**ICAEW**
REPRESENTATION 12/19

# INDEPENDENT REVIEW OF LEGAL SERVICES REGULATION

Issued January 2019

ICAEW welcomes the opportunity to comment on the first three working papers in the *Independent Review of Legal Services Regulation* published by the Centre for Ethics and Law, University College London in October 2018, copies of which are available from this link.

> We believe that the outcome of any review of legal services regulation should be a competitive environment where all users of legal services, whether individuals, small businesses or large organisations, can freely seek legal services from the most appropriate provider. This will be a provider (irrespective of their professional designation) who is sufficiently knowledgeable (on both the legal issues concerned and the circumstances of the consumer), cost effective for the user and regulated sufficiently robustly to maintain standards and to provide redress.

This ICAEW response reflects consultation with the Business Law Committee which includes representatives from public practice and the business community. The Committee is responsible for ICAEW policy on business law issues and related submissions to legislators, regulators and other external bodies.

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## KEY POINTS

### GENERAL APPROACH OF THE REVIEW AND OF THIS RESPONSE

1. It is helpful that the first three papers have been issued for comment at an early stage and will be updated following feedback as this is a wide ranging review and the various alternatives should be considered carefully. This response similarly gives our initial views on the issues arising in the published papers, but we may have other comments later in the process, particularly when the papers on what legal services should be regulated and by whom have been published.
2. Consideration of the initial papers will need to take account of possible outcomes from the later papers, not least because, whatever the scope of regulation, the practicalities of applying it need to be considered. For instance, if the scope of reserved activities were to be extended, the case for extending the pool of potential providers beyond the traditional lawyers might be even more compelling than it already is.

### ASSESSMENT OF THE CURRENT REGULATORY FRAMEWORK (Working Paper LSR – 0)

3. We agree that the current regime is flawed for reasons outlined below. There have also been developments in the market over the past decade that make a review timely, including authorisation of ICAEW as a front line regulator for probate, growth in ABSs and development of new technology.
4. In its 2016 survey of the legal services market the Competition and Markets Authority (CMA) concluded that 'unmet legal need' is a problem for individuals and SMEs and that the current regulatory framework serves to perpetuate this. This may in part be because of the way CMA characterises 'legal services'. The Legal Services Board (LSB)'s research found that many SMEs routinely ask their financial advisor (usually their accountant) for tax and regulatory advice. These advisors may, in fact, be providing legal advice (but not reserved activity) so that the overall need for legal services may be being met more fully than CMA appreciates. Nevertheless, the current regime has resulted in a position where many believe that legal advice should be obtained from a traditional lawyer authorised for reserved activity, and this may result in detriment to individuals and SMEs of the kind noted by CMA.
5. The current list of reserved activities is not based on the risk of detriment or level of complexity of the relevant activities and so is deeply flawed.
6. Areas of particular concern to our members include the reservation for preparation of deeds, which may include charitable trust deeds based on standard forms available to the public, deeds of arrangement between taxpayers and HMRC and waivers of dividends by deed. If the relevant transactions were contracts with even nominal consideration (say, a peppercorn) they would not be a reserved activity, but absent consideration they need to be drafted as deeds (and so are reserved). This is an absurd position and particularly illogical in view of the lack of any mandatory regulation of will writing. These documents frequently set out financial or tax arrangements and are most efficiently handled by appropriately qualified, skilled and regulated professionals who may not be traditional lawyers. The answer is not, therefore, to make contracts reserved too, but, on the contrary, to relax the current prohibitions.
7. We do not agree that overlapping roles of approved regulators is necessarily a shortcoming of the current regime as appears to be suggested on page 8 of the paper. Rather it could be seen as a rational, and arguably very positive, result of the operation of the market. Neither should it be supposed that regulatory competition inevitably leads to a race to the bottom. On the contrary, many individuals take pride in belonging to what they perceive to be the 'best' and possibly most demanding professional bodies not least in the belief that this is valued by their customers.
8. There is, however, a problem with overlapping regulation in that professional advisors may need to obtain authorisation from more than one body for no good reason, which is costly

and inefficient. This is a particular issue for ICAEW as our members provide such a wide array of services (although no doubt is felt elsewhere in society too). We comment more fully on this in the context of scope of legal services regulation below.

9. The current regulatory regime affords privilege to legal advice provided by lawyers but not to equivalent advice provided other suitably qualified professional advisors. This unfairly distorts competition. For instance, a person might seek tax advice from a solicitor or barrister in the expectation of having legal privilege when a chartered accountant might otherwise be a better choice for the relevant advice. We consider this to be a regulatory anomaly and hope that the review will consider how the scope of legal advice privilege could be extended to address it.

## THE RATIONALE FOR LEGAL SERVICES REGULATION (Working Paper LSR – 1)

10. We agree that legal services should be regulated. This is principally to ensure the administration of justice is fair and efficient and is not simply a matter of consumer law. This might, for instance, mean that conduct of litigation (in the courts at least) would continue to be a regulated activity, but would not necessarily mean that the current reserved activity regime should be retained more generally or that regulation should be extended to legal advice more broadly.
11. We also agree that there is a case for those providing services involving control of cash and other assets belonging to others, to be regulated. However, that need not necessarily be 'legal services' regulation and is just one example where the review will need to consider how legal services fits into the wider regulatory regime more fully (on which we comment further below).

## THE SCOPE OF LEGAL SERVICES REGULATION (Working Paper LSR – 2)

12. The working papers note that the UK regime is relatively liberal and represents an intermediate approach between no regulation and full regulation. We believe that this is a strength and that care should be taken to ensure that a proportionate and balanced approach to regulation continues.
13. As mentioned above, there is a risk in looking at 'legal services' in isolation without paying due regard to the wider regulatory environment in which business and individuals operate. If an activity is regulated by one means, there might be no need to regulate it by another.
14. In that context, we believe that it is unhelpful to categorise providers of legal services who are not regulated by the Legal Services Regulators under the Legal Services Act 2007 (LSA) as either 'unregulated' or 'unauthorised', because they may be regulated or authorised by bodies other than the Legal Services Regulators and with the same degree of rigour.
15. There are numerous activities that can be considered as legal services which are not covered by the LSA but are still subject to regulatory oversight. Investment business, claims management and consumer credit activities, for example, must be authorised either by the FCA or by another appropriate regulatory body. Many legal services require regulation under the Anti-Money Laundering Regulations. All these should be considered as part of a comprehensive review of Legal Services Regulation, for the avoidance of anomalies, duplications or gaps.
16. We are aware of many difficulties arising from regulatory gaps and anomalies. For instance, Insolvency Practitioners are precluded from providing consumer debt advice by Financial Conduct Authority (FCA) rules except in very limited circumstance (or FCA authorisation), yet they are obviously among the best qualified individuals to give this advice. Similarly, 'claims management' is regulated activity (recently moved to FCA) with exemptions for various categories of people (including solicitors) but not our members. The result is that our members (for whom any such activity is likely to be incidental) are effectively precluded from

helping their clients deal with potential financial claims in a way that might be more cost effective. This concern arises regardless of categorisation of a particular activity in regulatory terms as 'legal' or 'financial services', because, in practice, transactions and other activities typically involve a range of disciplines.

17. Insolvency services provide an illustration of this. Insolvency practitioners (IPs) need to have good legal skills to perform their duties, including a knowledge of often complex matters of insolvency law. However, they also need to have good financial and management skills. In some countries, IPs are invariably lawyers. However, in the UK, they are typically professionals with financial and other skills (and are very often our members, with our accounting qualification) and the UK is widely admired for the quality and depth of its insolvency profession. The Solicitors Regulation Authority (SRA) ceased regulating solicitors as insolvency practitioners in 2015.
18. We would be happy to discuss any of the points made in this response with both Professor Mayson and the Advisory Panel.

## ANSWERS TO SPECIFIC QUESTIONS POSED BY WORKING PAPERS

### WORKING PAPER LSR - 0: ASSESSMENT OF THE CURRENT REGULATORY FRAMEWORK

***Q1. Are there any characteristics of the legal services sector not identified in paragraph 3 that you regard as particularly important, either in assessing the current regulatory framework or in considering any reform of it?***

19. Legal services in the UK are provided in a far more complex regulatory environment than is described. The regulation of the legal sector should be examined in the context of all regulatory impositions on lawyers as well as the regulation of the providers of all legal activities. If this is not done, recommendations may be made which would cause unintended market consequences in sectors which have caused no regulatory concern, or which could unnecessarily damage the competitive environment within which the legal sector operates.
20. Anti-Money Laundering Regulation (AMLR) has not been considered, even though it imposes significant burdens on some, but not all, the services provided by lawyers. Trust and Company Service Providers are also subject to AMLR and prior authorisation is required by HMRC as the default regulator, but there is no other mandatory regulation for them, though they may have access to client moneys with significant risks to clients and consumers, and act in competition with the legal sector.
21. The management of client money and assets is provided in a particularly complex regulatory environment. As well as trust and company services provision, partially regulated by HMRC, banking and investment business are regulated by the FCA, subject to certain derogations. Solicitors and professional accountants can hold client money, but are forbidden from providing "banking services" to clients. Investment business and consumer credit services provided incidentally to professional services are regulated by a number of professional regulators, including the SRA and ICAEW under Part XX of the Financial Services and Markets Act.
22. Working Paper LSR2 mentions immigration, insolvency and claims management as legal activities which are subject to specific regulation requiring prior authorisation ( LSR 2 paragraph 2.2 "Current Scope of Regulation"), though not these other areas also requiring pre-authorisation. In contrast, acting as an office holder during insolvency proceedings is no longer routinely provided by solicitors. Nor is it authorised by the SRA or any other front line legal services regulator (apart from ICAEW) and could therefore be considered as something outside the scope of the regulation of the legal sector.
23. Moving to areas where pre-authorisation is not required, advice on specialist areas of the law is often provided far more appropriately from relevant specialists. For example, if builders were not able to discuss the requirements of the Building Regulations with customers, as well as ensuring that their work complies, serious complications would ensue and compliance levels fall, to the general detriment of the public interest. Similarly with car

mechanics and car safety legal requirements and a host of other specialist providers and their specialist law.

24. These factors inevitably increase the number of regulatory bodies with the capacity to regulate individuals and entities providing similar or related services, within the broad definition of legal activities. We do not consider that this is likely to be a cause for any concern, but rather allows regulatory bodies to provide nuanced and appropriate regulation. Indeed, it can provide a measure of competition among regulatory authorities, with consequent benefits in cost effectiveness and avoidance of monopolisation. However, we do think that appropriate oversight is necessary to ensure that standards adequate to the regulatory need are maintained. Where pre-authorisation as a legal activity is not required, or not required in the context of the legal activity itself, we think that a body such as the Legal Services Board should have wide powers of investigation, where abuses are identified, to coordinate with non-legal sector regulators, and/or take action where considered necessary.
25. Some regulatory costs may be borne by providers voluntarily to provide protection to the clients of their members, and thus assist in the marketing of their services. Examples of these include the numerous bodies for technicians and book-keepers operating in the accountancy sector. These operate in a free market and so if providers believe that their membership is worthwhile, and clients continue to justify this belief by their custom, then there is no need for Government to regulate to control regulatory costs. Of course, the position is somewhat different for the statutory regulators, which do not operate in a free market and it is important that ongoing cost v benefit assessment are made in that case.

***Q2. Do you agree with the nature and description of the challenges in the current framework set out in paragraph 4?***

26. Please see our introductory comments regarding some additional challenges. We agree that, whilst is it difficult to take exception to any of the current regulatory objectives in isolation, they do give rise to difficulties collectively. In particular, the objective to promote competition does not necessarily drive higher quality services (or improved value for money). As noted in the working papers, the objective to promote the public interest does not sit easily with the objective of promoting the interests of consumers.
27. The review might consider more fully how the market can address regulatory gaps. Professional and semi-professional bodies sometimes develop to meet relevant needs (eg the specialist bodies for will writers and the management of client and family money). If the activities they cover were to become ‘reserved’ activities, an oversight regulator should consider adding bodies such as this o its list of bodies able to authorise their members for the relevant regulated services.

***Q3. If you believe that there are significant challenges to access to justice and to legal services in England & Wales, to what extent might the approach to legal services regulation help to address those challenges?***

28. The high level of specialisation and expertise necessary to adequately assist consumers in the operation of the courts and other adversarial legal work, inevitably leads to supply shortages and high costs and therefore access to justice.
29. The response lies not in the amendment to the regulatory regime, but in supported access through legal aid and, where this is not practical in terms of public spending burdens, the provision of simplified court processes and judicial assistance to those who cannot afford regulated legal assistance.
30. Though we recognise the abuses that have been caused by the activities of some McKenzie friends, we value the assistance that can be provided by many of them to litigants in person, including by some of our own members. Their presence can mean that the operation of the courts, and hence access to justice, is significantly improved. The abuses should be addressed by alternative means, including a power of investigation and action by the Legal Services Board.

***Q4. What are the particular challenges in the emerging or foreseen use of technology, including artificial intelligence that give rise to a need for regulatory intervention or consideration?***

31. We do not comment on this at this stage.

***Q5. Are there any additional challenges that you would identify as important considerations for this Review?***

32. Please see our introductory comments above.

## WORKING PAPER LSR - 1: THE RATIONALE FOR LEGAL SERVICES REGULATION

***Q1. Do you agree with the CMA's conclusion that general and consumer law alone are insufficient to protect consumers in their purchase and experience of legal services?***

33. Yes. The main rationale for the mandatory regulation of legal services lies in externalities, such as the public interest in having a well-functioning system of justice, available to all citizens. Consumer protection adds an additional rationale for regulation, though it should be noted that there are other areas of consumer need that are equally outside the understanding of most citizens (such as building and construction) but which can have very serious consequences, sometimes delayed by many years, where suppliers are not required to be pre-authorised.

***Q2. Do you agree that 'the public interest' should be the prevailing interest in legal services regulation?***

34. Yes, so long as the right definition is used (if, indeed, there is a single appropriate definition – see our answer to Q3 below).

***Q3. Do you agree with the articulation of 'the public interest' in paragraph 3.7 and as elaborated by the Legislative Options Review in paragraph 4.2; and that these contain the right elements as a foundation for sector-specific regulation?***

35. What is meant by the term is not straightforward, please see our paper on the matter for more detail on this. In the context of legal services, it is in the public interest that private rights (eg to ownership and privacy) are respected and that advisors are able to fight the cause of their clients. This can produce unpopular results that government or the public generally may not like and it is important that any regulatory regime is designed to defend such outcomes in a robust way.

36. We do not accept that the fourth bullet point of section 3.7 that the notion of the public interest should "necessarily be contextually bound by geography, constituency and culture". The interpretation of what constitutes the public interest may and does vary across societies and cultures but as many aspects of our lives are influenced by globalisation, there is often much to be gained by a common approach across borders (eg anti-money laundering) and we should always be prepared to learn from good practices elsewhere (and help others to gain from our own experiences). Our regulatory regime needs to take this into account.

37. Regulation may protect the interest of third parties with no contractual relationship with the provider, for instance the beneficiaries of trusts and wills and (arguably) the employees of corporate clients and this should be taken into account in considering definitions of 'consumer' or 'public interest'.

## WORKING PAPER LSR-2: THE SCOPE OF LEGAL SERVICES REGULATION

***Q1. Is it an acceptable approach for this Review to discount the possibility of either no sector-specific regulation for legal services or full regulation of all legal activities?***

38. Yes. Neither of these extremes represents an appropriately modulated response to the need for legal services regulation.

***Q2. Is there any evidence of harm to the public interest arising from 'unbundling' or 'working around' the current reserved legal activities?***

39. Unbundling and working around are generally a rational response to an inappropriate boundary to the reserved areas and harms the public interest in the sense of adding unnecessary costs if nothing else.

40. It would be better for the 'reserved' areas of legal service to be drafted to catch all, but only, those legal services which are likely to cause significant harm to the public interest, without gaps leading to the opportunity to avoid (desirable) regulatory oversight (and with facility to authorise provider bodies outlined above).

***Q3. Do you agree that the current reserved legal activities provide a poor foundation for the development of a modern, risk-based, proportionate and cost-effective approach to the regulation of legal services?***

41. Yes. See above.

***Q4. Do you agree with an approach to regulation that draws a distinction between intervention to assure public good outcomes and those intended to secure consumer protection? Do you agree that both should lead to before-the-event authorisation?***

42. No, we don't agree with this distinction but only because we consider that appropriate consumer protection is one of the considerations that should be considered as an aspect of the public interest. Systematic abuse of consumers by experts is not something that is an acceptable aspect of the public good of any society.

***Q5. Do you have any observations on the candidates for reservation (or some form of before-the-event authorisation) discussed in paragraph 4? Are there any other legal activities that you believe should be included in such consideration?***

43. Please see our introductory comments above.

***Q6. What are your views on whether the notion of 'reserved legal activities' should be retained, or on alternative approaches that have no defined set of reserved activities?***

44. Please see our introductory comments above.

***Q7. Do you agree that all legal services provided for reward should be the subject of some form of regulation (such as after-the-event access to the Legal Ombudsman)?***

45. No we do not agree that all legal services provided for reward should be the subject of some form of regulation Citizens, for example, have redress through the courts (including small claims courts) in addition to any redress they may have through regulatory channels. It is important that people can seek advice from the relevant expert in any field and the risks of overlapping regulation noted above need to be considered carefully, both in terms of costs to citizens of regulation (that the user ultimately bears) and the risk of overlapping regulation that might deter otherwise suitable providers from servicing particular sectors.

46. However if a particular 'legal' activity is not regulated elsewhere and there is evidence of abuse/harm suggesting that the activity should be regulated as a legal service, then it might be helpful if the regime allowed that activity to be added. Whether this should be by primary legislation or less formally is an open question. In any case, it would then be necessary to consider whether additional bodies should be authorised to service the relevant market as suggested above.

***Q8. Whether or not reservation (or some form of before-the-event authorisation) applies to certain legal activities, do you have any views on whether a different approach – with different regulatory requirements and protection – could or should be applied to business-***

***to-business relationships (i.e. those not involving individual consumers or micro-enterprises)?***

47. No as in our view we think this would cause confusion. Further, all users of legal services should be entitled to appropriate protection.