Meeting: Legal Services Board

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Item: Paper (23) 18

Title: Mapping unregulated legal services – Reserved Legal Activities – first principles analysis

Author(s): Steve Violet, Statutory Decisions Lead; Margie McCrone, Head, Strategy and Policy

Status: Official

Introduction

1. This paper outlines the work done to complete a first-principles analysis of the existing reserved legal activities (RLAs) in the Legal Services Act 2007 (the Act) and possible future steps related to the scope of regulation for the Board to consider at a later date.

Recommendations

2. The Board is invited to:

   a. **note** the work undertaken to complete the analysis of the existing RLAs;

   b. **agree** that our analysis does not support futher action in relation to the configuration of the RLAs at this time.

Background

3. Last year we published our research[1] mapping the unregulated sector. From that work we concluded that while there was evidence of consumer detriment in some areas, it was not so great as to justifiy the considerable investment of time and resources into a full scale review, particularly given the low priority that would likely be placed by Government on implementation.

4. However, we committed, at our October 2022 Board meeting, as a proportionate use of LSB resources, to undertake a first principles analysis of the rationale for each of the existing RLAs in the Act.

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[1] https://legalservicesboard.org.uk/wp-content/uploads/2022/06/20220616-Mapping-unregulated-legal-services-FINAL-1.pdf

5. The Regulatory Objectives are of significance in our analysis. Of particular relevance are:

    - RO1 Protecting and promoting the public interest – this is relevant due to the risk of public harm associated with removing limitations on who can provide certain legal services.

    - RO3 Improving access to justice – this links to the potential access to justice benefits associated with removing activities from reservation.

    - RO5 Promoting competition in the provision of services – this links to the limitation of competition that results from reservation.

6. We also set out in the October 2022 Board paper our expectation that we would consider existing literature such as content from the Competition and Markets Authority (CMA), the Independent Review of Legal Services Regulation and its Supplementary Report, and a 2010 paper from the Legal Services Institute considering the history and rationale of the RLAs. Rather than seek to duplicate work already undertaken, we have drawn on these resources to inform our analysis.

7. In conducting our work, we have considered the rationale for reservation of each of the RLAs and the extent to which the rationale holds given how the market and associated risks have developed over time.

8. Finally, we have set out our early thinking on what could be considered should the Board return to further consider the scope of regulation in the future if it is identified as a priority workstream, with additional resource available for it. We note that our consultation response on the 2022/23 Business Plan noted that the significant resource undertaking associated with a formal review of the RLAs, and our current policy commitments, meant it was appropriate to focus our immediate resources where we can have the most impact.

The RLAs

9. The RLAs are listed in Section 12 of the Act and the meaning of each is set out in Schedule 2 to the Act. They are the exercise of a right of audience, the conduct of litigation, reserved instrument activities, probate activities, notarial activities and the administration of oaths.

10. Prior to the Act, each of the current RLAs had been limited/reserved first through custom and then through previous legislation. Their reservation was subject to debate in parliament during the passage of the then Legal Services Bill.

11. UCL's independent review of legal services regulation[2] noted that 'Reservation in effect creates a monopoly for qualified lawyers and so creates barriers to entry. But these activities lack any consistent, risk-based justification for their different treatment'. This view of inconsistency in justification for the RLAs is repeated across the literature we have reviewed. This is consistent with our previous

[2] https://www.ucl.ac.uk/ethics-law/sites/ethics_law/files/irlsr_final_report_final_0.pdf

arguments that within the context of a more fundamental review of the legislative framework, revisiting both the overall concept of RLAs and the specifics of individual RLAs would seem to be both desirable and necessary. Without such a review, however, action on the RLAs is not likely to be productive.

Analysis

12. We have considered each of the RLAs in turn. More detail can be found in Annex A, but in summary our conclusions are as follows:

Rights of audience and conduct of litigation

13. Both rights of audience and conduct of litigation are targeted at activities where the consequences of poor-quality service can be severe. Reservation seeks to provide consumer protection by ensuring only those who are qualified can undertake the activities.

14. Overall, the evidence does not suggest such a significant shift in the justifications for these activities being reserved as to create a serious demand for change outwith a more fundamental review of the legislative framework.

Reserved instrument activities and probate activities

15. Reserved instrument activities and probate activities are both narrowly drawn. With conveyancing[3] in mind for reserved instrument activities, the CMA noted that risks relating to client money or adequately ensuring title has changed hands are not covered by the reservation. Our recommendation is not to pursue changes to this RLA, but instead to satisfy ourselves that the respective regulatory arrangements operated by those regulators that oversee the RLA are sufficiently clear and effective in terms of the risks identified in the CMA review as an area with evidence of consumer detriment.

16. Our continuing engagement in this space has also identified concerns around the unregulated practice of selling pre-paid probate plans, which was the subject of a consumer warning[4] issued by the FCA earlier this year. In addition, probate activities are another area where the CMA has pointed to the fact that handling client money is not reserved. Again, we will want to pursue these matters with individual regulators rather than seek change to the RLA itself.

Notarial activities

17. Notarial activities can only currently be conducted by notaries under the authorisation of the Faculty Office. However, this is not solely due to the fact it is an RLA. Of the approved regulators named in the Act, only ICAEW has sought to also become an approved regulator for notarial activities. In 2017, the Lord

[3] Reserved instrument activities are not limited to conveyancing transactions.
[4] https://www.fca.org.uk/news/news-stories/consumer-warning-pre-paid-probate-plans

Chancellor[5] declined to accept the LSB's recommendation for ICAEW to be designated as an approved regulator for notarial activities.

18. Greater consumer choice in relation to notarial activities could be provided without the need to make any change to the RLAs. This could be achieved by designating other approved regulators in relation to notarial activities.

The administration of oaths

19. It is unlikely that any consumer gains from changes to this RLA would be worth the investment needed, particularly in light of the fact that costs to the consumer are already limited in many cases by statutory fees.

Conclusion

20. Balancing the above, we do not consider that our analysis identifies a strong case for immediate work to conduct a large-scale review of the RLAs without a more fundamental review of the legislative framework.

21. Our analysis, alongside the mapping research concluded last year and our ongoing stakeholder engagement work will provide evidence to inform a future review at a time when conditions are right.

22. In the meantime, we will undertake work to satisfy ourselves that the regulatory arrangements that relevant regulatory bodies have in place to oversee reserved instrument activities and probate activities are sufficiently clear and effective.

Possible future actions

23. There are a range of actions that could considered by the Board in the future should the scope of regulation be further considered at a later date. They include exploring:

    - The extent to which the full range of risks presented by a particular activity is adequately mitigated by individual regulators' arrangements (for example, in relation to conveyancing, ensuring that title has changed hands).

    - Whether the risk profile of any unregulated activities crosses over with any of the RLAs (for example, probate activities and estate administration).

24. As set out in October's paper:

    - We are continuing to keep a watching brief as other evidence emerges – such as through the SRA's research and the next wave of our Individual Legal Needs Survey.

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[5] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/646508/decision-notice-lord-chancellor-to-mr-izza-21-sept-2017.PDF

- Our work on consumer empowerment and a potential Regulatory Information Service is intended to improve consumers' ability to make informed decisions about the legal professionals they instruct, including understanding their regulatory status and the protections afforded by it. Through this work, there may be opportunities to leverage existing services such as Legal Choices.

Annex A – Additional detail on the RLAs

Risks and mitigations	
Financial:	No additional financial commitments have been identified at this time.
Environmental:	N/A
Legal:	As this is a scoping exercise for potential future work no legal risk advice has been taken. This will be considered if this project progresses in future.
Communications and engagement:	We are continuing to engage with relevant stakeholders to ensure we capture evidence of issues in the market to help inform future Board discussions and decisions.
Equality and diversity:	A strong, diverse, and effective legal profession with competition and innovation in the provision of services is best placed to serve a diverse public. It will be important for any future work to take full account of any risk of adverse equality and diversity outcomes associated with changes to the scope of regulation.
Resource:	Resourcing is within planned budgets

Freedom of Information Act 2000 (FoI)		
Para ref	**FoI exemption and summary**	**Expires**
N/A	N/A	N/A

Annex A – Additional Detail on the RLAs

The exercise of a right of audience

The exercise of a right of audience is the right to appear before and address a court, including the right to call and examine witnesses. It should be noted that a Judge may refuse to hear a person even if authorised (see s192 LSA 2007).

Exemptions (Schedule 3 LSA 2007)
• Granted by the court in relation to specific proceedings • Has a right of audience granted by or under any other enactment • Attorney General or Solicitor General if on the Roll of Solicitors or been called to the Bar & the Advocate General for Scotland if admitted as a Solicitor or as an advocate in Scotland • Litigants in Person • Individuals assisting in the conduct of litigation (under instructions of someone who is authorised for conduct of litigation and under that persons supervision) • Individuals authorised for the conduct of litigation • Solicitors to public departments and the City of London • And other specific limited exemptions

1. The limiting of the right to appear before and address a court is an artifact of history going back hundreds of years, but it is typically seen as a way of protecting the public by ensuring that only those who are suitably qualified to carry out advocacy do so.

2. Over time, rights of audience, traditionally the domain of barristers, have been expanded to solicitors, chartered legal executives, trade mark and patent attorneys and costs lawyers. The common thread from the Courts and Legal Services Act 1990 to the Act in force today has been to limit rights to those who are authorised by approved regulators who have appropriate regulatory arrangements in place.

3. The CMA market study focused on the impact of the RLAs on competition, and the consumer protection and public interest considerations for reservation. In assessing *the exercise of a right of audience* the CMA noted that "*given the technical difficulty involved in advocating a case and the potentially severe consequences of poor provision, reserving the exercise of a right of audience to only authorised persons secures consumer protections by providing a level of assurance as to minimum quality and ethics of the provider*".

4. In conducting our analysis, we have been mindful of the fact there are a range of exemptions that are set out in the Act (see Annex B), including the ability to appear as a litigant in person or for a court to grant rights of audience on an ad-hoc basis in relation to specific proceedings.

<u>The conduct of litigation</u>

the issuing of proceedings before any court in England and Wales, the commencing, prosecuting and defending of those proceedings and the performing of any ancillary functions in relation to those proceedings (such as entering appearances to actions).

Exemptions (Schedule 3 LSA 2007)
• Granted by the court in relation to specific proceedings. • Has a right of audience granted by or under any other enactment. • Litigants in person • And other specific limited exemptions

5. The original rationale for limiting the right to conduct of litigation is unknown. However, it is another activity that is limited to ensure the public is protected by allowing only those with suitable qualifications to conduct litigation.

6. Rather than barristers, the conduct of litigation was the domain of solicitors traditionally. Once again, the Courts and Legal Services Act 1990 features; it expanded the right to conduct litigation to a position that is broadly similar to that of the current Act which limits the right to those who are authorised by approved regulators who have appropriate regulatory arrangements for education and training in place.

7. The present position is that the conduct of litigation can presently be carried out by solicitors, barristers, chartered legal executives, trade mark and patent attorneys and costs lawyers. The scope of the right for each group to conduct litigation is set by their relevant approved regulator and in some cases is limited to their area of practise.

8. The CMA noted that "*Arguments in favour of reserving the conduct of litigation rest upon similar consumer protection and public interest grounds as the rights of audience*" and that reservation "*protects consumers from potentially severe, and possibly irreparable, consumer detriment that may result from poor quality service*"

9. It should be noted that a range of unregulated businesses have tested the limits of the conduct of litigation. This has been the subject of litigation and significant judgments in matters such as Agassi v HM Inspector of Taxes [2005][6] and JK v MK and E-Negotiation Ltd (trading as amicable) and The Queen's Proctor [2020][7].

10. The case law provides us with an insight into the narrow interpretation that Courts have applied to the ancillary activities that form part of the definition of the conduct of litigation. It also provides us with an understanding of whether

[6] https://www.bailii.org/ew/cases/EWCA/Civ/2005/1507.html
[7] https://www.bailii.org/ew/cases/EWFC/HCJ/2020/2.html

preserving the reservation is as anti-competitive a measure as it may appear at first glance.

11. The profile of the market has changed in a significant way since the Act was put in place. However, those changes have involved a broadening of the market and greater competition from the provision of legal services by unregulated providers. While the 2020 judgment was limited to a very specific business model it does provide some information on how Courts view the scope of the conduct of litigation.

Reserved instrument activities

preparing any instrument of transfer or charge for the purposes of the Land Registration Act 2002, making an application or lodging a document for registration under that Act; and preparing any other instrument relating to real or personal estate for the purposes of the law of England and Wales or instrument relating to court proceedings in England and Wales ("Instrument" includes a contract for the sale or other disposition of land (save for a contract to grant a short lease)).

Exemptions (Schedule 3 LSA 2007)
• Prepared in the course of a person's duty as a public officer • Carried out by an individual under the direction and supervision of an authorised person • Accredited persons are exempt in relation to farm business tenancies in certain circumstances • The activity is also a reserved legal activity of the exercise of a right of audience of the conduct of litigation • Carried out by an individual otherwise than for or in expectation of a fee, gain or reward • And other specific limited exemptions

12. Reserved instrument activities are narrowly drawn and limited to specific activities typically carried out, but not limited to, work done as part of the conveyancing process.

13. This was another right that was limited to solicitors (with barristers and notaries exempted from a specific prohibition on others) and was widened further through the Courts and Legal Services Act 1990 to enable licensed conveyancers to enter the market. This was done to widen competition in the provision of legal services. Since then, the right has also been extended to patent and trade mark attorneys.

14. The CMA noted that the reservation is actually only of a small part of the conveyancing process. It explained that "*the current reservation does not capture the real risks of the transaction, which arise not from preparing the documents of exchange but from not adequately checking the title has been transferred. In addition, the actual handling of client monies as part of the conveyancing process is not reserved.*" It also noted that some stakeholders had indicated that, rather than the reservation, it was actually the influence of intermediaries such as lender

panels that limited the widening of conveyancing services to unregulated providers.

15. Conveyancing has been regularly identified as high risk[8], this remains the case and could indicate that the reservation is well aligned to risk. However, we note the CMA quote above questioning whether the reservation captures the key risks in the process.

Probate activities

preparing any probate papers for the purposes of the law of England and Wales or in relation to any proceedings in England and Wales ("probate papers" are those on which to found or oppose a grant of probate or a grant of letters of administration).

Exemptions (Schedule 3 LSA 2007)
• Carried out by an individual under the direction and supervision of an authorised person • Carried out by an individual otherwise than for or in expectation of a fee, gain or reward

16. In recent history the reservation of probate activities was wider than in the current Act. The Solicitors Act 1974 prohibited anyone other than a solicitor, barrister or notary from even taking instructions for a grant of probate or letters of administration. The current reservation is more limited and enables greater competition.

17. As with the other RLAs, the list of those with the right to conduct probate activities has expanded over time with the addition of licensed conveyancers and chartered certified accountants[9].

18. The CMA noted that "*probate activities constitute a narrow reserved element between two larger unreserved legal activities: the making of wills and the administration of estates based on those wills*". This is another occasion where the CMA was less certain of the protection provided by reservation. It considered that "*reservation seems to be one of the least justifiable in terms of consumer protection. This is because the reserved element does not focus on the activity which raises the greatest risks, namely the handling of client's money within estate administration.*"

19. Our research[10] identified wills, trusts and estate administration as an area where we did find some evidence of detriment. This could again support the CMA

[8] Regularly identified as a key risk that increases the cost of PII (Law Society PII Surveys - https://www.lawsociety.org.uk/topics/research/pii-surveys)

[9] ICAEW probate firms and ACCA firms who are now regulated by CILEX Regulation in relation to probate activities

[10] https://legalservicesboard.org.uk/wp-content/uploads/2022/06/20220616-Mapping-unregulated-legal-services-FINAL-1.pdf

conclusion that the narrowly drawn reservation does not provide consumer protection.

20. However, this does not necessarily support removing the reservation. Instead, it may indicate there is a need to further consider what additional protections are required for consumers. We are continuing to engage with stakeholders to increase our understanding of risks in this part of the market.

Notarial activities

activities which immediately before the day the relevant section of the LSA came into force, were customarily carried on by notaries under the Public Notaries Act 1801.

Exemptions (Schedule 3 LSA 2007)
• Authorised to carry out notarial activities by or under any other enactment • Where section 14 of the Public Notaries Act 1801 applies and the work is carried on for ecclesiastical purposes or in the course of performing a public duty or service under government. • Carried out by an individual otherwise than for or in expectation of a fee, gain or reward

21. Notarial activities remain the most limited of the RLAs as only Notaries are currently authorised to carry them out.

22. The CMA noted the lack of clarity as to the scope of the reservation and the direct link to the title of 'notary'. It also noted that *"stakeholders agree that the use of notaries provides considerable certainty to business or individuals involved in international transactions, particularly with civil law countries. There is also a consumer protection justification in the sense that reservation avoids potentially costly litigation after the event should the validity of a document be disputed."*

23. The provision of notarial activities is more limited than the other RLAs because only one of the Approved Regulators is currently able to authorise its regulated community to carry it out. Proposing to remove the reservation would be a significant step, especially considering the fact that competition could be increased by extending this activity to other Approved Regulators without the need for removing the current reservation.

Administration of oaths

exercising powers conferred on a commissioner for oaths under the Commissioners for Oaths Act 1889; the Commissioners for Oaths Act 1891; and section 24 of the Stamp Duties Management Act 1891.

Exemptions (Schedule 3 LSA 2007)
• Authorised to carry out the administration of oaths by or under any other enactment • Has a commission under section 1(1) of the Commissioners for Oaths Act 1889

24. The CMA set out that "*The reservation of oaths seems to be based mainly on public interest grounds. Reservation of this activity ensures confidence and efficiency in the administration of justice and in transactions and appointments. Furthermore, it ensures that society can have confidence that oaths are administered by a person with good standing who has a duty to act with integrity and uphold the law.*"

25. All of the active approved regulators are approved in relation to authorisation the administration of oaths[11].

26. We note that the SRA is currently consulting[12] on minor amendments to its Standards and Regulations. Within the consultation it is proposing that the administration of oaths be treated differently to the other RLAs. Its proposal is that, the administration of oaths should not require three years of practice or adequate and appropriate insurance. This is based on the SRA's view that it is a low-risk activity which provides a useful service.

27. The CMA also noted that ICAEW had argued "*that the ethics of professional accountants (with its emphasis on integrity and objectivity) and their training and work experience in providing assurance on information provided for the use of third parties (such as in relation to audit) makes its members appropriate*" for carrying out the administration of oaths.

28. The risk profile of the administration of oaths is unlikely to have changed significantly. Although the use of the service is likely to have reduced over time with an increase in the ability to make applications online.

[11] ICAEW does not currently have regulatory arrangements in place for this activity
[12] https://www.sra.org.uk/sra/consultations/consultation-listing/standards-regulations-amendments/?s=o