



The Law Society

**The regulation of legal services: What is the case for  
reservation?**

The Law Society Response

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supporting  
solicitors

The Law Society is the representative body for over 140,000 solicitors in England and Wales. The Society represents and supports solicitors, negotiates on behalf of the profession and lobbies regulators, government and others. The Law Society welcomes the opportunity to provide our thoughts on the Legal Services Institute's second interim strategic paper on 'The Regulation of Legal Services: What is the case for reservation?'

We welcome the approach taken by the Institute and, in particular, the recognition that there is a strong case to be made out for ensuring that some legal services can only be provided for reward by appropriately trained and regulated individuals. This response represents the Society's further views on the topic. The Society is continuing to develop its policy in this area.

### **Primary regulatory objectives**

The paper identifies the following objectives as primary objectives:

- protecting and promoting the public interest,
- supporting the constitutional principle of the rule of law,
- improving access to justice and
- encouraging independent, strong and effective legal advice and representation

The paper suggests that, where these primary objectives conflict with the other objectives, then they should override them. We agree that some objectives should be given greater weight than others and support the authors' proposed primary objectives. We note that the final objective omits the word 'diverse' as the authors have decided that a diverse legal profession is a secondary objective. We have reservations about this conclusion. We believe that a diverse profession is in the interests of clients and the profession alike and that the word 'diverse' could be included in the fourth objective. It does not appear to us that this is likely to conflict with the other objectives.

### **The justification for reservation**

The paper argues that reservation of particular areas of work can be justified on the basis of the public interest in securing public good and consumer protection. We agree with this proposition.

The paper proposes that the following criteria need to be satisfied in order to justify reservation of legal work:

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

We agree that there needs to be a public interest justification for work being reserved to individual professionals. We note the authors see the public interest in this sense as being in:

- advancing specifically 'legal' outcomes of the regulatory objectives and
- promoting and protecting the UK Plc and its justice system.

The second point is an interesting one and important. We believe that it should be emphasised and we support it. We believe the public interest is also in ensuring that the public benefit from an independent and principled profession when undertaking transactions.

In addition, we consider that it is important to remember that legal services usually relate to very significant aspects of a consumer's life: their liberty, property or rights. The law is complex and consumers seeking advice need, in the public interest, to be able to have confidence that the advice is likely to be technically correct and in their best interests. This applies to courts also, where judges rely on the expertise and the ethical duties of the lawyers presenting the case. These appear to us to be strong arguments in favour of reservation.

We believe when considering the public interest, it is also important to consider the long term impact. For instance, greater competition may in the early stages create a benefit for consumers as prices fall. However, in the longer term greater competition can lead to a fall in the number of providers, reversing the price advantage and also reducing choice for consumers. There may also be long term impacts on quality of service.

The second requirement is that other responses are less effective. We note that there are no specific criteria for assessing effectiveness. However, it seems to us to be important that such responses must ensure competence, ethical duties and consumer protection.

We believe the third requirement is an important one. While it is possible that other mechanisms of regulation or consumer protection might be effective, reservation of a legal service often provides additional client protections over and above those provided by different routes. Given the importance of certain types of transactions to clients, the fact that many clients use legal providers in times of distress and that issues with legal work often cannot be put right, we believe that additional protections provided by reservation are not a 'nice to have' but often a necessity. These should be considered when deciding whether to make an activity reserved.

### **Consumer protection**

The paper highlights that consumer protection should not be a 'generic justification' for reservation, rather it is a justification where the effect of substandard work could cause serious harm which cannot be compensated for. We believe that the effect of poor quality legal work often cannot be adequately compensated for by the provision of 'after the event' insurance. Therefore we agree with the point that consumer protection should not be a generic justification. However, we do believe that in many cases there will be a consumer justification for reserving work.

We note that the authors have set out that evidence will be needed in order to justify reservation. They suggest the following may be considered as evidence:

- (1) circumstances in which consumers are widely known to receive incompetent or sub-standard advice and representation;
- (2) where there are known to be providers preying on vulnerable consumers, providing services where they are not required, or in combinations or at prices that take advantage of the vulnerability; and
- (3) where there are instances of providers absconding with client money.

We note the argument that the authors make in relation to reservation for the public good, that the decision to reserve in such cases can be made as a matter of principle rather than on the basis of evidence. We believe that a similar case can be made for reservation on the basis of consumer protection. Legal work is often of significant importance and value to the client. Most legal work is complex, there is often an asymmetry of information between provider and recipient, and poor quality work or dishonesty can frequently lead to substantial and irreparable damage to the consumer. In these cases, no evidence is needed to deduce that the consumer should be protected. We therefore believe that the decision to reserve on the basis of consumer detriment can often be made on the basis of principle rather than evidence.

### **Reservation of specific activities**

The authors conclude that activities including rights of audience, rights to conduct litigation and court related reserved instrument activities should remain reserved, as the continuation of reservation will help secure the 'primary' regulatory objectives. We support this proposal.

The authors suggest that only those that have rights of audience or to conduct litigation should be able to administer oaths and that their training should include appropriate training on the administration of oaths. We support the proposal that the administration of oaths should remain a reserved activity. We believe that it is important that those administering oaths have been shown to be persons of integrity and have the relevant understanding of the duties they are undertaking. However, we do not believe that it follows from this that only those entitled to undertake litigation or those who have rights of audience should be able to administer oaths. We believe that training to undertake most legal services should be able to instil an understanding of the values and purpose of taking an oath.

The importance of notarial activities to international commerce and therefore 'UK plc' is recognised by the authors and thus the need for such activities to remain reserved. We support this proposal. We also support the proposal that the current exception, applying to non-authorised persons where there is no reward, should be removed.

We are more concerned about the proposal that, while there is a need to regulate the registration of a first deed of title, ongoing registration of title is controlled by the Land Registry and therefore does not need to be additionally regulated as a reserved activity. The assurance of good title is not contained solely within the registration of a title at land registry. There are some overriding rights and easements not registered and a bundle of liabilities discoverable through searches and investigations that all

attach to the certification of good title. It is this assurance that a buyer and a lender require. There are many other aspects of benefit derived from reservation:

- Minimising fraud
- Securing interdependent transactions in chains with parallel financings; and
- the benefit of achieving simultaneous transactions in chains.

Thus, the existing reserved instrument definitions are justified.

Each transaction demands its own processes and judgements and these depend upon the location and characteristics of the property and its owners. The full reservation for instruments should stand along with the supporting extensions that are rightly argued in the paper.

The parallel drawn regarding other types of commercial contract is not apt. The number of contracts and the potential detriment to consumers is not paralleled in other areas. Indeed the consumer credit legislation tightly regulates much smaller values than are involved in land transactions.

We support the proposal that immigration services and advice should become reserved activities and that there is a public interest in this being taken forward, particularly given the impact such advice can have and the potential confusion for consumers of having two regulatory systems.

We support the proposal that will writing should become a reserved activity.

While we believe that the reservation applying to probate activities should be extended, we do not believe that persons who are not authorised should be able to apply for the grant of probate on behalf of others. This is a complex area and consumers often turn to a third party to help them with their application at a time of great distress. The person making the application will generally be the first point of contact for a consumer. Consumers would be unaware that a non-authorised person could carry out this work and that they will be unprotected if anything goes wrong.

We agree that there is no need for the current system of regulation to be altered to bring insolvency services under the LSA. .

The authors recognise the need for claims management to be regulated. However, they do not believe reservation would be appropriate, as much of the claims management work which is currently regulated could not be classed as a legal activity. We agree with this point. However, the fact remains that many claims handlers do undertake work that is very much part of the legal process – gathering evidence, instructing experts and interviewing witnesses. There is considerable scope for damage to clients at this stage. Given the importance of pre-litigation work we believe that activities outside the pure marketing of services should be reserved work. The pre-litigation protocols are complex and it is essential that the work is carried out correctly before proceedings are issued. Otherwise consumer expectations are falsely raised or disappointed, the litigation may fail and the client will be left with no recourse. For this reason, those carrying out such work should be

suitably regulated and qualified. Reservation of such work would offer clients greater protection than the current system and ensure parity of standards. We therefore believe that all work in contemplation and preparation of litigation should be reserved.

We are aware that LeO receives complaints regarding claims management firms and the unregulated providers that they refer work to. While many complaints relate to personal injury claims, other areas such as employment law, family law, wills and probate also give rise to complaints. This is of serious concern, as LeO can only consider complaints where the provider is an authorised person.

We also believe that other areas of law should be considered for reservation. Both housing law and employment law are areas of considerable complexity. Consumers in these areas of law are often vulnerable and making a one-off 'distress' purchase. The consequences of poor quality advice in these areas can have a significant impact on consumers. Moreover, many of these cases involve appearances before Tribunals who rely on the integrity and competence of the advocates. We believe that further consideration needs to be given to whether these areas of law should be reserved.

### **Who should be able to undertake reserved activities?**

We do not believe that only those who are members of a legal profession should be allowed to carry out reserved activities. However, much of the benefit of reservation is derived from restricting certain work to those who are appropriately qualified and trained. This may not mean that a person has to be a member of a legal profession or 'legally qualified'. However, in most cases a broad legal education will be required to undertake a reserved activity to an appropriate standard.

### **Conclusion**

We support the approach taken by the authors and support many of the proposals made by the authors. We hope that our comments on the paper prove useful.