the potential for competitive or first-mover advantage in regulatory reform.

I am very mindful of this point made by Matthews 30 years ago (1991: page 750; emphasis in original):

> I conclude by pointing out, as at least a possibility, one way of getting the worst of both worlds. An increasing proportion of occupations is becoming professionalised, in the sense that admission to them is restricted by the requirement of qualifications that are probably in excess of what is necessary. At the same time, many of the professions themselves are being pushed in directions that endanger elements in their codes of conduct that *are* appropriate to their circumstances.

Paraphrasing for the context of this report, the 'warning' is clear: extend regulation to those who are currently unregulated and supply might decrease and costs increase; but reduce regulation in currently regulated areas and something might be lost in terms of cost-effective protection for consumers even if that regulation represents a constraint on regulated competition.

I accept Matthews's points, but believe that the path to extending regulation charted in this chapter strikes the right balance. It should not disproportionately increase regulatory burdens and costs on those who are currently unregulated. Equally, it

137. See footnote 112 above.

recognises the role and value of codes and professional standards and wishes to see the best of them adopted more widely.

Focusing regulation on consumer empowerment and the avoidance of harm misses the broader goal of enhancing legal well-being and securing the public's trust and confidence in their engagement with all providers of legal services. It has also so far failed to deliver a sufficiently broad and competitive market capable of supplying the range of legal services and providers, or the innovation, necessary for twenty-first century society.

CHAPTER 8

CONCLUSIONS

8.1 Introduction

Although there are many potential types and sources of consumer harm (identified in Chapter 1), in practice the harms that most often affect consumers of legal services arise from lack of access to legal services and from poor service provided to those who do access them. The response to lack of access cannot rest on an increase in the types of providers who are currently regulated under the 2007 regulatory framework.

Complaints about poor service apply equally to regulated and unregulated providers. However, where poor service is experienced by consumers who use unregulated providers, there is no protection for them unless their provider has opted for a form of voluntary self-regulation. In short, for consumers who assume that all legal services are in some way regulated and protected, that assumption is misplaced.

The country is seeking to 'build back better' and 'level up' (cf. HM Government 2022). At a time when legal rights and obligations assume ever greater importance in our daily lives, any mismatch between need and access, and between consumer expectation and regulatory protection, is detrimental. It will undermine public confidence in legal services and the rule of law or in the well-being of our fellow citizens.

8.2 Current responses are inadequate

My Final Report (IRLSR 2020) proposed a more risk-based approach for the future regulation of legal services. What this Supplementary Report has sought to demonstrate is that the risk to public and consumer interests does not so much lie in the legal services themselves as in the structure of the regulated market and in the circumstances of the consumer.

In this context, though, I would suggest that it is not the actual or potential vulnerability of a consumer that is in itself the issue. I would also say that the distinction between 'ordinary' and 'vulnerable' consumers is a false one, or at least unhelpful.

The 'circumstances of a consumer' in dealing with a legal issue can, for instance, range from the prospect of losing their liberty, home, job, child, or citizenship, to dealing with moving house, the death of a loved one, debt, or faulty goods. In these commonly occurring situations, virtually all consumers will experience a degree of vulnerability and stress.

The variety of these circumstances, of the effects that they will have on any given consumer, and in the nature of the response that these will induce, all combine to

produce a more consistently observable constant: a deficit in access to legal services and in personal legal capability, both of which undermine what I describe in this Report as 'legal well-being'.

It is clear that consumers use 'heuristics' or mental short-cuts (cf. paragraphs 2.3.4 and 3.2.2 above) when they assess their legal needs and decide whether or not to engage a provider of advice and assistance. One particular – and prevalent – short-cut runs along these lines: 'Lawyers are expensive; all legal services are regulated; therefore it's alright to use a provider who is not a lawyer'. We might even describe this as predictably irrational (cf. Ariely 2008).

If a misconception is prevalent and persistent (that is, hard to shift), a possible course of action would be to try to 'manage' the context of such decision-making (its 'choice architecture') in order to reshape consumers' perceptions and the factors they take into account. In the context of legal services, this could, for example, give rise to the following options:

(1) ignore the risk to consumers and do nothing (allowing the misconception and risk of harm to persist);

(2) regulate for price reduction and competition among lawyers (to change the perception that lawyers are expensive);

(3) make it illegal for 'non-lawyers' to provide legal services (to remove the choice to use them); or

(4) regulate the provision of legal services, irrespective of who provides them (to align regulation with consumers' expectations).

The preferred option of this Report is (4).

This Report has argued that greater disclosure is not the answer to a lack of legal capability: consumer disengagement with legal needs and the retention of legal advice and representation remains prevalent. Nor is increased public legal education (PLE) and pro bono advice the answer: the deficit in both is simply too great.

This is not to say that measures to improve transparency and disclosure, or PLE, should be abandoned. It is to recognise that these, alone or in combination (and even with the addition of increases in legal aid funding and pro bono services) cannot close the gap between need and provision. They are not sufficient to improve consumer access, confidence, agency, empowerment and well-being to the level necessary to remove or redress the harms most likely to be experienced by consumers.[138]

Equally, while undoubtedly welcome, increasing the range of providers or access to legal advice and representation, though potentially addressing *unmet need*, will not deal with the question of consumer *protection*. Indeed, increasing the number of providers might increase the opportunity and frequency for consumer harm.

138. As Sudeall points out (2022: pages 651-652; emphasis supplied): "The added irony is that ... lawyers have attempted to create a monopoly on their services, even though they do not actually provide anywhere near the scale of services that is needed. Indeed, there are far too many legal needs and far too few lawyers available to address them. *There is arguably no way to close this gap without using nonlawyers to provide assistance in some capacity.*"

Though also welcome and arguably overdue, simplifying court and other formal processes in an attempt to make it easier for consumers to engage directly with substantive legal issues (cf. footnote 97 above), will similarly not deal with the challenges of enabling and protecting consumers[139].

These limitations on the efficacy of disclosure, PLE, increased provision or simplified substantive procedures in tackling the challenges arise because there is so little in the current approaches to regulation that gives the consumer immediate and low-friction access to redress.

Admittedly, all of these initiatives might improve the quality of provision or otherwise reduce the need for redress; but they do not help those consumers who still find themselves disadvantaged or harmed. They might reduce the *potential* for harm, but they fall short in dealing with the *actuality* of harm suffered.

In both the regulated and unregulated sectors, the consumer is required to take action. This is experienced as expensive, uncertain and stressful, and is detrimental to health and well-being: it compounds the initial problem, and compels the consumer to 'take on' a provider in their own expert sphere. At least the regulated sector has a dedicated consumer dispute resolution method – the Legal Ombudsman – but this option is not available for those who use unregulated providers or have issues with the technical competence of any provider, regulated or not.

8.3 A new approach

Consistent with the findings and recommendations of the Final Report, the conclusion of this Report is that legal services regulation and consumer protection should not be designed around the needs and expectations of providers. Instead, there should in the longer term be a graduated approach to regulation based on an assessed risk of harm, such that consumers have most protection when they are facing the most serious issues.

However, a further conclusion from this Supplementary Report is that we should not design legal services regulation and consumer protection around the needs and expectations of 'ordinary' or 'average' consumers. Virtually all consumers of legal services are, in some way, lacking full legal capability at the time their legal need arises, at the time they instruct (or not) a provider to help them, or during the course of addressing their need.

Regulation *must* protect the weakest, the most vulnerable, and the least capable. It must therefore start with the needs, expectations and capabilities of this type of consumer. I am deliberately not referring to them as a 'group' because, for the reasons explored in this Report, the composition of the weak, vulnerable and least capable is not a collection of people that can be predetermined or identified.

139. See McKeever et al (2022), who identify intellectual, practical, emotional, and attitudinal barriers to participation by litigants in person.

Where a frequently experienced harm is poor service in the provision of legal services, the better regulatory response will be to offer a suitable after-the-event process for all consumers in resolving the issue and seeking redress.

Extending some form of regulation to currently unregulated providers should lead to three principal benefits:

(a) increasing the number of regulated providers;

(b) reducing the level of unmet legal need and constrained inaction (cf. paragraph 3.4.4 above); and

(c) improving consumer well-being and public confidence in the provision of legal services: consumers of unregulated legal services are already exposed to risks of harm, but extending regulation would allow them to do something meaningful if one or more of those risks materialises.

The nature of the extension to regulation that this Supplementary Report now recommends is made up of the following elements:

(1) access to consumer dispute resolution for consumers who engage currently unregulated providers (partially affirming Recommendation S2 of the Final Report);

(2) within the framework of the Legal Services Act 2007, the form of that dispute resolution should be determined by either the Legal Services Board or the Office for Legal Complaints (and therefore may allow alternative schemes other than the Legal Ombudsman to be used by providers);

(3) the Office for Legal Complaints should also establish a 'triage' system that would provide a single point of access for all unresolved consumer complaints (against those who would currently be characterised both as regulated and unregulated), and including those complaints that would be determined as 'conduct' as well as 'service': the intention would be to point dissatisfied consumers in the right direction, rather than necessarily to undertake the resolution of all referred complaints;

(4) either as part of the triage system, or as a supplement to it, the Office for Legal Complaints should identify and publicise 'gateways' or pathways that are tailored to certain types of legal problems or to certain types of people;

(5) consumers should be able to check easily whether or not a consumer redress or triage option is open to them in relation to the provider they have used, and Recommendation S1 of the Final Report relating to a register of providers is therefore affirmed; and

(6) extension to regulators approved under the 2007 Act of the ability to take enforcement action against registered providers of legal services under the CRA 2015.

I understand the concerns about the additional cost of regulation on both regulated and unregulated providers that arise from these suggestions. However, as the Final Report makes clear (IRLSR: paragraph 7.3.1), registration need not be an expensive proposition.

I would also make the point that the ultimate cost on providers lies in their own hands and actions. If they provide a valuable, meaningful and accessible service to consumers, there will be fewer unresolved complaints and so a reduced need for any investigation and redress under a mandatory dispute resolution system. There is a conundrum and a balancing act.

Without mandatory requirements, consumers who are most in need of protection might not have it. But mandatory schemes impose some cost and burden on providers. This could be an important consideration where, as the OECD observes (2021: page 67), "specific consumer dispute resolution processes are seen as a cost imposed by governments. This perception has stopped businesses investigating their own genuine interest in efficient dispute resolution".

Such a shift from any residual notion of *caveat emptor* towards *caveat venditor* (from buyer beware to seller beware) would not, to my mind, be unwelcome in a sector where competition should be encouraged and where the dynamics of knowledge and power are so often stacked against relatively uninformed and understandably disengaged consumers.

It would also allow us to move from potentially limiting notions of access to justice, unmet legal need and vulnerability[140] to a more inclusive idea of legal well-being.

8.4 Legal well-being

In drawing this Report to a close, I want to return to the idea of 'legal well-being'. It probably goes without saying that any experience of consumer harm will compromise a consumer's well-being. Avoiding harm could therefore contribute to maintaining well-being. Similarly, unmet legal needs will negatively contribute to stress and other manifestations of reduced well-being, such that steps to reduce unmet need will also maintain or improve well-being.

It is probably therefore also true that increasing consumer information and education through disclosure and PLE, supporting consumers through pro bono initiatives and legal aid (where available), and making court processes and documents easier to navigate, will be likely to enhance legal capability and again reduce the prospect of impaired well-being.

The difficulty with making these 'goals' – avoiding harm, disclosure, PLE, pro bono, legal aid, simplified court processes, and so on – an integral part of the policy objectives and infrastructure for legal services regulation is that they come at a significant cost to society or providers. In my view, they also miss the target.

Current measures to avoid harm do not necessarily lead to a consumer being able to resolve their legal needs or offer meaningful redress to those consumers who are still harmed despite those measures. Sanctions on the providers who cause that harm do not directly benefit the mistreated consumer. Initiatives or requirements to inform,

140. By describing these notions as 'limiting', I certainly do not intend to diminish their importance or to imply that they are not relevant.

educate, support and simplify do not help those (many) consumers who have no access to legal services, or who disengage or exclude themselves from provision.

These unwelcome outcomes for consumers are not always (or even usually) the consequence of their own election or poor decision-making. It therefore cannot be right to maintain a framework that knowingly gives rise to these outcomes, to the detriment of the effective resolution of legal needs, to consumer well-being, to public confidence and to the public purse.

Well-being also does not necessarily require legal capability, though improvement in both may result in some of the same outcomes, such as confidence and self-esteem. Accordingly, positive capability to deal with legal needs should be welcomed and promoted. Nevertheless, an equally positive sense for consumers of assurance and peace of mind when dealing with their legal needs and the providers of legal services (however they choose to deal with them) can be achieved through other approaches that remove a burden from them rather than impose one on them.

The position of this Supplementary Report is that there would be value in shifting – or at least extending – regulatory focus and intervention beyond protection from harm to the promotion of well-being. This would offer the possibility of assurance, peace of mind, effectiveness of service, empathy, and a greater prospect of multidisciplinary provision.

Promoting legal well-being would also shift the burden for consumers from direct self-sufficiency to indirect reassurance. This should still not present guarantees at all costs and in all circumstances; but it would recognise that the world has changed and continues to do so. It can also be realised in a way that reflects relative risk, with targeted and proportionate intervention, rather than blanket requirements that apply in the same way to all providers and all legal services.

8.5 Regulation and the spectre of paternalism

To some extent, the approach advocated in this Report and the Final Report could be seen as seeking to protect consumers from themselves, possibly even infringing their right to decide for themselves (cf. Ebejer & Morden 1988: page 338). In other words, it might be seen as somewhat paternalistic.

Such a view could give rise to legitimate concerns about freedom to choose and decide, and the effect that this can have on consumers taking responsibility for their actions. As Wójcik explains, in the context of financial services providers, but as equally applicable with the substitution of 'legal' for 'financial' (2019: page 113):

> too much external regulation and systemic protection diminishes the alertness and care of individuals when choosing financial service providers and alters perceptions of responsibility. It is commonly believed that it is the imperative of financial institutions and their regulators to guarantee the security [*sic*]. Poor financial education and confidence in state protection lead people to exonerate themselves from their duty of care as they take it for granted that government bodies will take over individual burdens of control and supervision. If the role of the state, its institutions and regulators is perceived as sufficiently protective, this can overwhelm the individual's sense of reasonable care.

Siciliani et al also observe that (2019: page 100): "Whenever public intervention is advocated to prevent consumers from making mistakes, the spectre of paternalism looms. Paternalism is the interference of a state authority with a person without his consent justified by a claim that the person interfered with will be better off or protected from harm".

But as Ebejer & Morden point out (1988: page 337-338):

> Most of us expect paternalism in certain situations. If the service we are purchasing is an appendectomy, we typically allow the salesman (in this case the surgeon) a major role in deciding whether we need the service. We rely on the ethics of the profession to protect us from the possible exploitation.

As we have already seen, consumers of legal services more often expect advice than information, and to be saved rather than empowered (see Sandefur 2020 in footnote 108 above and Genn 1999 in paragraph 6.2.3.3 above). Some forms of paternalism are not necessarily anathema to consumers.

In fact, through consumer protection legislation, such paternalism has in effect already been extended by imposing requirements on traders not to deal unfairly (see paragraph 2.2.2 above). As Ebejer & Morden put it (1988: page 338):

> To claim that a salesperson is professionally required to inform customers fully about a product or service, to disclose fully all relevant information without hiding crucial stipulations in small print, to ascertain that they are aware of their needs and the degree to which the product or service will satisfy them, is to impose upon the salesperson the positive duty of limited paternalism. According to this standard a salesperson is, to a limited degree, "his buyer's keeper."

Consequently, perhaps, "Paternalism is nothing to be feared" (Siciliani et al 2019: page 180). Indeed, steps in this direction should perhaps be conceived as a more significant shift towards a stronger and more overt policy of fair dealing. As Riefa & Saintier would claim (2021: paragraph 1.2.2): "less regulation is required when businesses behave fairly and are attuned to their consumers' needs".

Nevertheless, the mission of a sector or a provider to treat consumers fairly "does not however mean treat everyone equally, or in the same way, but instead to recognise individuals' differences and treat them accordingly" (Hunter 2021: paragraph 9.2).

Even so, unless this trend towards generalised fair dealing, professionalism and due diligence in providing legal services to consumers is applied across the sector, the goal of public and consumer confidence in legal services will not be realised. The current distinction in the treatment of harm caused by regulated and unregulated providers needs to be removed.

This would also provide an opportunity to encourage a shift towards recognising the value of improved legal well-being. The benefit from this shift accrues not only to all citizens but also to the wider economy of the country. As Stucke & Ezrachi explain (2020: page 252):

> ethics and morals can complement, and inform, the competitive process. There is simply no empirical support that competition requires its participants to disregard important ethical and moral norms.... The state can play an important role in reconciling these values to ensure the well-being of all citizens.... Referred to as the social side of

> competition, fairness is viewed as essential to cultivating trust in markets and crystallizing legitimate expectations of market participants. Fairness does not undermine the goals of competition. Rather it advances them.

I do not regard the proposals in this Supplementary Report as paternalistic. They do not seek to substitute different outcomes for consumers' own choice and judgement, or to protect them from themselves. They do, however, seek to remove some of the burdens on consumers, and the barriers to better well-being, by offering greater assurance and confidence in their dealings with providers of legal services, as well as by extending the range of regulated providers from whom they can choose to seek advice and representation.

8.6 Replacing the fig leaf

8.6.1 Summary

This Supplementary Report is fundamentally about the protection of consumers from harm. As Sandefur observed in the US context (2020: page 312 and 313):

> If the regulation of the practice of law is to be guided by honest concerns for consumer protection, the evidence shows that there is much more scope for nonlawyers to practice law safely and effectively than is permitted by the current rules....
>
> For people whose legal situations are complex enough to require a fully qualified lawyer's expertise, competent nonlawyer advice service will be second-best to full representation by an attorney. However, it will often be better than navigating a life-changing justice problem with no legal assistance at all, which is the situation many currently confront. At the same time,... nonlawyer legal advice will not only be sufficient for the needs of some individuals – it will be actively preferred.

My conclusion in this Supplementary Report is that the same is true in England and Wales.

It seems that maintaining public trust and confidence in the legal system lies as much in securing access and in assuring consumers in their choice of providers through the regulation of a wider range of providers of help than in persisting with a narrow view of professional qualification and technical competence.

So much of the current regulatory framework appears – and is claimed – to offer protection to consumers. On closer examination, though, the protection is illusory, it turns out to be a fig leaf. The sector-specific framework focuses more on sanctions on providers' misconduct than on protection and redress for consumers who suffer harm. Provisions for the supervision of employees by legally qualified practitioners turn out to offer unreliable proxies for competence.

General consumer law concentrates more on third parties taking action against traders than on providing meaningful redress for consumers who have suffered harm.

The time has come (or has even already passed by) when we should recognise that a lawyer monopoly[141] and its supporting regulatory framework "drives up prices, reduces

141. In the non-absolute sense described in footnote 104 above.

competition, and creates a one-size-fits-all approach to serving the public's legal needs" (Steinberg et al 2021: page 1322).

I repeat the quotation that opened this Report: "Sometimes an expert non-lawyer is better than a lawyer non-expert."[142] Consequently, "the salient question is not whether an alternative provider of legal services is as good as a lawyer but rather, whether that alternative provider is better than nothing" (Steinberg et al 2021: page 1324).

This is not about creating an uncontrolled free-for-all, but offering a structural, regulated and protected approach to more alternatives than are currently available. It is time to recognise that *regulated* providers who are not lawyers would be better than nothing and better than unregulated providers.

Legal issues and needs are widespread, and not evenly distributed among the population. There are also many different ways of seeking (or not) to resolve them. This is not just a question of the cost of available services. It is also about the availability of competent providers, and the search and opportunity costs of finding and using an adviser, as well as of taking action if something goes wrong.

Some consumers will struggle in one or more of the dimensions of available time, access, finance, cognitive ability and other resources. Unfortunately, *caveat emptor* and a regulatory policy of disclosure assume no such insufficiencies. In any event, there remains the question of consumers having the *right* information and not just the *most* information.

A fundamental policy shift is required away from placing responsibility on consumers to be informed and capable, to an emphasis that allows their energies to be targeted at seeking a positive outcome rather than avoiding a negative.

8.6.2 New inversions

Regulatory policy for legal services needs to invert many of its foundational assumptions and propositions:

(1) Move from the position that *some* consumers might be vulnerable to a presumption that *all* consumers are.

(2) The potential for consumer harm and its consequences do not differ depending on the regulated or unregulated status of the provider.

(3) Consumer disengagement and compromised legal capability should be regarded as an expected state; and transparency, disclosure, PLE and pro bono advice will not close the gap.

(4) *Caveat emptor* should play no role in the engagement of legal services providers: rather than traders being under a duty not to be unfair, providers of legal services should be subject to a positive *duty of fair dealing*.

(5) The goal of reform does not lie in adding something new to the existing consumer support mechanisms of disclosure, PLE, pro bono and legal aid.

142. Chief Judge Jonathan Lippman, recorded in Zorza & Udell (2016: page 1262); and cf. paragraph 6.2.5.

Instead, the 'something new' should provide a base for all consumers, with disclosure, PLE, pro bono, lawtech and legal aid then adding to that base.

(6) While courts might remain the *final* arbiter of consumer harm and redress, consumer dispute resolution will in practice be the *most common* arbiter.

(7) Rather than focusing on an *absence* or avoidance of harm, the structure and focus of regulation should promote the *presence* of legal well-being.[143]

8.6.3 Breakthrough change

The conclusion of this Supplementary Report therefore substantially supports that of the Final Report. It is that regulation should protect all consumers through a sector-specific approach that applies to all providers of legal services. Further, it should allow for the confident engagement of a legally capable intermediary wherever possible and, in appropriate circumstances, whether legally qualified or not.

As the Final Report acknowledged, this will require both incremental and radical change (IRLSR: page ix and paragraph 7.1). But ours is not the only jurisdiction that needs such change, and I am not the only person to suggest it, as this from Himonas & Hubbard shows (2020: page 268):

> Incremental improvements are critical to access to justice. But these improvements have only slowed the rate at which the access-to-justice gap has grown.... [We] need breakthrough change – change that includes institutional modifications and market-driven solutions – to bridge the access-to-justice gap.

The lead author was a judge of a state supreme court in the United States. When senior judges reach such conclusions, the moment for reform is surely with us – wherever in the world we live and work.

Recent events in Ukraine must highlight the inherent value to citizens in a democratic society of protection under the rule of law, of freedom from arbitrary state action, and of legitimate participation in society. These outcomes are not secured serendipitously but through careful and sustained policy, investment and maintenance.

Our investments to date in training and regulating lawyers, in legal aid, in pro bono advice, in public legal education, and in sandboxed innovation – welcome as they all are – have not been anywhere near sufficient to close the gap in unmet legal need. The conclusion of this Report is that even further investment in these various forms of provision will not close it, either.

It is time for more radical change that will increase the number of regulated providers, supported by an environment of fair competition and targeted regulation. While more

143. Not only would this be consistent with the thrust of this Report, but also entirely consistent with the OECD's framework for people-centred justice (2021: page 19): "health internationally has chartered an important trajectory – focusing increasingly on the needs of people rather than 'disease'.... In many if not most countries the health (and other human service) infrastructures are much larger and well established than are legal aid and legal assistance infrastructures. Legal and justice systems could benefit from similar approaches, for example providing legal care that requires prevention, education and regular check-up strategies to ensure the population's 'legal health'".

providers and competition are to be encouraged, I do not believe that competition alone can ensure sufficient protection from the types and consequences of transactional consumer harm discussed in this Report.

Both providers and consumers should be able to expect and experience balanced and effective regulation of legal services that does not impose unrealistic burdens and costs on them. Consequently, with some further points of detail offered in this Report, I continue to advocate for the risk-based, targeted, minimum necessary intervention proposals in the Final Report for both the short term and long term reform.

Annex: Draft Amendments to the Legal Services Act 2007

This Annex offers some thoughts about the ways in which the Legal Services Act 2007 might be amended to give effect to the short-term proposals and recommendations in the Final Report of the Independent Review of Legal Services Regulation.

In the Legal Services Act 2007:

1. Insert a new section –

191A Registration of non-authorised persons

(1) From the appointed day—
  (a) the Board shall establish and maintain a public register containing the name and place of business of any person within subsection (2) who has been registered under this section; and
  (b) any person whose name appears on the register is in this section referred to as a "registered person".

(2) This section applies to a person who—
  (a) is carrying on a legal activity which is not a reserved legal activity[a],
  (b) is carrying on that legal activity in the ordinary course of business[b], and
  (c) is not an authorised person[c].

(3) For the purposes of this section—
  (a) a person who supplies to a consumer:
    (i) legal information in any form or format, or
    (ii) a document in any form or format,
  which is not applied, adapted or modified to the particular circumstances, needs or intentions of that consumer shall not by that reason alone be treated as carrying on a legal activity;[d]
  (b) a person who is carrying on a legal activity for or in expectation of any fee, gain or reward shall—
    (i) be treated as carrying it on in the ordinary course of business[e], and

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a. Registration would only apply to non-reserved activities.
b. Given that not all businesses (e.g. lawtech) will be charging consumers directly a fee for legal services, this is intended to focus registration on the nature of the provider rather than the nature of the transaction; and see subsection (3)(b)(ii).
c. Registration should not apply to providers who are already covered by the Act as authorised persons.
d. Subsection (3)(a) is intended to exclude those who simply provide legal text or templates with no element of tailoring or bespoking: combined with subsection (2)(b), there would be no question of, for instance, a publisher or library needing to register.
e. Subsection (3)(b)(i) is intended to extend registration to those who might otherwise consider themselves to be carrying on a 'paid hobby' or sideline.

(ii) be so treated notwithstanding that no fee, gain or reward is provided by the consumer for whose benefit the legal activity is carried out[f];

(c) where a registered person provides a legal activity which is not a reserved activity free of charge, in whole or in part, to a consumer, that person shall be treated as carrying on that activity in the ordinary course of business[g] [;

(d) non-commercial legal services shall be treated as the carrying on of a legal activity in the ordinary course of business[h]].

(4) Subsection (2) does not apply to—

(a) a public body;[i]

(b) a person who holds a public office and is acting in that capacity;[i]

(c) a person who is a qualified person within the meaning of section 84 of the Immigration and Asylum Act 1999;[j]

(d) a person carrying on a regulated claims management activity who is subject to rules made under the Financial Services and Markets Act 2000 (Claims Management Activity) Order 2018;[k]

(e) a person who is an authorised insolvency practitioner under the Insolvency Act 1986;[l]

(f) a person who is not an authorised person but who otherwise has a duty to comply with the regulatory arrangements of an approved regulator;[m]

(g) a person carrying on a legal activity within subsection (2)—

(i) that is a subsidiary but necessary activity of that person, and

(ii) whose main activity does not involve the provision of one or more legal activities, and

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f. Subsection (3)(b)(ii) is intended to include those providers (e.g. online or lawtech) who take their 'reward' from other sources in order to provide a free service to the consumer.

g. Subsection (3)(c) is intended to clarify that any 'incidental' pro bono services provided by a registered person are nevertheless covered by the provisions for redress.

h. Words in square brackets would require a policy decision. Non-commercial legal services are defined in section 207(1), and would bring law centres and other major organised providers of wholly pro bono services within the scope of registration and redress, even if there is no commercial activity, profit motive or exchange of fees, etc.

i. Subsection (4)(a) and (b) are to exclude MPs, local councils, councillors, court officials, the police, etc from registration and offences.

j. Subsection (4)(c) is to ensure that only the provisions of the 1999 Act and the jurisdiction of the Immigration Services Commissioner apply to non-authorised persons who provide immigration advice and services.

k. Subsection (4)(d) is to ensure that claims management companies remain outside the scope of legal services regulation.

l. Subsection (4)(e) is to ensure that insolvency practice remains outside the scope of legal services regulation.

m. Subsection (4)(f) is to ensure that other professionals (say, chartered accountants) who are not carrying on a reserved activity (such as probate) but do carry on what would otherwise be a legal activity (such as tax advice or estate administration) are not brought within the registration and redress scheme when they are already regulated.

(iii) whose main activity is designated by the Board for the purposes of this section;[n]

(h) an individual who is carrying on a legal activity—

(i) in that individual's capacity as an employee, manager or agent of an authorised person or registered person; or

(ii) at the direction and under the supervision of an authorised person or registered person;[o] or

(i) any other person subject to exemption from the provisions of this section by rules made by the Board under subsection (5).[p]

(5) The Board must make rules about the register to be established by the Board under this section and must publish those rules.

(6) In particular, rules made under subsection (5)—

(a) must make provision about the form and manner in which applications for registration under this section are to be made;

(b) may make provision about the information which an application for registration must contain, and the documents which must accompany an application;

(c) must not allow a person who is disqualified as mentioned in section 100 to be a registered person or a registered manager;[q]

(d) may allow the Board to refuse to register any person that it does not consider to be a fit and proper person to be registered for the purposes of this section;

(e) must make provision for the payment by a registered person of a prescribed fee to the Board on initial application for registration and from time to time for maintaining the registration;

(f) must require a registered person at all times to have designated an individual who consents to act as the registered manager and who—

(i) is permanently resident in England and Wales[r];

(ii) must take all reasonable steps to ensure that the registered person and all employees, managers and agents comply with the requirements of the rules made under this section; and

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n. Subsection (4)(g) is to exclude from registration and offences those (such as surveyors and town planners) who give legal advice as a minor and incidental aspect of their main professional or business services: see IRLSR: page 123.

o. Subsection (4)(h) is to exclude from registration and offences those who are providing legal services as part of their employment, etc on behalf of an already authorised or registered person.

p. Subsection (4)(i) is a final 'reserve power' to allow the Board to exempt others as and when appropriate.

q. Subsection (6)(c) is intended to require the exclusion from registration of those who have already been excluded from ABS licensing. Query whether there should be a broader requirement also to exclude previously authorised persons who, as a consequence of disciplinary procedures, have had their right to practise removed (e.g. disbarred as a barrister or removed from the Roll of Solicitors).

r. Subsection (6)(f)(i) is intended to ensure that there is some regulatory 'hook' within the jurisdiction in respect of, say, foreign providers or lawtech providers.

(iii) must, as soon as reasonably practicable, report to the Board any failure by the registered person or any employee, manager or agent to comply with the requirements of the rules made under this section;[s]

(g) must make provision for the registration entry for the registered person to record the name and address of the registered manager;

(h) may prescribe any further information which must be contained in an entry on the register in relation to any person or class of person;

(i) must determine the form and manner in which the information on the register is to be made available to the public;

(j) must determine whether the information on the register is to be made available free of charge and, if not, to prescribe the fee payable;

(k) must not include any provision relating to redress;[t]

(l) must make—[u]

(i) provision requiring a registered person to establish and maintain procedures for the resolution of a relevant complaint, or

(ii) provision requiring a registered person to participate in, or make arrangements to be subject to, such procedures established and maintained by another person, and

(iii) provision for the enforcement of that requirement;

and, for the purposes of section 126(2), these provisions shall be treated as having been made in accordance with section 112[v];

(m) must, in connection with the investigation, consideration and or determination of a complaint under the ombudsman scheme, make—[w]

(i) provision requiring a registered person and a registered manager to give ombudsmen all such assistance requested by them as that person or manager is reasonably able to give, and

(ii) provision for the enforcement of that requirement;

(n) may, as and to the extent that the Board sees fit, make provision for—[x]

(i) practice rules,

(ii) conduct rules,

(iii) qualification requirements,

(iv) indemnification arrangements, or

(v) compensation arrangements; and

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s. Subsection (6)(f)(ii) and (iii) are equivalent to section 91(3) and (4) for a Head of Legal Practice in an ABS.

t. Subsection (6)(k) is equivalent to section 157 for approved regulators.

u. Subsection (6)(l) is equivalent to section 112 for approved regulators.

v. The words at the end are to ensure that complainants must first use the registered person's complaints procedure.

w. Subsection (6)(M) is equivalent to section 145 for authorised persons.

x. Subsection (6)(n) is equivalent to section 21(1).

(o) may, as and to the extent that the Board sees fit, make provision for the application of the rules referred to in paragraphs (l), (m) and (n) where a registered person provides a legal activity within subsection (2) free of charge, in whole or in part, to a consumer.[y]

(7) The Board may suspend or revoke the registration of a registered person if—

(a) that person fails to comply with rules made under this section;

(b) that person fails to pay any prescribed fee due to the Board under subsection (6)(e);

(c) the Board is satisfied that the registered person no longer meets the requirements for registration in subsection (2); or

(d) the Board is satisfied that the registered manager—

(i) is not fulfilling the requirements of subsection (6)(f), or

(ii) is not complying with rules made under this section[, or

(iii) is not otherwise a fit and proper person to carry out the duties of a registered manager].

(8) From the appointed day, it is an offence—

(a) for a person to whom subsection (2) applies to carry on a legal activity while not a registered person; and

(b) for a person wilfully to pretend to be a registered person when not registered under this section[;

except that it shall not be an offence under paragraph (a) if the person within subsection (2) is a body within section 23(2)[z]].

(9) A person who is guilty of an offence under subsection (8) is liable[on summary conviction to a fine not exceeding level [X] on the standard scale.] *or* [—

(a) on summary conviction, to a fine not exceeding the statutory maximum, and

(b) on conviction on indictment, to a term of imprisonment not exceeding 2 years or a fine (or both).][aa]

(10) In this section—

y. Subsection (6)(o) is intended to make it clear that the Board can, if appropriate, make different or modified rules in relation to pro bono services.

z. Policy decision: While (subject to the retention of subsection (3)(d)), a body within section 23(2) (a not-for-profit body, a community interest company or an independent trade union – and therefore also a law centre or similar) would fall within the registration requirements and should therefore be registered, the exception in square brackets would mean that it would not be an offence if they chose not to register.

aa. Policy decision required about the nature of an offence and the appropriate penalties to be attached.

(a) "appointed day" means the day appointed for the purposes of this section, and different days may be appointed for different purposes;[bb]
(b) "approved regulator" has the meaning given by section 20(2);
(c) "authorised person" has the meaning given by section 18;
(d) "compensation arrangements"[cc] means arrangements to provide for grants or other payments for the purposes of relieving or mitigating losses or hardship suffered by a consumer in consequence of—
    (i) negligence or fraud or other dishonesty on the part of registered persons, or of employees of theirs, in connection with their activities as a registered person, and
    (ii) failure, on the part of registered persons, to account for money received by them in connection with their activities as a registered person;
(e) "conduct rules"[cc] means any rules (however they may be described) as to the conduct required of registered persons;
(f) "consumer"[dd] means (subject to section 207(3)) persons—
    (i) who use, have used or are or may be contemplating using, a person within subsection (2), or
    (ii) who have rights or interests which are derived from, or are otherwise attributable to, the use of such person by other persons, or
    (iii) who have rights or interests which may be adversely affected by the use of such a person by persons acting on their behalf or in a fiduciary capacity in relation to them[, and
    (iv) meet the requirements of section 128(3)[ee]];
(g) "indemnification arrangements"[cc] means arrangements for the purpose of ensuring the indemnification of those who are or were registered persons against losses arising from claims in relation to any description of civil liability incurred by them, or by employees or former employees of theirs, in connection with their activities as a registered person;

bb. This wording would allow subsection (8) to be brought into effect after subsection (1) so that it would not immediately become an offence for an unauthorised person to provide non-reserved legal activities until the registration process was set up.
cc. Taken from section 21(2).
dd. The specific definition in subsection (10)(f) is required because section 207(1) defines 'consumer' by reference to section 207(2)(a) and therefore in part to authorised persons and reserved legal activities.
ee. Policy decision: subsection (6)(f)(iv) would limit the meaning of 'consumer' for registration and redress purposes to those covered by the Legal Services Act 2007 (Legal Complaints) (Parties) Order 2010 SI No. 2091, broadly: individuals; micro-enterprises; small charities, clubs and similar organisations; small trusts; and personal representatives and beneficiaries of the estates of a deceased recipient of legal services who died before making a complaint to LeO.

(h) "legal activity" and "reserved legal activity" have the meanings given by section 12;[ff]
(i) "ombudsman scheme" means the scheme and scheme rules established in accordance with section 115;
(j) "practice rules"[cc] means any rules (however they may be described) which govern the practice of registered persons;
(k) "provision relating to redress" means any non-statutory provision for redress in respect of acts or omissions of registered persons and any provision connected with such provision;[gg]
(l) "public body" has the meaning given by section 128(7);
(m) "qualification requirements"[cc] means any rules (however they may be described) relating to the education and training which a person must receive, or any other requirements which must be met by or in respect of them, in order to be a registered person under this section;
(n) "relevant complaint", in relation to a registered person, means a complaint which—
    (i) relates to an act or omission of that person, and
    (ii) may be made by a consumer under the ombudsman scheme.[hh]

2. *In section 128 (Parties), replace subsection (1) as follows –*

(1) The respondent is within this section if, at the relevant time, the respondent was—
    (a) an authorised person in relation to an activity which was a reserved legal activity (whether or not the act or omission relates to a reserved legal activity), or
    (b) a registered person under section 191A.[ii]

3. *In section 128(4)(b), replace –*

"to an authorised person" with "either to an authorised person or to a registered person under section 191A".[jj]

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ff. Policy decision: subsection (6)(h) maintains the current scope of 'legal activities' in the 2007 Act, making no switch to 'legal services' or including mediation (as both recommended in IRLSR Final Report: paragraph 4.6), and makes no assumptions about any changes to the reserved legal activities. However, it is also not clear that the current scope of advice, assistance and representation in section 12(3) would include the preparation of any document other than one that is subject to reservation as part of a litigation, reserved instrument or probate activity.

gg. Subsection (10)(k) is equivalent to section 157(4) for approved regulators and authorised persons.

hh. Subsection (10)(n) is equivalent to section 112(3) for authorised persons.

ii. The addition of subsection (1)(b) is to extend LeO's jurisdiction to registered persons.

jj. The addition of the reference to a registered person is to extend LeO's jurisdiction to a complaint against a registered person even where the services were procured for the complainant by an authorised person or another registered person.

4. *In section 146 (Reporting failures to co-operate with an investigation to approved regulators), insert –*

(7) For the purposes of this section and its application to a complaint against a registered person under section 191A—[kk]

(a) references to an authorised person are to be read as references to a registered person and to a registered manager,

(b) references to a relevant authorising body are to be read as references to the Board, and

(c) [subsection (5) shall not apply] *or* [the reference to the Board in subsection (5) is to be read as a reference to the Lord Chancellor][ll].

5. *In section 148 (Reporting failures to provide information or produce documents), insert –*

(7) For the purposes of this section and its application to a complaint against a registered person under section 191A—[kk]

(a) references to an authorised person are to be read as references to a registered person and to a registered manager,

(b) references to a relevant authorising body are to be read as references to the Board, and

(c) [subsection (5) shall not apply] *or* [the reference to the Board in subsection (5) is to be read as a reference to the Lord Chancellor][ll].

6. *In section 164 (Power to establish voluntary scheme for resolving complaints), at the end of subsection (5)(b), after "section 129" insert –*

, or

(c) was a registered person under section 191A.[mm]

7. *In section 175 (Amounts payable into the Consolidated Fund), after subsection (1)(d) insert –*

(da) any sums received by the Board by virtue of rules under section 191A (registration of non-authorised persons);

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kk. The addition of subsection (7) is to apply the ombudsman's reporting powers to the registration scheme, with consequential amendments to cover registered persons, registered managers, and the Board as the operator of the register.

ll. Policy decision: there is no point in the ombudsman making a report about the Board's failure to the Board itself, so a decision would need to be made about either excluding the power in relation to a registration failure or including a report to someone other than the Board (the draft assumes that this would be the Lord Chancellor).

mm. The addition of paragraph (c) is intended to remove registered persons from the scope of voluntary jurisdiction.

In the Consumer Rights Act 2015:

In paragraph 8(1) of Schedule 3, delete "or" at the end of sub-paragraph (j), and after "the Consumers' Association" insert –

, or

(l) an approved regulator within the meaning of section 20(2) of the Legal Services Act 2007.

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