

STRATEGIC DISCUSSION PAPER

THE REGULATION OF LEGAL SERVICES

Reserved Legal Activities: History and Rationale

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Summary

This is the first of two papers, and it traces the origins of the six reserved legal activities found in section 12(1) of the Legal Services Act 2007. These activities are: the exercise of a right of audience; the conduct of litigation; reserved instrument activities; probate activities; notarial activities; and the administration of oaths. Our purpose here is to understand the history and, where possible, the reasons behind the selection of each of these activities for reservation. In the second paper, we will explore the broader basis for the regulation of legal services in the light of the Legal Services Board's powers under the Act to recommend the addition or removal of legal services as reserved activities.

The Act provides for the extension or removal of reserved activities by order of the Lord Chancellor (rather than by primary legislation, and only on the recommendation of the Legal Services Board). However, it seems to us that, for the Board to make any recommendation to add a reserved legal activity to the list, it must be clear in articulating the policy reasons and criteria for doing so. Only in this way will it be possible to test the recommendation, not just in relation to the recommended activity itself but also in relation to other legal activities that appear to satisfy the same policy reasons and criteria. Further, to the extent that one (or more) of the currently reserved activities does not appear to meet those same policy reasons and criteria, it should follow that the Board ought to recommend that it (or they) should be the subject of a recommendation for removal.

On the assumption that there were valid policy reasons and criteria for creating the current reserved activities, we hoped that their history would provide some basis for identifying suitable criteria for the addition or removal of reserved activities in the future. The original intention of this paper was to identify those historical criteria, and to consider whether they provide a preliminary basis for recommendations for extension or removal under the Act. Unfortunately, we have concluded that they do not. Because reserved activities are a fundamental pillar of the Legal Services Act and its intended reforms, as well as its approach to the regulatory framework, we must express surprise and concern that the structure appears to be built on such tenuous foundations.

The origins of the reserved legal activities can be traced back, in some cases, many centuries. Indeed, for some of them (such as barristers' rights of audience in the higher courts), the origins stretch so far back that they cannot be identified directly. In other cases (such as solicitors' rights of audience in the higher courts), modern statutory origination is clear. Taken as a whole, though, the history of the reserved activities is obscure and often the result of simply confirming then current practice or of political influence. Further, in the few Hansard debates that do exist regarding the reserved activities, protectionist influences are also often evident.

The creation of reserved legal activities (as a form of exclusivity granted by the State to those deemed to be appropriately qualified) is only one approach to regulation. Parliamentary intervention has also led to some services that would fall within the definition of 'legal activity' in section 12(3)(b) of the Legal Services Act 2007 being regulated by statute, but not as reserved legal activities. Examples include immigration advice, claims management services, and insolvency work. This adds a degree of complexity to the regulatory terrain.

In a final twist, some legal *activities* are neither reserved under the Legal Services Act 2007 nor regulated by any other statute. However, where the *person* carrying them out is qualified and regulated (such as a barrister, solicitor and licensed conveyancer), the activities they undertake can become regulated as a consequence of the person being regulated. The outcome is that non-reserved legal activities carried out by unregulated persons can be undertaken without any regulatory oversight. This leads to a 'regulatory gap', where clients who procure activities which are not reserved or regulated, from providers who are not regulated as qualified or licensed practitioners, are left without any protection. Activities that currently fall into this gap include some that could potentially seriously affect the lives of the people involved and of others around them (such as the preparation of wills, advice and representation at a police station, and advice about mental health).

As things currently stand, therefore, the regulation of legal activities is somewhat confusing (and surprising) for consumers. It would seem illogical to consider the creation or removal of reserved activities merely in the context of the powers to reserve or liberate without reviewing the broader approach to the regulation of activities, individuals and entities.

Our purpose in investigating the historical origins of the reserved activities was to determine whether it is possible to identify a common policy or rationale underpinning each or all of them, which could then be used to suggest criteria for any future amendments to the list in section 12 of the Legal Services Act. We would suggest that there are no underlying principles that form an acceptable basis for a contemporary approach. At best, we can propose after-the-event, modern interpretations and justifications; but there is little or no evidence of the actual reasons for the reservations at the time they were created.

Given that the origins of the reserved legal activities have proved to be remarkably dispersed and uncertain, with very little treatment available in textbooks or other sources, we have taken this opportunity to deal with the topic in some detail in order to gather in one place as complete a record as possible. Our second paper will explore the potential public interest rationale for the regulation and reservation of legal activities in order to suggest a contemporary approach.

1. Introduction

1.1 The importance of reserved legal activities

Reserved legal activities are one of the fundamental building blocks of the Legal Services Act 2007. For example, they are pivotal to the definition of an 'authorised person' (section 18), to the designation of a regulator as an 'approved regulator' (section 20(5)), to the grant of licences to alternative business structures (section 111(1)), and to the appointment of a Head of Legal Practice for an ABS (Schedule 11, paragraph 11(3)(b)).

The Legal Services Act confirms the list and extent of reserved legal activities (see paragraph 1.2 below), as well as setting out the transitional and continuing authority of practitioners to exercise them (see section 22 and Schedule 5).

1.2 The reserved legal activities

1.2.1 *Definition and extent*

As Sir David Clementi pointed out in his final report¹:

The definition of reserved legal services is relatively straightforward since those areas are contained in statute.... These areas could be termed the inner circle of legal services. In order to provide such services, a practitioner must be certified by a regulatory body which has itself been authorised so to do. A 'lawyer' could therefore be defined as any duly certified member of such a body².

The legal activities which are currently³ reserved, and therefore (subject to exemptions: see paragraph 1.2.2 below) can only be carried out by appropriately authorised persons, are set out in section 12(1) of the Legal Services Act and defined in Schedule 2:

- (a) *the exercise of a right of audience*: the right to appear before and address a court, including the right to call and examine witnesses, except where, before the Act comes into force, there was no restriction (Schedule 2, paragraph 3);
- (b) *the conduct of litigation*: the issuing, commencement, prosecution and defence of proceedings before any court in England and Wales, and the performance of any ancillary functions (such as entering appearances to actions) in relation to such proceedings, except again where, before the Act, there was no restriction (Schedule 2, paragraph 4);
- (c) *reserved instrument activities*: preparing any instrument⁴ of transfer or charge for the purposes of the Land Registration Act 2002, or making an application

¹ See Clementi (2004), Chapter E, para 14.

² The report points out that this definition is wider than the definition of 'lawyer' in various EU Directives, such as the Mutual Recognition and Establishment Directive (98/5/EC) and Services Directive (77/249/EEC).

³ The provisions of the Legal Services Act relating to reserved legal activities came substantially into force on 1 January 2010 (see SI 2009 No. 3250). We are taking the Act as our starting point for the purposes of this paper.

⁴ This includes a contract for the sale or other disposition of land (except a contract to grant a short lease within the meaning of s. 54(2) of the Law of Property Act 1925), but excludes wills and other testamentary instruments, agreements not intended to be executed as deeds (other than the contracts already mentioned), letters or powers of attorney, and transfers of stock that contain no trust or limitation: Sch. 2, para 5(3) and (4).

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 other instrument relating to court proceedings within England and Wales (except where, before the Act comes into force, there was no restriction relating to instruments relating to court proceedings) (Schedule 2, paragraph 5(1) and (2));

- (d) *probate activities*: preparing any probate papers (that is, papers on which to found or oppose a grant of probate or of letters of administration) for the purposes of the law of, or in relation to any proceedings in, England and Wales (Schedule 2, paragraph 6);
- (e) *notarial activities*: activities which, immediately before the Act comes into force, were customarily carried on by notaries in accordance with the Public Notaries Act 1801 (see further, paragraph 2.6 below), though this is not taken to include reserved instrument or probate activities or the administration of oaths (Schedule 2, paragraph 7); and
- (f) *the administration of oaths*: the exercise of the powers conferred on a commissioner for oaths by the Commissioners for Oaths Acts 1889 and 1891 and section 24 of the Stamp Duties Management Act 1891 (Schedule 2, paragraph 8).

A summary table of the origins of these reservations is set out in the Appendix to this paper.

1.2.2 *Exempt persons*

The Act identifies a number of exemptions for people who, although they are not authorised persons, can nevertheless carry on one or more of the reserved legal activities (sections 19 and 193, and Schedules 3 and 5). The exemption is usually allowed because the person in question is given authority, say, by the court, by statute, or because of their role or status (for example, as Attorney General, litigant in person, a European lawyer)⁵. There are exemptions in relation to reserved instrument and probate activities for individuals who carry out those activities under the direction and supervision of an employer, manager or colleague who is an authorised person, or where the activities are not carried out for or in expectation of any fee, gain or reward (Schedule 3, paragraphs 3 and 4).

1.3 **Other regulated, but not reserved, legal activities**

A further complication arising from the Act's approach to legal activities and reserved legal activities is that some 'legal activities' which are not reserved legal activities within the meaning of the Act are nevertheless regulated. These other regulated legal activities are of two types:

- (a) legal activities that are carried out by individuals (usually authorised persons) who are regulated in all of their services by their approved regulator – such as barristers and solicitors; and

⁵ There are also transitional exemptions relating to notaries and law costs draftsmen carrying out certain activities for their employer: Sch. 5, paras 13 and 18.

- (b) legal activities that are otherwise regulated by statute, even though they are not treated as reserved legal activities – such as immigration, claims management, and insolvency work: these are considered further in paragraph 3 below.

2. History and origins of currently reserved legal activities

2.1 Introduction

The history of many of the currently reserved legal activities is shrouded in mystery and often lost in the mists of time. What is surprising is how little Parliamentary debate there has been over the years (including during the passage of the Legal Services Act 2007). This section represents our best attempts to establish the history and origins of each of the reserved activities.

2.2 Rights of audience

2.2.1 General

Holdsworth (1922: 262) states that it is difficult to say whether there was ever a time when a man was not allowed assistance from his friends when appearing before a court. This right was certainly available as early as the reign of Henry I (1100-1135), unless the case involved a felony (although by 1836, this rule was abolished to allow those accused of a felony to have counsel to speak for them⁶). A profession of pleaders had emerged in the King's Courts by the middle of the 13th century (Baker 2002: 76), and they are referred to as early as 1235 (Holdsworth 1922: 263). In addition, in 1253, a man who appeared for another was 'amerced' because he was not an advocate⁸.

Admission to the Bar, and the associated rights of audience, appear to have been awarded by the judiciary, rather than being derived from statute. In *R. v. Gray's Inn Benchers* (1780) 1 Doug 353, Lord Mansfield said (at page 364):

The original institution of the Inns of Court nowhere precisely appears, but it is certain that they are not corporations, and have no constitution by charters from the Crown ... but all the power they have concerning the admission to the Bar, is delegated to them from the judges.

It is clear that rights of audience have traditionally been monopolised by barristers, with solicitors having gained some rights in the lower courts. In 1989, the Government mooted an idea to widen this pool of advocates in its Green Paper on Legal Services⁹, and followed it up with a stated intention to extend rights of audience to provide the public with "the widest possible choice amongst properly qualified advocates" (para 3.4). The proposals were (in the words of the Attorney General) designed to "stimulate competition and foster high standards of professional service to the public¹⁰", and to replace the "existing complex rights of audience under statute and common law" (para 3.8).

⁶ Trials for Felony Act 1836 (6 & 7 Will. 4, c. 114).

⁷ Meaning a pecuniary punishment in the discretion of the court.

⁸ Plac Abbrev 137, as noted in Holdsworth (1922).

⁹ Lord Chancellor's Department (1989) *Legal Services: A Framework for the Future*, Cm. 740 (London, HM Stationery Office), para 3.4.

¹⁰ Hansard Official Report, HC Deb 18 April 1990, Vol. 170, c. 1442.

Not surprisingly, there were long debates about these proposals during their passage through Parliament. The Lord Chancellor stated that granting fresh rights of audience would in future be based on three factors¹¹:

whether persons granted such rights are appropriately qualified, in terms of education and training; whether they are subject to rules of a professional or other body whose rules of conduct... make appropriate provision for the interests of the administration of justice in relation to the kind of work involved; and whether the body in question can be expected to enforce its rules effectively.

In response, Lord Mishcon (himself a prominent solicitor) highlighted the Master of the Rolls's opinion that the interests of justice may require the preparation and presentation of the case be in separate hands, and expressed his disagreement with this view. In his support, Lord Mishcon quoted Sir William Goodhart's view that under the current arrangement "the more you know about a case, the less suitable you are to present it"¹². Lord Hutchinson took the opposing view of the Bill, surmising that it¹³:

in due course will achieve the Government's aim to clear the Crown Courts of the Bar, reflecting ... their dislike of jury trials. I can only say the consumer will suffer.... Prosecutions will be conducted by the state prosecution service ... with a strong incentive to obtain a conviction.

Lord Hutchinson argued strongly for the protection of the Bar, due to the safeguards against abuses of power that barristers' independence and expertise provides. In his support, he reminded the House that the American Chief Justice had 'implored' the Royal Commission not to sanction development of the High Street trial lawyer, as was the case in America.

In the House of Commons, Keith Vaz MP reasoned that previous widening of rights of audience had not led to any loss of independence or problems for the Bar. He also claimed many solicitors currently holding rights of audience still preferred to use counsel, and that "conferral of a right does not guarantee that that right will be exercised"¹⁴. At a later date, Ivan Lawrence MP suggested that the Bill would encourage the Bar to 'wither away', thus increasing costs for clients¹⁵. This was countered by Sir Hugh Rossi MP who said that extending rights of audience to specially trained solicitors had caused no ill effects to the Bar of Australia or New Zealand¹⁶. A side issue was raised¹⁷ regarding whether rights of audience should be extended to Crown Prosecution Service employees, but was dismissed by the same speaker on the grounds that the CPS was already overrun with work, and its employees would be biased as advocates and therefore could not provide the independence inherent in the Bar¹⁸.

¹¹ Hansard Official Report, HL Deb 19 December 1989, Vol. 514, cc. 126-127.

¹² Hansard Official Report, HL Deb 19 December 1989, Vol. 514, c. 132.

¹³ Hansard Official Report, HL Deb 19 December 1989, Vol. 514, c. 135.

¹⁴ Hansard Official Report, HC Deb 12 February 1990, Vol. 167, cc. 51-52.

¹⁵ Hansard Official Report, HC Deb 18 April 1990, Vol. 170, c. 1469.

¹⁶ Hansard Official Report, HC Deb 18 April 1990, Vol. 170, c. 1478.

¹⁷ Hansard Official Report, HC Deb 18 April 1990, Vol. 170, c. 1456 (Mr Morris MP).

¹⁸ Advocates employed by the CPS with a right of audience granted by an authorised body were the subject of s. 31A of the Access to Justice Act 1999, which provided that the authorised body may not limit the courts within which such a right may be exercised. There is now an equivalent provision in s. 189 of the Legal Services Act 2007.

Sir Anthony Grant expressed the most logical and convincing viewpoint later in the same debate when he said¹⁹:

When I was practising, the last thing ... I wanted was to appear in the High Court. [I] wanted to use the best expertise [I] could find from the Bar That is why I wholly support the need to preserve an independent Bar.... However, the Bar must recognise that ... 80 per cent of people say that they want solicitors to have the opportunity to appear in court if necessary. It is ridiculous that solicitors cannot appear in certain instances which probably do not require the greatest expertise. That is why it is necessary to open up the rules and rights of audience.

The result of these deliberations was section 27(2) of the Courts and Legal Services Act 1990:

A person shall have a right of audience before a court in relation to any proceedings only in the following cases –

(a) where –

- (i) he has a right of audience before that court in relation to those proceedings granted by the appropriate authorised body; and
- (ii) that body's qualification regulations and rules of conduct have been approved for the purposes of this section, in relation to the granting of that right.

The provision also reserved the right of a court to refuse to hear a person on providing reasons for so doing (section 27(4) and (5)). Section 31 then provided the first general statutory basis for the rights of audience for barristers. In its original form, barristers were deemed to have been granted by the Bar Council the rights of audience they had immediately before the Act. An identical provision in relation to solicitors and the Law Society could be found in section 32. A new section 31, applying to both barristers and solicitors, was substituted by the Access to Justice Act 1999, under which they were deemed to have been granted by their regulator "a right of audience before every court in relation to all proceedings". These rights, however, are only exercisable in accordance with their respective regulator's approved qualification regulations and rules of conduct, which will bring barristers and solicitor-advocates within their obligations, for instance, to hold practising certificates and, in the case of solicitors, to have acquired their higher rights qualification.

The Legal Services Act 2007 now includes in section 12(1)(a) the exercise of a right of audience in its list of reserved legal activities. It covers the right to appear before and address a court, including the right to call and examine witnesses, except where, before the Act comes into force, there was no restriction (Schedule 2, paragraph 3). This is supplemented by section 12(2) and Schedule 4, which confirm the reservations of the existing regulators (all of whom, except the Master of the Faculties and the Council for Licensed Conveyancers, are approved in relation to rights of audience). The Act also provides for continuity of these rights (Schedule 5, paragraph 1), and for transitional authority (Schedule 5, Part 2). There is also the grant of rights of audience through an inserted section 60A in the County Courts Act 1984 to employees of housing management bodies in respect of certain housing proceedings in a county court before a district judge (section 191 of the Legal Services Act 2007).

¹⁹ Hansard Official Report, HC Deb 18 April 1990, Vol. 170, c. 1495.

The Act contains a number of exemptions (cf. paragraph 1.2.2 above). The expectation seems to be that anyone who exercises rights of audience (other than as a litigant in person) will be appropriately qualified, and so there is no exemption in respect of someone appearing 'otherwise than for, or in expectation of, any fee, gain or reward'. However, judicial discretion will exist to allow a friend to represent a party without payment.

Finally, the Legal Services Act preserves the power of "any court in any proceedings to refuse to hear a person (for reasons which apply to that person as an individual) who would otherwise have a right of audience before the court in relation to those proceedings", though it must give its reasons (section 192(1) and (2)). Further, where a court does not permit the appearance of advocates, or does so only with leave, the existence of rights of audience under the Act does not entitle an advocate to appear (section 192(3)²⁰).

We now consider the origins of specific sources of rights of audience, leading up to the all-encompassing provisions of sections 31 and 32 of the Courts and Legal Services Act 1990.

2.2.2 *Rights of audience in magistrates' courts*

The 1989 Green Paper on the Legal Profession highlighted that, before the Courts and Legal Services Act 1990, rights of audience had different statutory origins depending on the court concerned²¹. Rights of audience in the magistrates' courts were derived from section 2 of the Trials for Felony Act 1836:

in all Cases of Summary Conviction Persons accused shall be admitted to make their full Answer and Defence, and to have all Witnesses examined and cross-examined by Counsel or Attorney.

There are no debates regarding the rationale behind this provision in Hansard that are relevant to the origins of rights of audience as a reserved activity: the focus of Parliamentary discussions was on whether felons were entitled to defence or not.

This right was expressed in section 99 of the Magistrates' Court Act 1952, and then by section 122 of the Magistrates' Courts Act 1980:

A party to any proceedings before a magistrates' court may be represented by counsel or solicitor.

However, the provision was later altered by the Courts and Legal Services Act to allow representation by 'a legal representative²²', reflecting the widening of rights of audience that was one of the main aims behind that Act.

²⁰ A court cannot limit the right to appear to only some of those who are entitled to exercise a right of audience under the Act: s. 191(4).

²¹ Lord Chancellor's Department (1989) *The Work and Organisation of the Legal Profession*, Cm. 570 (London, HM Stationery Office), Annex E.

²² Meaning an 'authorised advocate' or 'authorised litigator' within s. 119(1) of the Courts and Legal Services Act 1990 (broadly barristers, solicitors, and others granted rights of audience by authorised bodies under the Act: see further, paragraphs 2.2.7 to 2.2.10 below).

2.2.3 *Rights of audience in county courts*

The provisions concerning rights of audience in the county courts can be traced back as far as the County Courts Act 1846 (“an Act for the more easy Recovery of Small Debts and Demands in England”)²³, which applied only to the county courts outside London²⁴. This Act is recognised as being the basis of the current county courts system (Baker 2002: 27). Section 91 states:

no Person shall be entitled to appear for any other Party to any Proceeding in any of the said Courts unless he be an Attorney of One of Her Majesty’s Superior Courts of Record, or a Barrister at Law instructed by such Attorney on behalf of the Party; or, by leave of the Judge, any other person allowed by the Judge to appear instead of such party.

This provision allowed both barristers and attorneys to appear, and was later viewed as having been “a great boon to the public”²⁵ by removing technicalities in existing rights of audience. However, a prohibition on the appearance of solicitors acting for other solicitors appeared in the County Courts Act 1852. The 1852 Act repealed the rights of audience provision from the 1846 Act and stated:

it shall be lawful for the Party to the Suit or other Proceeding, or for an Attorney of One of Her Majesty’s Superior Courts of Record, being an Attorney acting generally in the Action for such Party, but not an Attorney retained as an Advocate by such first-mentioned Attorney, or for a Barrister retained by or on behalf of the Party, on either Side, but without any Right of exclusive or pre-Audience, or by Leave of the Judge, for any other Person allowed by the Judge to appear instead of the Party, to address the Court.

This provision was introduced following claims by the Attorney-General, Sir Alexander Cockburn, in the House of Commons that attorneys had been colluding to fix prices and monopolise work in the county courts by excluding the Bar, to the detriment of the public²⁶. Section 91 of the 1846 Act was designed to dismantle the monopoly currently held by barristers on appearing in the county courts, but the Attorney-General argued that it had merely been transferred to attorneys²⁷. Some reasonable arguments were made against the inclusion of the above clause in the 1852 Act, perhaps most significantly by Mr Fitzroy MP that “no complaints had been made by the public of the manner in which the advocates in the County Courts had conducted their business”²⁸. From this it can be inferred that the only complaints had come from within the profession itself (possibly from barristers who had lost some business to the attorneys). It was also suggested by Sir George Strickland MP that after creating such public benefit in 1846 it should not then be destroyed²⁹, and by Mr Hume MP that barristers were perfectly capable of protecting themselves³⁰. In response, the Attorney General expressed the remarkably elitist opinion that³¹:

²³ 9 & 10 Vict., c. 95.

²⁴ The City of London Court was only included within the meaning of ‘county courts’ from 1867 onwards, by section 35 of the County Courts Act 1867.

²⁵ Hansard Official Report, HC Deb 15 July 1851, Vol. 118, c. 783 (Sir George Strickland MP).

²⁶ Hansard Official Report, HC Deb 15 July 1851, Vol. 118, c. 778.

²⁷ Hansard Official Report, HC Deb 15 July 1851, Vol. 118, c. 780.

²⁸ Hansard Official Report, HC Deb 15 July 1851, Vol. 118, c. 781.

²⁹ Hansard Official Report, HC Deb 15 July 1851, Vol. 118, c. 783.

³⁰ Hansard Official Report, HC Deb 15 July 1851, Vol. 118, c. 784.

³¹ Hansard Official Report, HC Deb 15 July 1851, Vol. 118, cc. 779-780.

the business of the advocate in all our courts, superior or inferior, should be conducted by men of trained education as advocates, of established position as gentlemen, as men of honour. He did not believe that any one was visionary enough to imagine that it would be an advantage to dispense with the advocacy of a class of men who had enjoyed the highest education, and who were known to be influenced by the highest feelings if any monopoly at all were allowed to exist, it would surely be better to place it in the hands of a highly-educated class of men, rather than in those of an inferior class.

From a modern perspective, it seems astonishing that the Attorney-General is not just arguing against a monopoly held by attorneys, but rather in favour of one to be held by barristers. Nevertheless, despite more convincing opposing arguments, this opinion was carried and the clause preventing attorneys from engaging other attorneys was included in the 1852 Act.

The County Courts Consolidation and Amendment Act 1888 continued the exclusion (in section 72):

It shall be lawful for any party to an action or matter or for a solicitor being a solicitor acting generally in the action or matter for such party, but not a solicitor retained as an advocate by such first-mentioned solicitor, or for a barrister retained by or on behalf of any party on either side, but without any right of exclusive audience, or by leave of the judge for any other person allowed by the judge to appear instead of any party, to address the court, but subject to such regulations as the judge may from time to time prescribe for the orderly transaction of the business of the court, the right of a solicitor to address the court shall not be excluded by reason only that he is in the permanent employment of any other solicitor.

The meaning of this section remained essentially the same as section 86 of the County Courts Act 1934, which was then directly copied into the County Courts Act 1959 (section 89):

In any proceedings in a County Court any of the following persons may address the court, namely-

- (a) any party to the proceedings;
- (b) a barrister retained by or on behalf of any party;
- (c) a solicitor acting generally in the proceedings for a party to thereto, but not a solicitor retained as an advocate by a solicitor so acting;
- (d) any other person allowed by leave of the court to appear instead of any party;

Provided that-

- (i) the right of a solicitor to address the court shall not be excluded by reason only that he is in the permanent and exclusive employment of any other solicitor; and
- (ii) a court may refuse to hear a person claiming to address the court as a solicitor unless that person has signed and delivered to the court a statement of his name and place of business and the name of the firm (if any) of which he is a member.

This section still prevented solicitors from appearing in the county courts as advocates for another solicitor. However, the first proviso preserved the position of an employee (rather than retained advocate) of the solicitor acting in the proceedings, who could therefore appear on his own or be represented by one of his employed solicitors.

This restriction on solicitors' rights of audience in the county courts was finally removed by section 60 of the County Courts Act 1984, which stated:

In any proceedings in a County Court any of the following persons may address the court:

- (a) any party to the proceedings;
- (b) a barrister retained by or on behalf of any party;
- (c) a solicitor acting generally in the proceedings for a party to them (... a solicitor on the record);
- (d) any solicitor employed by a solicitor on the record;
- (e) any solicitor engaged as an agent by a solicitor on the record;
- (f) any solicitor employed by a solicitor so engaged;
- (g) any other person allowed by leave of the court to appear instead of any party;

But a court may refuse to hear a person claiming to address the court as a solicitor unless that person has signed and delivered to the court a statement of his name and place of business and the name of the firm (if any) of which he is a member.

Unfortunately, there are no mentions of the reasons behind these changes in Hansard.

2.2.4 Rights of audience in the Crown Court

The Courts Act 1971 established the Crown Court as part of the Supreme Court of Judicature, and the pre-existing rights of audience for barristers within the Supreme Court would apply to the Crown Court. The 1971 Act therefore only addresses rights of audience specifically for solicitors (section 12):

The Lord Chancellor may at any time direct that solicitors may appear in, conduct, defend and address the court in any proceedings in the Crown Court, or in proceedings in the Crown Court of such description as is specified in the direction.

During this Act's passage as a Bill through the House of Lords, Lord Tanglely moved an amendment³² allowing solicitors rights of audience in the newly created Crown Court with regard to any appeal, any proceedings on committal to the court for sentence, and any proceedings on indictment for an offence triable summarily but for any reason committed to the court for trial. After stating he had been a solicitor for 55 years, Lord Tanglely denounced any interest in competition between the two branches of the profession and contended that the client's interests should always be placed above any such concerns. The main reason he gave for the amendment was that a client should be able to choose who represents him. He argued that, as the situation stood before the Act, a person could be represented by his solicitor in a magistrates' court, but if the matter goes to appeal he would have to be represented by an unknown advocate because of his solicitor's lack of any right of audience³³. This situation would be exacerbated³⁴ if the chosen barrister could not attend on the day and had to send a colleague at the last minute. Similar circumstances would also arise if the original case was meant to be heard in a magistrates' court but was shifted to the Crown Court³⁴.

³² Hansard Official Report, HL Deb 03 December 1970, Vol. 313, c. 670.

³³ Hansard Official Report, HL Deb 03 December 1970, Vol. 313, cc. 672- 673.

³⁴ Hansard Official Report, HL Deb 03 December 1970, Vol. 313, c. 674.

The Lord Chancellor countered these arguments by stating that the Bill concerned the structure of the courts, not of the legal profession, and so the amendment was beyond its remit³⁵. He attempted to dismiss Lord Tangle's point that it would be difficult to explain to a client why he could not be represented by his chosen lawyer, by stating that there "are lots of things that are difficult to explain to the client, but ultimately it is the interests of the client which matter and not what you can easily explain to him"³⁶. The Lord Chancellor was then opposed by Lord Janner³⁷, Lord Parker³⁸, Viscount Brentford³⁹ and Lord Fletcher⁴⁰. Only Lord Gardiner attempted to dispute the amendment, by bringing in the wider issue of possible fusion of the two branches; he stated that anyone in favour of the amendment must also be a fusionist⁴¹. Arguably, the Lord Chancellor's reasoning seems unconvincing, while Lord Gardiner's analysis does not address the point being raised. Faced with such opposition, the Lord Chancellor offered to arrange a meeting between himself, Lord Tangle, and representatives of the Law Society and the Bar Council⁴². After this meeting had been held, Lord Tangle withdrew his amendment⁴³.

Section 12 of the Courts Act 1971 was replaced in identical terms by the Supreme Court Act 1981 (section 83) which provided that the Lord Chancellor could direct that solicitors could appear in any proceedings in the Crown Court. This provision was itself repealed by the Access to Justice Act 1999 (section 106).

2.2.5 *Rights of audience in the High Court*

For barristers, rights of audience were not historically created by statute, but by High Court judges acting as a collegiate body⁴⁴. As the courts derived their authority from the Crown, the grant of rights of audience by the judges appears to have evolved from their inherent power to regulate their own proceedings. The inherent power was gradually transferred to the Inns of Court, Bar Council, and Bar Standards Board.

In *Abse v. Smith* [1986] 1 QB 536, the Court of Appeal upheld the decision at first instance not to allow a solicitor to appear before the High Court because he was not a barrister or litigant, and there was no emergency. Since then, section 27 of the Courts and Legal Services Act 1990 has designated the Law Society as an 'authorised body' for the purposes of granting rights of audience, paving the way for solicitor-advocates to appear in the higher courts. This provision was supplemented by the Higher Courts Qualification Regulations 2000 (now the Solicitors' Higher Rights of Audience Regulations 2010), which set out the routes through which solicitors could qualify as higher court advocates.

³⁵ Hansard Official Report, HL Deb 03 December 1970, Vol. 313, cc. 682- 683.

³⁶ Hansard Official Report, HL Deb 03 December 1970, Vol. 313, c. 685.

³⁷ Hansard Official Report, HL Deb 03 December 1970, Vol. 313, c. 687 *et seq.*

³⁸ Hansard Official Report, HL Deb 03 December 1970, Vol. 313, cc. 692- 693.

³⁹ Hansard Official Report, HL Deb 03 December 1970, Vol. 313, c. 698.

⁴⁰ Hansard Official Report, HL Deb 03 December 1970, Vol. 313, c. 712

⁴¹ Hansard Official Report, HL Deb 03 December 1970, Vol. 313, c. 700 *et seq.*

⁴² Hansard Official Report, HL Deb 03 December 1970, Vol. 313, c. 727.

⁴³ Hansard Official Report, HL Deb 17 December 1970, Vol. 313, c. 1550.

⁴⁴ Lord Chancellor's Department (1989), *The Work and Organisation of the Legal Profession*, Cm. 570 (London, HM Stationery Office), Annex E.

The general provisions of sections 31 and 32 of the Courts and Legal Services Act 1990 became the statutory basis for rights of audience in the higher courts.

2.2.6 Rights of audience in the Court of Appeal and House of Lords/Supreme Court

In the same way as for the High Court (paragraph 2.2.5 above), barristers' rights of audience in the highest courts were originally regulated by the judges acting as a collegiate body, whilst solicitor-advocates were authorised to appear by the Law Society acting under the Courts and Legal Services Act.

The creation of the new Supreme Court was not accompanied by any provisions in the Constitutional Reform Act 2005 relating to rights of audience. The general provisions of sections 31 and 32 of the Courts and Legal Services Act 1990 would therefore apply.

2.2.7 Legal executives

The Institute of Legal Executives Order 1998⁴⁵ was passed under the Courts and Legal Services Act (section 29). This Order allowed the Institute to grant rights of audience to its Fellows by virtue of its status as an authorised body within the meaning of section 27 of the Courts and Legal Services Act 1990.

According to the Institute's website, legal executives were granted certain rights of audience under the County Court (Rights of Audience) Direction 1978, including some unopposed applications in the County Court, and applications for judgment by consent. In addition, legal executives may appear in county court arbitrations and before tribunals under the general discretionary power of the court or tribunal. Further⁴⁶:

ILEX members are able to qualify as Legal Executive Advocates.

The qualification enables ILEX members to exercise greater rights of audience. The rights of audience that ILEX can grant are split into civil, criminal and family proceedings, and these are set out below. The qualification scheme is available to Members and Fellows, although Members will not be able to exercise their advocacy rights until they qualify as Fellows. Members and Fellows should seek rights in the area of law in which they practice.

Civil Proceedings Certificate

- To appear in open court in the County Court in all actions, except family proceedings
- To appear before Justices or a District Judge (Magistrates' Court) in the Magistrates' Courts in relation to all matters originating by complaint or application, including applications under the licensing, betting and gaming legislation
- To appear before any tribunal under the supervision of the Council on Tribunals where the tribunal rules provide for a non-discretionary right of audience being available to barristers and solicitors
- To appear before Coroners' Courts in respect of all matters determined by those Courts and to exercise rights of audience similar to those exercised by solicitors and barristers.

⁴⁵ SI 1998 No. 1077

⁴⁶ See http://www.ilex.org.uk/about_legal_executives (accessed 29 June 2010).

Criminal Proceedings Certificate

- * To appear before Justices or a District Judge (Magistrates' Court) in all adult magistrates courts in relation to all matters within that Court's criminal jurisdiction
- * To appear before Justices or a District Judge (Magistrates' Court) in all Youth Courts in relation to all matters within that Court's criminal jurisdiction
- * To appear in the Crown Court or High Court before a judge in chambers to conduct bail applications
- * To appear in the Crown Court on appeal from the Magistrates' Court, the Youth Court or on committal of an adult for sentence or to be dealt with, if s/he, or any solicitor by whom s/he is employed or any other solicitor or Fellow in the same employment as her/him, appeared on behalf of the defendant in the Magistrates' Court or Youth Court
- * To appear before Coroners' Courts in respect of all matters determined by those Courts, and to exercise rights of audience similar to those exercised by solicitors and barristers.

Family Proceedings Certificate

- To appear in Court (including in open court) in all County Court family proceedings
- To appear before Justices or a District Judge (Magistrates' Court) in the Family Proceedings Courts;
- To appear before Coroners' Courts in respect of all matters determined by those Courts, and to exercise rights of audience similar to those exercised by solicitors and barristers.

2.2.8 Patent attorneys

Registered patent agents were granted the right to appear in the Patents Court on appeal from the comptroller of the UK Intellectual Property Office by the Patents Act 1977 (section 102A)⁴⁷. In connection with such an appearance, the agent could perform all the functions of a solicitor of the Supreme Court, except the preparation of deeds⁴⁸. Similar rights and restrictions were placed on registered patent agents appearing in front of a patents county court by the Copyright Design and Patents Act 1988 (section 292).

The Chartered Institute of Patent Agents Order 1999⁴⁹ bestowed authorised body status on the Institute, allowing it to grant rights of audience to its members within their spheres of practice. This Order was passed under the Courts and Legal Services Act 1990 (section 29). As a result, all patent attorneys have a right of audience in the Patents County Court and on appeal from the Patent Office in the Patents Court (which is part of the High Court).

2.2.9 Trade mark attorneys

In the same way, trade mark attorneys may have rights of audience granted to them by their governing body, in reliance on The Institute of Trade Mark Attorneys Order 2005⁵⁰. The

⁴⁷ As substituted by the Copyright Designs and Patents Act 1988, s. 295, and Sch. 5, para 27

⁴⁸ Patents Act 1997, s. 102A(2).

⁴⁹ SI 1999 No. 3137.

⁵⁰ SI 2005 No. 240, made under the Courts and Legal Services Act 1990, s. 29.

explanatory notes to the Order state that it gives the Institute power to grant the following rights⁵¹:

Civil Proceedings Certificate (Fellows and Ordinary members)

- To appear in open court in county courts in all actions, except family proceedings;
- To appear before Justices or a District Judge (Magistrates' Court) in magistrates' courts in relation to all matters originating by complaint or application, including applications under the licensing, betting and gaming legislation;
- To appear before any tribunal under the supervision of the Council on Tribunals where the tribunal rules provide for a non-discretionary right of audience being available to barristers and solicitors;
- To appear before coroners' courts in respect of all matters determined by those courts and to exercise rights of audience similar to those exercised by solicitors and barristers.

Family Proceedings Certificate (Fellows and Ordinary members)

- To appear in open court in a divorce county court in all family proceedings;
- To appear before Justices or a District Judge (Magistrates' Court) in family proceedings courts;
- To appear before coroners' courts in respect of all matters determined by those courts, and to exercise rights of audience similar to those exercised by solicitors and barristers.

Criminal Proceedings Certificate (Fellows and Ordinary members)

- To appear before Justices or a District Judge (Magistrates' Court) in all adult magistrates' courts in relation to all matters within that court's criminal jurisdiction;
- To appear before Justices or a District Judge (Magistrates' Court) in all youth courts in relation to all matters within that court's criminal jurisdiction.
- To appear in the Crown Court or High Court before a judge in chambers to conduct bail applications;
- To appear in the Crown Court on appeal from the magistrates' court or on committal of a person for sentence to be dealt with, if s/he, or any solicitor by whom s/he is employed or any solicitor or Fellow in the same employment as her/him, appeared on behalf of the defendant in the magistrates' court;
- To conduct a plea and directions hearing in the Crown Court;
- To conduct preliminary hearings in the Crown Court where an indictable only offence has been transferred to the crown court;
- To appear before coroners' courts in respect of all matters determined by those courts, and to exercise rights of audience similar to those exercised by solicitors and barristers.

In addition, ITMA is also seeking the following rights for its Fellows and Ordinary members:

- a) subject to the jurisdiction of the courts concerned, the right to conduct litigation in the Chancery Division of the High Court, including the patents court, and in the county court, including the Patents county court; and to conduct appeals from the Comptroller General of Patent Designs and Trade Marks, the Patents county court, the county court and the Chancery Division of the High Court, in respect of any matter relating to the protection of any trade mark or design or as to any matter involving passing off, or to the Olympic Symbol etc. (Protection) Act 1995, or to the Olympic Association Right (Infringement Proceedings) Regulations 1995, or to the right to an injunction to restrain the unauthorised use of Royal Arms etc. conferred by Section 99(4) of the Trade Marks Act 1994 and any ancillary matter thereto ("Trade Mark & Design Litigation");

⁵¹ See http://www.opsi.gov.uk/si/em2005/uksiem_20050240_en.pdf (accessed 28 June 2010).

- b) Subject to the jurisdiction of the courts and tribunal concerned, the right of audience in:
 - i) hearings in the county court, including the Patents county court, in Trade Mark & Design Litigation;
 - ii) hearings before the Appeal Tribunal constituted by the Registered Designs Act 1949; and
 - iii) hearings in private on interim matters ancillary to Trade Mark & Design Litigation.

The rights sought are for Fellows or Ordinary Members of ITMA who have been granted Trade Mark & Design litigator Certificates by ITMA in accordance with the proposed ITMA Qualification Regulations.

2.2.10 Law costs draftsmen

The Association of Law Costs Draftsmen was granted authorised body status by The Association of Law Costs Draftsmen Order 2006⁵², which came into force on 1 January 2007. This Order was passed under the Courts and Legal Services Act 1990 (sections 27-28). As an authorised body, the Association may grant its members rights of audience.

The explanatory notes to the 2006 Order state⁵³:

The Association of Law Costs Draftsmen is the professional body representing and regulating law costs draftsmen working in England and Wales. Costs draftsmen draw up and analyse bills relating to all aspects of the legal costs included in solicitors [*sic*] bills in relation to cases in all courts. They also appear at court hearings where assessment of such bills takes place. An assessment involves a detailed examination by a costs judge of each item on a bill, whether it was properly charged and whether the service charged for was necessary for the proper administration of justice between the parties. The Association seeks designation as an authorised body so that it can grant the right of audience and the right to conduct litigation in legal costs matters to properly qualified and trained members so that such members can act independently of solicitors in costs proceedings and can address the court during assessment hearings.

2.3 Conduct of litigation

2.3.1 Introduction

The conduct of litigation encompasses the issuing, commencement, prosecution and defence of proceedings before any court in England and Wales, and the performance of any ancillary functions (such as entering appearances to actions) in relation to such proceedings (Legal Services Act 2007, Schedule 2, paragraph 4). It has traditionally been the preserve of solicitors.

The Legal Services Act 2007 now includes in section 12(1)(b) the conduct of litigation in its list of reserved legal activities. This is supplemented by section 12(2) and Schedule 4, which confirm the reservations of the existing regulators (all of whom, except the Master of the Faculties, the Institute of Legal Executives and the Council for Licensed Conveyancers, are approved in relation to the conduct of litigation). The Act also provides for continuity of these rights (Schedule 5, paragraph 1), and for transitional authority (Schedule 5, Part 2).

⁵² SI 2006 No. 3333.

⁵³ See http://www.opsi.gov.uk/si/em2006/uksiem_20063333_en.pdf (accessed 28 June 2010).

The Act contains a number of exemptions (cf. paragraph 1.2.2 above). As with rights of audience, the expectation seems to be that anyone who conducts litigation (other than a litigant in person) will be appropriately qualified, and so there is no exemption in respect of someone acting 'otherwise than for, or in expectation of, any fee, gain or reward'.

Where rights to conduct litigation exist under the Act, a court cannot limit those rights to only some of those who are entitled to exercise them (section 191(5)).

The leading authority on what falls within the parameters of the 'conduct of litigation' is *Agassi v. Robinson (Inspector of Taxes) (Costs)* [2006] 1 WLR 2126. In its judgement, the Court of Appeal approved the opinion of Potter, J in *Piper Double Glazing Ltd v. DC Contracts* [1994] 1 WLR 777, who held that the words 'acting as a solicitor' in sections 21 to 25 Solicitors Act 1974 were limited "to the doing of acts which only a solicitor may perform and/or the doing of acts by a person pretending or holding himself out to be a solicitor. Such acts are not to be confused with the doing of acts of a kind commonly done by solicitors, but which involve no representation that the actor is acting as such." In delivering the judgement of the Court of Appeal, Dyson, LJ then continued:

A person who does not have a current practising certificate and who is not an authorised litigator ... acts as a solicitor in breach of section 20(1) of the 1974 Act at least if he: (a) issues proceedings; (b) performs any ancillary functions in relation to proceedings; or (c) draws or prepares an instrument relating to legal proceedings contrary to section 22(1) of the 1974 Act.

The Court also felt that the penal nature of section 20 of the Solicitors Act required that its ambit be drawn narrowly. Many activities that might be considered by some to be functions ancillary to the conduct of litigation – such as taking a statement from a witness, or dealing with correspondence from the other party – consequently do not fall within the meaning of the expression. As Dyson, LJ put it:

The word 'ancillary' indicates that it is not all functions in relation to proceedings that are comprised in the 'right to conduct litigation'. The usual meaning of 'ancillary' is 'subordinate'. A clue to what was intended lies in the words in brackets '(such as entering appearances to actions)'. These words show that it must have been intended that the ancillary functions would be formal steps required in the conduct of litigation. These would include drawing or preparing instruments within the meaning of section 22 of the 1974 Act and other formal steps. It is not necessary for the purposes of this case to decide the precise parameters of the definition of 'the right to conduct litigation'. It is unfortunate that this important definition is so unclear. But because there are potential penal implications, its very obscurity means that the words should be construed narrowly. Suffice it to say that we do not see how the giving of legal advice in connection with court proceedings can come within the definition. In our view, even if, as the Law Society submits, correspondence with the opposing party is in a general sense 'an integral part of the conduct of litigation', that does not make it an 'ancillary function' for the purposes of section 28.

We now consider the origins of specific sources of rights to conduct litigation.

2.3.2 *Solicitors*

Abel-Smith & Stevens note that the monopoly on conducting litigation that solicitors had 'long possessed' (1967: 20) was first enshrined in the Attorneys and Solicitors Act 1729⁵⁴, which stated that in section 3 that:

no Person ... shall be permitted to act as a Solicitor, or sue out any Writ or Process, or commence, carry on, solicit or defend any Suit, or any Proceedings, in the Name of any other Person ... unless such Person shall take the Oath hereinafter directed and appointed to be taken by Solicitors in Courts of Equity, and shall also be admitted and inrolled.

There are no records of debates regarding this provision in Cobbetts Parliamentary History, and it was introduced before the commencement of Hansard. It is therefore impossible to know what the rationale behind its inclusion was.

This provision was followed by section 2 of the consolidating Solicitors Act 1843:

no Person shall act as an Attorney or Solicitor, or as such Attorney or Solicitor sue out any Writ or Process, or commence, carry on, solicit, or defend any Action, Suit, or other Proceeding, in the Name of any other Person or in his own Name [in any court] ... or act as an Attorney or Solicitor in any Cause, Matter or Suit, Civil or Criminal ... unless such Person shall have been previously to the passing of this Act admitted and enrolled and otherwise duly qualified to act as an Attorney or Solicitor.

Further consolidations in 1932 and 1957 were followed by the Solicitors Act 1974 (section 20):

No unqualified person shall ... act as a solicitor, or as such issue any writ or process, or commence, prosecute or defend any action, suit or other proceeding, in his own name or in the name of any other person, in any court of civil or criminal jurisdiction.

It is striking how little the statutory wording of this reserved activity changed over 245 years, from the 1729 Act to the Solicitors Act 1974. However, the next incarnation of this reservation came in the Courts and Legal Services Act 1990, which stated (in section 28(2)):

A person shall have a right to conduct litigation in relation to any proceedings only in the following cases –

(a) where –

- (i) he has a right to conduct litigation in relation to those proceedings granted by the appropriate authorised body; and
- (ii) that body's qualification regulations and rules of conduct have been approved for the purposes of this section.

This provision clearly had a much wider scope than those of the Solicitors Acts. It made the right to conduct litigation dependent not on being a qualified solicitor, but (according to the Attorney-General of the day⁵⁵) firstly on meeting the educational and training requirements

⁵⁴ An attorney was formerly a person admitted to practise in the superior courts of common law, representing suitors who did not appear in person; after the Judicature Act 1873, attorneys became solicitors of the Supreme Court, and as a consequence of s. 89(6) of the Solicitors Act 1974, statutory references to attorneys are to be read as references to solicitors.

⁵⁵ Hansard Official Report, HC Deb 18 April 1990, Vol. 170, c. 1446.

for the court or proceedings in question, and secondly on membership of a professional body that has rules of conduct in line with the proper administration of justice.

In the House of Commons debates preceding this Act, a word of caution was sounded by Peter Archer MP that consumer interest does not always tally with the public interest where litigation is concerned: for example, it could be in the interests of an unmeritorious claimant to win his case, but that in no way profits the general public⁵⁶. In this area, therefore, it is necessary to make sure the public good is benefitted by any relevant statutory control. There were no further concerns expressed about section 28 during its passage through Parliament.

Under section 33, in its original form, solicitors were deemed to have been granted by the Law Society the rights to conduct litigation they had immediately before the Act. A new section 31(2)(b), applying in place of section 33, was substituted by the Access to Justice Act 1999, under which solicitors were deemed to have been granted by the Law Society “a right to conduct litigation in relation to every court and all proceedings”. These rights, however, are only exercisable in accordance with the approved qualification regulations and rules of conduct.

2.3.3 *Barristers*

The Access to Justice Act 1999 amended section 28 of the Courts and Legal Services Act 1990, granting the General Council of the Bar authorised body status and allowing it to confer the right to conduct litigation. The power was not immediately used. However, with the implementation of the Legal Services Act, and the increase in the extent, nature and sources of competition that barristers face (combined with changes in the procurement of publicly funded and volume services), the possibility of allowing the self-employed Bar to conduct litigation becomes a serious consideration. The Bar Standards Board’s recent changes to the Code of Conduct do not yet amount to ‘the conduct of litigation’.

2.3.4 *Legal executives*

Section 40 of the Access to Justice Act 1999 amended the Courts and Legal Services Act, by designating the Institute of Legal Executives an authorised body for the purposes of making an application for rights to conduct litigation. On 3 April 2010, the Institute closed a consultation period on an application under the Legal Services Act for litigation rights in civil and family proceedings. The rationale for seeking these new rights was expressed in the Consultation Paper as follows⁵⁷ (paragraph 16):

The rights to conduct litigation sought for ILEX members mirror the rights that they are already able to exercise, albeit as employees. Many ILEX members will be issuing and responding to proceedings in the natural course of the litigation work that they undertake. They will be experienced and suitably qualified to exercise those rights. The application, if

⁵⁶ Hansard Official Report, HC Deb 18 April 1990, Vol. 170, c. 1465.

⁵⁷ ILEX Professional Standards Ltd (2010) *Proposal to seek rights to conduct litigation for ILEX members and rights of audience for independent litigator practitioners*: consultation document available at <http://www.ilex.org.uk/PDF/IPS%20con%20doc%20litigation%20rights.pdf> (visited 4 June 2010).

approved, would allow ILEX members to continue to undertake the litigation that they do already, although they would be able to practice independently, if they so wished. There will be some members, given the new practice structures envisaged by the Legal Services Act, who will qualify as litigators although they would not wish to practice independently, but will do so in a partnership with other lawyers, a legal disciplinary partnership or in due course a licensed body.

No rights have yet been approved.

2.3.5 Patent attorneys

The Chartered Institute of Patent Agents Order 1999⁵⁸ bestowed authorised body status on that Institute, allowing it to grant Litigator Certificates to its members within their spheres of practice. This Order was made under the Courts and Legal Services Act 1990 (section 29). According to the Institute's website⁵⁹:

All patent attorneys have the right both to conduct litigation (i.e. to run cases) and the right of audience in the Patents County Court and on appeal from the Patent Office in the Patents Court, which is part of the High Court. In 1999 the Institute was given authorised body status to grant Litigator Certificates to suitably qualified and experienced members. These give the right to conduct litigation in the High Court, including the Patents Court, and in the Court of Appeal on appeal from the Patents County Court or the High Court in any matter relating to patents, designs, trade marks or technical information. This right means that a Patent Attorney Litigator can conduct the litigation and instruct a barrister to appear before the Court, without the need to use a solicitor for this work. The purpose of the government in granting this right was to give clients greater freedom of choice in selecting their advisers and to reduce the cost of litigation. The award of Certificates is governed by the CIPA Higher Court Qualification Regulations.

On 28 June 2010, the Chartered Institute's website listed 66 individuals holding a Litigator Certificate, spread across 43 firms.

2.3.6 Trade mark attorneys

Similarly, trade mark attorneys may have the right to conduct litigation in their sphere of work granted to them by the Institute of Trade Mark Attorneys⁶⁰. On 28 June 2010, the Institute's website listed 29 authorised trade mark litigators.

2.3.7 Law costs draftsmen

The Association of Law Costs Draftsmen was granted authorised body status by The Association of Law Costs Draftsmen Order 2006⁶¹, which came into force on 1 January 2007. This Order was made under the Courts and Legal Services Act 1990 (sections 27-28). As an

⁵⁸ SI 1999 No. 3137.

⁵⁹ See <http://www.cipa.org.uk/pages/advice-patent> (visited 30 May 2010).

⁶⁰ SI 2005 No. 240, made under the Courts and Legal Services Act 1990, s. 29.

⁶¹ SI 2006 No. 3333.

authorised body, the Association may grant its members the right to conduct costs litigation (see also paragraph 2.2.10 above).

2.4 Reserved instrument activities

2.4.1 Introduction

The expression 'reserved instrument activities' is not a familiar one – even to lawyers. For many, it is synonymous with 'conveyancing'. However, this would (paradoxically) be both an unduly restrictive as well as a generous interpretation. It is restrictive because the definition in the Act encompasses activities that are not related to conveyancing (such as the transfer of personal property). It is generous because many of the activities carried out as part of a conveyancing transaction do not fall within the definition.

The Legal Services Act 2007 now includes reserved instrument activities in section 12(1)(c) as part of its list of reserved legal activities. This is supplemented by section 12(2) and Schedule 4, which confirm the reservations of the existing regulators (all of whom, except the Institute of Legal Executives and the Association of Law Costs Draftsmen, are approved in relation to reserved instrument activities). The Act also provides for continuity of these rights for licensed conveyancers (Schedule 5, paragraph 2), and for transitional authority (Schedule 5, Part 2). The Legal Services Act 2007, section 12(1)(c) and Schedule 2, paragraph 5, confirms reserved instrument activities as reserved legal activities.

Under the Act, 'reserved instrument activities' means preparing any instrument of transfer or charge for the purposes of the Land Registration Act 2002, or making an application or lodging a document for registration under that Act. For this purpose, an 'instrument' includes a contract for the sale or other disposition of land (except a contract to grant a short lease within the meaning of s. 54(2) of the Law of Property Act 1925), but excludes wills and other testamentary instruments, agreements not intended to be executed as deeds (other than the contracts already mentioned), letters or powers of attorney, and transfers of stock that contain no trust or limitation: Schedule 2, paragraph 5(3) and (4).

The reservation also extends to preparing any other instrument relating to real or personal estate for the purposes of the law of England and Wales, or other instrument relating to court proceedings within the jurisdiction (except where, before the Act comes into force, there was no restriction relating to instruments relating to court proceedings): Schedule 2, paragraph 5(1) and (2).

There are exemptions in respect of:

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

We now consider the origins of this reservation in relation to each of the authorised professions.

2.4.2 *Solicitors*

In 1712, the scriveners of the City of London were awarded a monopoly on conveyancing within that area (Abel-Smith & Stevens, 1967: 22). The Society of Gentleman Practisers (essentially a precursor to the Law Society) commenced an attack on this monopoly in 1749 (according to Abel-Smith & Stevens), which succeeded in 1760 (Holdsworth, 1938: 71).

In the 1780s and 1790s, Parliament raised funds by imposing taxes on articles and practising certificates, and in 1804 the Society of Gentleman Practisers protested against rumours of further such taxes (Abel-Smith & Stevens, 1967: 22). Pitt refused to relinquish his proposed tax increases but by way of appeasement agreed to insert a clause giving lawyers a monopoly on conveyancing for gain in the same Bill (which Abel-Smith & Stevens suggest the Society itself drafted: 1967: 23). Thus, what was to prove to be a highly lucrative monopoly was “somewhat casually granted” (Abel-Smith & Stevens, 1967: 206) to the legal profession in section 14 of the Stamp Act 1804:

every Person who shall, for or in Expectation of any Fee, Gain or Reward, directly or indirectly, draw or prepare any Conveyance of, or Deed relating to, any Real or Personal Estate, or any Proceedings in Law or Equity, other than and except Serjeants at Law⁶², Barristers, Solicitors, Attornies⁶³, Notaries, Proctors⁶⁴, Agents or Procurators⁶⁵, having obtained regular Certificates, and Special Pleaders⁶⁶, Draftsmen in Equity⁶⁷, and Conveyancers ... shall forfeit and pay for every such Offence the Sum of fifty Pounds.

Due to the circumstances of this provision’s inclusion, it is perhaps not surprising that there are no Parliamentary debates about its rationale in Hansard!

The earliest enunciation of the reservation of conveyancing in any of the Solicitors Acts is found in the Solicitors Act 1932 (section 47):

Any person, not being a barrister, or a duly certificated solicitor, law agent, writer to the signet, notary public, conveyancer, special pleader, or draftsman in equity, who, for or in expectation of any fee, gain or reward, either directly or indirectly, draws or prepares any instrument relating to real or personal estate, or any legal proceeding, shall be liable on summary conviction to a fine ...

and in section 48:

⁶² Serjeants at law were an elite group of barristers who held exclusive rights of audience in the Court of Common Pleas. No new serjeants were created after the Judicature Act 1873.

⁶³ See footnote 52 above.

⁶⁴ In the ecclesiastical and admiralty courts, proctors carried out duties comparable to those of solicitors and attorneys in other courts; after the Judicature Act 1873, their functions were merged with those of solicitors. References in statutes to proctors are now to be construed as references to solicitors (s. 89(6) of the Solicitors Act 1974).

⁶⁵ A procurator appears to be an appointment derived from Roman law under which a person was appointed as another’s agent with a mandate to act either in a specific matter or more generally.

⁶⁶ A special pleader was one who drew pleadings at common law (cf. footnote 65 below).

⁶⁷ A draftsman in equity (or equity draftsman) was one who drew pleadings in Chancery (cf. footnote 64 above).

Any person, not being a barrister or duly certificated solicitor, notary public, or conveyancer who, for or in expectation of any fee, gain or reward, either directly or indirectly, draws or prepares any instrument of transfer or charge for the purposes of the Land Registration Act, 1925, or makes any application or lodges any document for registration under that Act at the registry, shall on summary conviction be liable to a fine.

There are no definitions of the professions or qualifications referred to in section 47 contained within the Act⁶⁸.

In later Acts, the reservation becomes more narrowly drawn. The Solicitors Acts 1957 and 1974 both refer to 'unqualified persons' (meaning essentially those not qualified as solicitors⁶⁹), and section 22 of the 1974 Act confirmed that conveyancing could only be conducted by solicitors and other exempted persons⁷⁰:

any unqualified person who directly or indirectly draws or prepares any instrument of transfer or charge for the purposes of the Land Registration Act 2002, or makes any application or lodges any document for registration under that Act at the registry, or draws or prepares any other instrument relating to real or personal estate, or any legal proceeding shall, unless he proves that the act was not done for or in expectation of any fee, gain or reward, be guilty of an offence.

There are no mentions of these provisions in any Parliamentary debates held at the time, but comparisons show how little the wording of this reservation has changed over the years. One significant difference in the reservation was achieved by the Administration of Justice Act 1985, which extended it to include the conveyancing contract as well as the instrument of transfer. This was a response to the recommendation of the (Benson) Royal Commission on Legal Services. In its final report, the Commission wrote (in paragraph 21.61)⁷¹:

The present restrictions ... prevent an unqualified person from drawing up a conveyance or document of transfer but do not prevent such a person from drawing up the binding contract which is exchanged by the two parties. We consider that this is an anomaly which should be rectified because the client needs the same degree of protection in respect of the contract as he does in respect of the document by which the transaction is completed. Some would go so far as to say that the need for protection is even greater at this stage. We recommend that the Solicitors Act 1974 should be amended to prohibit an unqualified person not merely from drawing up for gain the final document but also from preparing a contract for the sale or other disposition of land or any interest in land.

Like rights of audience, conveyancing was another monopoly held by lawyers that Parliament went some way to breaking down with the Courts and Legal Services Act 1990. Section 34 of the 1990 Act created the Authorised Conveyancing Practitioners Board, one of the aims of which is "to seek to develop competition in the provision of conveyancing services"⁷². Any person, body corporate or its employee that is an 'authorised practitioner' is exempt from the restriction in section 22 of the Solicitors Act 1974 (Courts and Legal Services Act 1990, section 36), and so may draw or prepare the instrument to convey property. These provisions paved the way to opening up the market and allowing financial

⁶⁸ Cf. footnotes 64 and 65 above.

⁶⁹ See Solicitors Act 1974, s. 87(1).

⁷⁰ Such as barristers and notaries (Solicitors Act 1974, s. 22(2)(a)), and (later) licensed conveyancers (Administration of Justice Act 1985, s. 11(4)).

⁷¹ Cmnd. 7648 (London, HM Stationery Office, London).

⁷² Courts and Legal Services Act 1990, s. 35(1)(a).

institutions to offer a 'one-stop shop' service for mortgages, financial advice and conveyancing⁷³. MPs voiced a significant level of opposition to this idea, based on the possible conflicts of interest that could arise within that arrangement⁷⁴. However, it is worth noting that nearly all of those who opposed this development were lawyers⁷⁵!

Those supporting the Government's intentions also argued their side strongly, such as the following from Ian Bruce MP⁷⁶:

we have heard so little about the consumer, other than the self-congratulatory remarks of the lawyers who are looking after them so well. The idea that we should put any restrictions on the way in which the market for conveyances has opened up ... should be strongly resisted. We need regulations that protect the consumer but do not protect the monopoly of the legal profession.'

The concerns voiced by MPs proved unfounded, as the Act contained provisions preventing the tying-in to a mortgage of an obligation to purchase other services (sections 104-107). These provisions were highlighted by the Attorney-General at the beginning of the debate⁷⁷ but were not discussed – perhaps adding to idea that objections to the relaxation of the conveyancing monopoly were simply made on principle rather than being based on an analysis of the Bill's provisions.

2.4.3 Barristers

Barristers were specifically exempted from the prohibition in the Solicitors Act 1974 on unqualified persons conducting reserved instrument activities (section 22(2)(a)). This exemption also existed in the Solicitors Acts of 1932 and 1957.

2.4.4 Public notaries

As with barristers, notaries were also specifically exempted from the prohibition in the Solicitors Act 1974 on unqualified persons conducting reserved instrument activities (section 22(2)(a)), and the exemption also existed in the Stamp Act 1804 as well as the Solicitors Acts of 1932 and 1957.

2.4.5 Licensed conveyancers

Following the report in 1985 of the Conveyancing Committee chaired by Professor Julian Farrand, the Administration of Justice Act 1985 created the Council for Licensed

⁷³ Hansard Official Report, HC Deb 18 April 1990, Vol. 170, c. 1502 (Ian Bruce MP).

⁷⁴ Hansard Official Report, HC Deb 18 April 1990, Vol. 170, c. 1497 (Eric Illsley MP).

⁷⁵ For example: Peter Archer MP (HC Deb 18 April 1990, Vol. 170, c. 1465), Ivan Lawrence MP (HC Deb 18 April 1990, Vol. 170, c. 1468), Sir Hugh Rossi MP (HC Deb 18 April 1990, Vol. 170, c. 1480), and Sir Anthony Grant MP (HC Deb 18 April 1990, Vol. 170, c. 1495). The only other voice joining them came from Eric Illsley MP (HC Deb 18 April 1990, Vol. 170, c. 1497) who, although not having practised as a lawyer, did hold a degree in law.

⁷⁶ Hansard Official Report, HC Deb 18 April 1990, Vol. 170, c. 1502.

⁷⁷ Hansard Official Report, HC Deb 18 April 1990, Vol. 170, c. 1450.

Conveyancers and laid down the rules to be imposed on practitioners⁷⁸. The same Act also exempted licensed conveyancers from the prohibition in the Solicitors Act 1974 on unqualified persons preparing certain instruments⁷⁹.

2.4.6 Patent attorneys

Schedule 4 to the Trade Marks Act 1994 (para 5) amends section 22 of the Solicitors Act 1974, so that patent attorneys are exempt from the prohibition on unqualified persons engaging in reserved instrument activities.

2.4.7 Trade mark attorneys

The amendment by the Trade Marks Act 1994 to the Solicitors Act 1974 noted in paragraph 2.4.6 above in relation to patent attorneys also applies to enable trade mark attorneys to conducting reserved instrument activities.

2.5 Probate activities

2.5.1 Introduction

Probate activities cover preparing any probate papers (that is, papers on which to found or oppose a grant of probate or of letters of administration) for the purposes of the law of, or in relation to any proceedings in, England and Wales (Legal Services Act 2007, Schedule 2, paragraph 6).

The Legal Services Act 2007 now includes probate activities in section 12(1)(d) within its list of reserved legal activities. This is supplemented by section 12(2) and Schedule 4 of the Legal Services Act, and the Legal Services Act 2007 (Approved Regulators) Order 2009⁸⁰, which confirm the reservations of the existing regulators. Thus, the Law Society, the Bar Council, the Master of the Faculties, the Council for Licensed Conveyancers, the Institute of Chartered Accountants of Scotland and the Association of Chartered Certified Accountants are approved in relation to probate (though we understand that the two latter bodies have not yet authorised any members to provide probate services). The Act also provides for transitional authority (Schedule 5, Part 2). There are exemptions only in respect of (a) individuals who carry out probate activities under the direction and supervision of an employer, manager or colleague who is an authorised person, and (b) individuals who carry on those activities otherwise than for, or in expectation of, and fee, gain or reward (Schedule 3, paragraph 4).

In his review of legal regulation for the Law Society, Lord Hunt of Wirral recommended that the whole of probate activity, rather than just the preparing of papers, should be regulated⁸¹.

⁷⁸ Administration of Justice Act 1985, s. 12 *et seq.*

⁷⁹ Administration of Justice Act 1985, s. 11(4).

⁸⁰ SI 2009 No. 3233.

⁸¹ *The Hunt Review of the Regulation of Legal Services* (2009, London), page 81.

2.5.2 *Solicitors*

Before the establishment of a specialist probate court, the Church exercised jurisdiction over testamentary matters. This was governed by the Ecclesiastical Courts Act 1813, section 9 of which provided:

in case any Person or Persons shall in his or their own Name, or in the Name of any other Person or Persons, make, do, act, exercise or perform an Act, Matter or Thing whatsoever in any way appertaining or belonging to the Office, Function or Practice of a Proctor⁸², for or in Consideration of any Gain, Fee or Reward, or with a view to participate in the Benefit to be derived from the Office, Functions or Practice of a Proctor, without being admitted and enrolled, every such Person, for every such Offence, shall forfeit and pay the Sum of Fifty Pounds, to be sued for and recovered in manner hereinafter mentioned.

In other words, there was a fine for falsely acting as a lawyer in ecclesiastical courts which had jurisdiction over probate. Unfortunately, there are no debates concerning this provision in historic Hansard. The Court of Probate was created by the Court of Probate Act 1857. The jurisdiction of the ecclesiastical and other courts was abolished by section 3. Section 45 stated that:

All Solicitors and Attornies-at-Law may practice in the Court of Probate, and the Laws and Statutes now in force concerning Solicitors and Attornies shall extend to Solicitors and Attornies practising in the said Court.

There are lengthy debates in Hansard about this Act, but in the main they concern reform of the ecclesiastical courts, rather than why probate should only be prepared by lawyers.

More recently, the reservation of probate was set out in the Solicitors Act 1932 (section 49), in language that mirrors that in respect of conveyancing in section 47 (cf. paragraph 2.4.2 above):

Any person, not being a barrister, or duly certificated solicitor, notary public, conveyancer, special pleader or draftsman in equity, who for or in expectation of any fee, gain or reward, either directly or as an agent of any other person, whether as a person qualified as above mentioned or not, takes instructions for or draws or prepares any papers on which to found or oppose a grant of probate or of letters of administration, shall ... be liable on summary conviction to a penalty.

There are no definitions within the Act of the terms used in section 49⁸³.

Again, reflecting the shift in relation to conveyancing towards prohibiting 'unauthorised persons' from acting (cf. paragraph 2.4.2 above), the Solicitors Acts of 1957 and 1974 made the same change in relation to probate. Thus, section 21 of the 1957 Act provided that:

any unqualified person, not being a barrister or duly certificated notary public, who, either directly or as an agent of any person, takes instructions for or draws or prepares any papers on which to found or oppose a grant of probate, or of letters of administration, shall, unless he proves that the act was not done for or in expectation of any fee, gain or reward ... be liable on summary conviction to a penalty ...

⁸² See footnote 62 above.

⁸³ Cf. footnotes 64 and 65 above.

The Solicitors Act 1974, section 23 was similar in that if any person other than a solicitor, barrister or notary public:

directly or as an agent of any other person ... (a) takes instructions for a grant of probate or of letters of administration, or (b) draws or prepares any papers on which to found or oppose any such grant, he shall, unless he proves that the act was not done for or in expectation of any fee, gain or reward ... be guilty of an offence.

Section 23 was replaced by the Administration of Justice Act 1985 to remove the prohibition on unauthorised persons taking instructions. The Courts and Legal Services Act 1990 further reduced the scope of the prohibition by exempting certain parties from its scope, including banks, building societies and insurance companies (section 54), and any individuals granted exemption by an approved body (section 55). This obviously had the effect of much reducing the solicitors' monopoly over probate.

There are no debates in Hansard about the probate clauses of either the Solicitors Act 1974 or the Courts and Legal Services Act 1990.

2.5.3 Barristers

Barristers were specifically exempted from the prohibition in the Solicitors Act 1974 on unqualified persons preparing papers for probate (section 23(2)). This exemption also existed in the Solicitors Acts of 1957 and 1932.

2.5.4 Public notaries

Like barristers, duly certificated notaries were specifically exempted from the prohibition in the Solicitors Act 1974 on unqualified persons preparing papers for probate (section 23(2)), and the exemption also existed in the Solicitors Acts 1957 and 1932.

2.5.5 Licensed conveyancers

Power was given for approved bodies to grant exemption from the prohibition in the Solicitors Act 1974 by section 55 of the Courts and Legal Services Act 1990. The Council for Licensed Conveyancers became an approved body in respect of probate activities with effect from 1 August 2008 under the Probate Services (Approved Bodies) Order 2008⁸⁴. Although not part of the original table in Schedule 4 of the Legal Services Act 2007, the Council was added in respect of probate activities by the Legal Services Act 2007 (Approved Regulators) Order 2009⁸⁵. An amendment to the Act by this Order also provides for the continuity of these rights (Schedule 5, paragraph 2A⁸⁶), as well as for rights during the transitional period⁸⁷.

⁸⁴ SI 2008 No. 1865, para 2(2)(a).

⁸⁵ SI 2009 No. 3233, para 3(a).

⁸⁶ Inserted by SI 2009 No. 3233, para 4.

⁸⁷ SI 2009 No. 3233, para 5.

2.5.6 *Scottish chartered accountants*

As with licensed conveyancers, the Institute of Chartered Accountants of Scotland became an approved body in respect of probate activities on 1 August 2008, using the power under the Courts and Legal Services Act⁸⁸. The Institute was also added to Schedule 4 of the Legal Services Act as an approved regulator for probate activities⁸⁹. Rights during the transitional period are also given⁹⁰.

2.5.7 *Chartered certified accountants*

The Association of Chartered Certified Accountants became an approved body in respect of probate activities with effect from 1 August 2009, using the power in the Courts and Legal Services Act⁹¹. The Association was also added to Schedule 4 of the Legal Services Act as an approved regulator for probate activities⁹². Rights during the transitional period are also given⁹³.

2.6 Notarial activities

2.6.1 *Introduction*

Notaries are arguably the oldest part of the legal profession. Originally of ancient Roman origin and later appointed by the Pope, following the Reformation notaries were established under statutory powers that created the Court of Faculties (the Ecclesiastical Licences Act 1533).

According to the Notaries Society⁹⁴:

Many notaries provide a service for commercial firms engaged in international trade, and for private individuals. The most common tasks are:

- Preparing and witnessing powers of attorney for use overseas
- Dealing with purchase or sale of land and property abroad
- Providing documents to deal with the administration of the estates of people who are abroad, or owning property abroad
- Authenticating personal documents and information for immigration or emigration purposes, or to apply to marry or to work abroad
- Authenticating company and business documents and transactions

... Most notaries act in that capacity to provide the sort of services already described, but they can also provide authentication and a secure record for almost any sort of transaction, document or event.

⁸⁸ SI 2008 No. 1865, para 2(2)(b).

⁸⁹ SI 2009 No. 3233, para 3(b).

⁹⁰ SI 2009 No. 3233, para 6.

⁹¹ SI 2009 No. 1588, para 2.

⁹² SI 2009 No. 3233, para 3(b).

⁹³ SI 2009 No. 3233, para 7.

⁹⁴ See www.thenotariessociety.org.uk (accessed 18 June 2010).

Also as a member of the oldest legal profession in England and Wales, a notary can do any form of legal work for you except for taking cases to court.

Most notaries are also solicitors and do their general legal work in that capacity and under the regulation of the Solicitors Regulation Authority. Others (including the Scrivener notaries in London) practice only as notaries doing commercial and property work (including conveyancing) and family and private client work (including wills, probate and the administration of estates).

Notarial activities are defined in the Legal Services Act 2007 by reference to history: “activities which ... were customarily carried on by virtue of enrolment as a notary” (Schedule 2, paragraph 7(1)). However, they specifically exclude reserved instrument and probate activities, as well as the administration of oaths (Schedule 2, paragraph 7(2)), which are the subject of separate reservation and confirmation to notaries elsewhere in the Act (see paragraphs 2.4.4 and 2.5.4 above, and paragraph 2.7.5 below).

The Legal Services Act 2007 now includes notarial activities in section 12(1)(e) within its list of reserved legal activities. This is supplemented by section 12(2) and Schedule 4, which confirm the reservations of the existing regulators (that is, only the Master of the Faculties is approved in relation to notarial activities). The Act also provides for transitional authority (Schedule 5, paragraph 12(2)(c)). There are exemptions in respect of (a) a person who otherwise has statutory authority to carry on notarial activities, and (b) individuals who carry on those activities otherwise than for, or in expectation of, and fee, gain or reward (Schedule 3, paragraph 5(2) and (4)). In addition, the exemption in section 14 of the Public Notaries Act 1801 is continued:

nothing in this Act contained shall extend, or be construed to extend, to any proctor⁹⁵ in any ecclesiastical court in England; nor to any secretary or secretaries to any bishop or bishops, merely practising as such secretary or secretaries; or to any other person or persons necessarily created a notary publick for the purpose of holding or exercising any office or appointment, or occasionally performing any publick duty or service under government, and not as general practitioner or practitioners.

However, where the person is holding or exercising an office or appointment, the exemption only extends to notarial activities carried on for ecclesiastical purposes; and where the person is performing a public duty or service under government, the exemption applies only to notarial activities carried on in the course of performing that duty or service (Schedule 3, paragraph 5(3)).

2.6.2 Public notaries

The modern origin of the reservation of notarial activities by statute is found in the Public Notaries Act 1801. Section 1 stated that:

no person in England shall be created to act as a publick notary, or use and exercise the office of a notary, or do any notarial act, unless such person shall have been duly sworn, admitted,

⁹⁵ The Solicitors Act 1974, s. 89(6) now requires references to proctors to be read as references to solicitors.

and inrolled, . . . in the court wherein notaries have been accustomedly sworn, admitted, and inrolled⁹⁶.

Following this, section 10(1) of the Public Notaries Act 1843 stated that:

In case any person shall, in his own name or in the name of any other person, make, do, act, exercise, or execute or perform, any act, matter, or thing whatsoever of or in anywise appertaining or belonging to the office, function, or practice of a public notary, for or in expectation of any gain, fee, or reward, without being able to prove, if required, that he is duly authorized so to do, he shall be guilty of an offence.

The Solicitors Act 1974 clarified the meaning of a 'duly authorised notary public' for all statutory purposes as someone who either had a solicitor's practising certificate entered in the Court of Faculties or a notary public's practising certificate issued by that Court (sections 87(1) and 89(7)).

No records of Parliamentary debates about either the 1801 or 1843 Acts can be found.

Although the distinction between notaries and scriveners still exists, the latter's former exclusive jurisdiction within three miles of the City of London was removed by the Access to Justice Act 1999 (section 53). However, the Scriveners' Company continues to examine, admit and regulate Scrivener Notaries. It is first necessary for Scrivener Notaries to qualify as public notaries and so there are no remaining requirements in relation to reserved activities that apply only to scriveners.

2.7 Administration of oaths

2.7.1 Introduction

The administration of oaths is now a reserved activity in accordance with section 12(1)(f) of the Legal Services Act 2007. This is supplemented by section 12(2) and Schedule 4, which confirm the reservations of the existing regulators (all of the approved regulators are approved for the purposes of the administration of oaths). The Act also provides for transitional authority for all practitioners (Schedule 5, Part 2).

The definition for the purposes of the Act covers the exercise of the powers conferred on commissioners for oaths by the Commissioners for Oaths Acts 1889 and 1891 and section 24 of the Stamp Duties Management Act 1891 (Schedule 2, paragraph 8). The principal power under the 1889 Act is in section 1:

(2) A commissioner for oaths may, in England or elsewhere, administer any oath or take any affidavit for the purposes of any court or matter in England, including any of the ecclesiastical courts or jurisdictions, matters ecclesiastical, matters relating to applications for notarial faculties, and matters relating to the registration of any instrument, whether under an Act of Parliament or otherwise, and take any bail or recognizance in or for the purpose of any civil proceeding in the [Superior Courts].

(3) Provided that a commissioner for oaths shall not exercise any of the powers given by this section in any proceeding in which he is interested⁹⁷.

⁹⁶ Proctors (cf. footnote 62 above) were excluded from the Act (s. 14).

The Commissioners for Oaths Act 1891 introduced a minor amendment relating to the place at which effective oaths could be taken for certain purposes. The Stamp Duties Management Act 1891 allows a statutory declaration relating to stamp duties to be made before a commissioner for oaths (section 14).

There are exemptions in respect of a person who otherwise has statutory authority to administer oaths (Schedule 3, paragraph 6(2)). There is no exemption for individuals who carry on those activities otherwise than for, or in expectation of, and fee, gain or reward.

2.7.2 *Commissioners for oaths*

The earliest reservation by statute of the administration of oaths that has been found dates from 1853, in An Act relating to the Appointment of Persons to administer Oaths in Chancery, and to Affidavits made for Purposes Connected with Registration⁹⁸. Section 2 stated that:

It shall be lawful for the Lord Chancellor from time to time to appoint any Persons practising as Solicitors within Ten Miles from Lincoln's Inn Hall at their respective places of business to administer Oaths and take Declarations, Affirmations, and Attestations of Honour in Chancery, and to possess all such other Powers and discharge all such other Duties as aforesaid; and such persons shall be styled "London Commissioners to administer Oaths in Chancery"; and they shall be entitled to charge and take a fee of One Shilling and Sixpence for every Oath administered by them, and for every Declaration, Affirmation, or Attestation of Honour taken by them, subject to any Order of the Lord Chancellor varying or annulling the same.

The 1853 Act was repealed and replaced by the Commissioners for Oaths Act 1889, which provided (in section 1(2)) that only a commissioner for oaths could "administer any oath or take any affidavit for the purposes of any court or matter in England".

No records of Parliamentary debates about either the 1853 or 1889 Acts can be found. However, the administration of oaths had been discussed in the House of Lords during the passage of the Small Debts Bill⁹⁹. Lord Brougham objected to gaolers being granted the power of taking affidavits from prisoners, which until that point had always been administered by visiting assize judges, on the grounds that gaolers were 'inferior' officers¹⁰⁰. Despite the clear arguments for gaolers being granted such powers – namely, that assize judges by their very nature were rarely present – Lord Brougham's viewpoint prevailed and the provision concerned is altered¹⁰¹. This seems to be a clear example of reservation of legal activities being accepted without fuller consideration and debate.

⁹⁷ Subsection (3) is produced as amended by the Legal Services Act 2007, Sch. 21, para 12; s. 183(3) also confirms that a commissioner for oaths "may not carry on the administration of oaths in any proceedings in which that person represents any of the parties or is interested".

⁹⁸ 16 & 17 Vict. c. 78

⁹⁹ The Bill later became the Small Debts Act 1846 (which is more commonly known as the County Courts Act 1846; cf. paragraph 2.2.3 above).

¹⁰⁰ Hansard Official Report, HL Deb 23 June 1845, Vol. 81, cc. 1018-1019.

¹⁰¹ The amendment finally required that oaths could only be administered by judges, or by gaolers if a judge was not available within 12 hours: Hansard Official Report, HL Deb 23 June 1845, Vol. 81, cc. 1019-1020.

2.7.3 Solicitors

The limited powers of 1853 were superseded in 1889. By section 1(1) of the Commissioners for Oaths Act 1889, the Lord Chancellor could choose to appoint any practising solicitor (or any other fit and proper person) as a commissioner for oaths. Subsequently, the Solicitors Act 1932 provided that solicitors could administer oaths (section 71). This was followed by the Solicitors Acts of 1957 (section 81) and 1974 (section 81).

2.7.4 Barristers

By section 113(1) of the Courts and Legal Services Act 1990, barristers became permitted to act as commissioners for oaths. However, since 1 January 2010 (when paragraph 4(4) of Schedule 5 came into force), barristers must have a valid practising certificate in order to perform this function.

2.7.5 Public notaries

The authority of public notaries to administer oaths and take affidavits under the Commissioners for Oaths Acts 1889 and 1891 was replaced by section 113(4) of the Courts and Legal Services Act 1990.

2.7.6 Legal executives

Since 1995, legal executives have been able to exercise the powers of commissioners for oaths as a result of the Commissioners for Oaths (Prescribed Bodies) Regulations 1995¹⁰², passed under the Courts and Legal Services Act (sections 113 and 119).

2.7.7 Licensed conveyancers

Similarly, licensed conveyancers have been entitled to act as commissioners for oaths since 1994 as a result of the Commissioners for Oaths (Prescribed Bodies) Regulations 1994¹⁰³.

2.7.8 Patent attorneys

The authority for patent attorneys to administer oaths is contained in Schedule 4, paragraph 1, with Schedule 5, paragraphs 14 and 15 providing authority during the transitional period to conduct this reserved activity. Patent attorneys acquired the right to administer oaths and take affidavits under section 113(1) of the Courts and Legal Services Act 1990 by virtue of their status as an authorised advocate or litigator.

¹⁰² SI 1995 No. 1676.

¹⁰³ SI 1994 No. 1380, made under the Courts and Legal Services Act, ss. 113 and 119.

2.7.9 *Trade mark attorneys*

The authority for trade mark attorneys to administer oaths is contained in Schedule 4, paragraph 1, with Schedule 5, paragraph 16 providing authority during the transitional period to conduct this reserved activity. Trade mark attorneys acquired the right to administer oaths and take affidavits under section 113(1) of the Courts and Legal Services Act 1990 by virtue of their status as an authorised advocate or litigator.

2.7.10 *Law costs draftsmen*

The authority for law costs draftsmen to administer oaths is contained in Schedule 4, paragraph 1, with Schedule 5, paragraphs 17 and 18 providing authority during the transitional period to conduct this reserved activity. Law costs draftsmen acquired the right to administer oaths and take affidavits under section 113(1) of the Courts and Legal Services Act 1990 by virtue of their status as an authorised advocate or litigator.

3. Regulated but not reserved legal activities

3.1 Introduction

As a result of Parliamentary intervention, some services that would fall within the definition of 'legal activity' in section 12(3)(b) of the Legal Services Act 2007 are regulated by statute, even though they are not listed as reserved legal activities in the Act. The section looks briefly at the principal regulated activities as a point of comparison with the reserved activities.

3.2 Immigration

The provision of immigration advice was included in the list of seven legal services subject to statutory regulation in the 2005 White Paper, along with what are now the reserved legal activities¹⁰⁴. Despite an expressed intention in the White Paper that it should be reserved, it did not become so under the Legal Services Act, and is currently regulated by section 84 of the Immigration and Asylum Act 1999.

In the House of Lords debates on the Legal Services Bill, Lord Kingsland argued for immigration services to be included within the reserved activities for three main reasons: they clearly constitute a legal activity; the then Department for Constitutional Affairs should therefore assume responsibility for it (rather than the Home Office, which is generally the opposing party in immigration proceedings); and it should fall under the ambit of the Legal Services Board to comply with the Bill's aim of simplifying regulation¹⁰⁵. The Minister's initial response to this was that regulation by the Immigration Services Commissioner was UK-wide, whereas the Legal Services Bill covered only England and Wales. She also stated that the ISC was currently under review, with recommendations due to be made to the Home Secretary by the end of March 2007¹⁰⁶. Lord Kingsland therefore agreed that further discussion should wait until after this review had taken place¹⁰⁷.

There was no discussion of immigration services in the Joint Committee's report on the draft Legal Services Bill¹⁰⁸.

Immigration is the subject of Schedule 18 to the Legal Services Act 2007, which establishes the Law Society, the General Council of the Bar, and the Institute of Legal Executives as qualifying regulators for the purposes of authorising solicitors, barristers and legal executives to provide immigration advice and services under the Immigration and Asylum Act 1999.

¹⁰⁴ Department for Constitutional Affairs (2005) *The Future of Legal Services: Putting Consumers First*, Cm. 6679, Appendix B.

¹⁰⁵ Hansard Official Report, HL Deb 6 Mar 2007, c. 197.

¹⁰⁶ Hansard Official Report, HL Deb 6 Mar 2007, cc. 197-198 (Baroness Ashton of Upholland).

¹⁰⁷ Hansard Official Report, HL Deb 6 Mar 2007, c. 198.

¹⁰⁸ Joint Committee on the Draft Legal Services Bill, *Draft Legal Services Bill Volume I: Report* (2006)

3.3 Claims management

Claims management was also left out of the list of reserved activities, after similarly being mentioned in the 2005 White Paper:

The Government is bringing forward legislation to add the provision of claims management services to [the] list of reserved legal activities¹⁰⁹.

The Joint Committee report recommended that the Government should clarify its position on the regulation of claims management, and reflect the provisions of what was then the Compensation Bill in those of the Legal Services Bill¹¹⁰. Schedule 19 of the Legal Services Act details amendments to be made to the Compensation Act 2006.

The Compensation Act 2006 now regulates claims management. No suggestions were made at any time during the Legal Services Bill's passage through Parliament that this should be made a reserved activity.

3.4 Insolvency

Insolvency practitioners carry out a regulated activity, and may only do so if they are specifically authorised. However, insolvency work was not considered for reservation under the Legal Services Act 2007. The Insolvency Act 1986 states that (section 389(1)):

A person who acts as an insolvency practitioner in relation to a company or an individual at a time when he is not qualified to do so is liable to imprisonment or a fine, or to both.

Only individuals may act as insolvency practitioners (section 390(1)), and they must be authorised to practise in England and Wales either through membership of a professional body or by permission of a competent authority (section 390(2)). The Secretary of State may declare a body recognised if it (section 391(2)):

regulates the practice of a profession and maintains and enforces rules for securing that such of its members as are permitted by or under the rules to act as insolvency practitioners—

- (a) are fit and proper persons so to act, and
- (b) meet acceptable requirements as to education and practical training and experience.

The current bodies recognised under the Insolvency Act 1986 as capable of granting the right to practise insolvency are: the Association of Certified Chartered Accountants; the Institute of Chartered Accountants in England and Wales; the Institute of Chartered Accountants in Ireland; the Institute of Chartered Accountants in Scotland; the Insolvency Practitioners Association; the Solicitors Regulation Authority; the Law Society of Scotland; and the Secretary of State¹¹¹.

¹⁰⁹ Department for Constitutional Affairs, *The Future of Legal Services: Putting Consumers First* (2005), Cm. 6679, Appendix B, Section 7.

¹¹⁰ Joint Committee on the Draft Legal Services Bill, *Draft Legal Services Bill Volume I: Report* (2006), para 221.

¹¹¹ The Insolvency Service website: <http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/rpb.htm> (visited 7 June 2010).

4. Non-regulated legal activities

4.1 Introduction

Some legal activities are neither reserved under the Legal Services Act 2007 nor regulated by any other statute. This includes many of the non-contentious services provided by solicitors in private practice. The consequence is that these activities can be undertaken by non-authorised persons without any regulatory oversight. This leads to a 'regulatory gap'¹¹²: where these non-regulated activities are provided by practitioners (or, in the future, by 'alternative business structures' or licensed bodies under the Act) who are authorised persons in respect of reserved activities, their non-regulated activities will be subject to personal or entity regulation; where they are not, clients who procure non-regulated activities from non-authorised persons will not have any protection.

Activities that currently fall into this regulatory gap include those that could potentially seriously affect the lives of the people involved. Examples of work that does not have to be undertaken by a qualified, and therefore regulated, lawyer include: advice and representation provided at a police station; assistance with non-contentious employment issues, such as discrimination in the workplace; and advice about mental health issues and detention. It is arguable that the consequences of incorrect or inexperienced advice in these situations could be equally as grave as in the improper provision of a reserved activity (and, in some cases, even more so).

This paragraph will now explore in more detail the position of will writing – often regarded as the principal candidate for being added to the list of reserved legal activities. However, other candidates (including those alluded to above) might be suggested. These will be considered further in our second paper.

4.2 Will writing

Many consumers are surprised to learn that will writing is not a regulated activity (unless carried out by someone who is legally qualified and therefore regulated as a practitioner). If a will is incorrectly prepared, the mistake is often not discovered for many years. By this time the client could be dead and unable to prepare a new will or codicil to give effect to his or her true intentions. Further, by that time, the unregulated perpetrator of the error might have gone out of business, leaving the wronged party without any chance of recompense. For these and other reasons, the possible regulation of will writing has been the subject of longstanding debate.

The writing of wills has been differentiated from conveyancing in statute since the provision that gave lawyers their monopoly on the latter. Section 14 of the Stamp Act 1804 stated that any non-lawyer conveying real or personal estate would be subject to a £50 fine:

Provided always, that nothing herein contained shall extend, or be construed to extend, to prevent any Person or Persons drawing or preparing any Will or other Testamentary Papers, or any Agreement not under Seal, or any Letter of Attorney.

¹¹² This expression is borrowed from Clementi (2004), Chapter E.

Given the supposed involvement of the predecessor of the Law Society in the emergence of this provision (see paragraph 2.4.2 above), it is perhaps surprising that will writing did not become a reserved activity. One can perhaps surmise that, at that time, will writing was not as lucrative an activity as conveyancing!

The Royal Commission on Legal Services considered the position of wills, and concluded in its final report¹¹³ (1979) that there was no case for change (paragraphs 19.26):

There is at present no restriction on the preparation of wills, whether for reward or not, by an unqualified person on behalf of another. The Law Society proposed to us that solicitors alone should be allowed to prepare wills for reward. It pointed out the importance of accurate wording and sound legal knowledge in drafting a will. We accept that the home-made will is a frequent source of trouble. We consider, nevertheless, that it would be impracticable and unacceptable to ban preparation of a will by a testator himself, whether or not he is advised, without payment, by a friend. Having regard to the circumstances in which many wills are drafted, there would be serious objections to imposing a total ban on their preparation by unqualified persons. Preparation for reward is another matter; but there is no evidence that there is a class of persons, other than solicitors, who hold themselves out to draft wills for reward. We do not recommend legislation to prevent a practice which is not known to occur.

The reasoning of the penultimate sentence of this quotation would not hold true in 2010, given that there are many unqualified¹¹⁴ will writers now preparing wills for reward. We cannot therefore know if the Commission's conclusion would be the same today.

As the Legal Services Bill made its passage through Parliament, will writing was put forward in the House of Lords as a candidate for reservation, because it was felt that it would be wrong to leave the situation to the Legal Services Board to deal with. Lord Kingsland said that¹¹⁵:

Our view is that the absence of regulation of will writing combined with the fact that a defect in a will is normally identified only when it is too late to do anything about it provide a particularly strong need for regulation in this sector.

This opinion was in line with the recommendations made by the Joint Committee, whose report states¹¹⁶:

We recommend that will writing for fee, gain or reward should be included within the new regulatory framework. The draft Bill should be amended to provide for regulation subject to any exemptions necessary in the consumer interest. We note that there is currently no existing regulatory framework for will writing and no existing professional body with responsibility for will writing activities. We note that these hurdles have been overcome in respect of the claims management sector, in the context of the Compensation Bill, and urge the Government to consider whether will-writers might be brought within the scope of the regulatory framework in a similar manner.

During the House of Lords debates, Viscount Bledisloe noted that conveyancing was a reserved activity, and then said¹¹⁷:

¹¹³ Cmnd. 7648 (London, HM Stationery Office).

¹¹⁴ This is a reference to their not being legally qualified, rather than a suggestion that they have received no training at all.

¹¹⁵ Hansard Official Report, HL Deb 22 Jan 2007, c. 943.

¹¹⁶ Joint Committee on the Draft Legal Services Bill, *Draft Legal Services Bill Volume I: Report* (2006), at para 216.

Why a disposition of land by me during my lifetime is a reserved instrument activity that has to be done by a qualified person but a disposition of land by me in my will is something that I can do without having my hand held is something that does not immediately commend itself to me as lucidly logical.

The Minister replied, firstly, by saying that will writing differs from the other reserved activities since they have all “been reserved for many years”¹¹⁸. She then continued to use the example of claims management to show that the Government was willing to regulate in areas where regulation is required, but that they were not convinced of the need with will writing and were reluctant to act without compelling evidence. The minister said that the Government was required to weigh the advantages of regulation against the disadvantages (such as increased cost to consumers). She claimed support for the decision not to regulate from Which?, the National Consumer Council, and the OFT¹¹⁹.

Despite holding opposing evidence from the AA and Co-operative Legal Services, Lord Hunt of Wirral withdrew the amendment intended to make will writing a reserved activity¹²⁰. However, three months later, he reintroduced it on the basis of information received from the Institute of Professional Willwriters that it had not been consulted by the DCA, having submitted a report to the department in 2005, despite a commitment in the White Paper to consult with providers of will writing services¹²¹. Lord Evans of Temple Guiting claimed that the DCA had been in regular contact with the Institute, but had not seen its report¹²²; the amendment was withdrawn pending further investigation into the apparent confusion¹²³.

Lord Hunt returned to this issue in his report to the Law Society on legal regulation. He again expressed the view (as a recommendation) that will writing should become a regulated activity¹²⁴.

The current situation, therefore, is that for will writing to become a reserved activity, the Legal Services Board would need to consider using its powers under the Legal Services Act. Recent research for the Ministry of Justice suggested that 88% of wills were prepared by solicitors, and only 7% by unregulated will writers¹²⁵. The Board would no doubt investigate very carefully the likely consumer detriment that has been or might be caused if these percentages were thought to be representative and expected to continue.

Interestingly, in a variation on ‘postcode lottery’, the Scottish Parliament is currently considering the introduction of regulation on will writers as part of its Legal Services (Scotland) Bill.

¹¹⁷ Hansard Official Report, HL Deb 22 Jan 2007, c. 943.

¹¹⁸ Hansard Official Report, HL Deb 22 Jan 2007, c. 945 (Baroness Ashton of Upholland).

¹¹⁹ Hansard Official Report, HL Deb 22 Jan 2007, c. 946 (Baroness Ashton of Upholland).

¹²⁰ Hansard Official Report, HL Deb 22 Jan 2007, c. 948.

¹²¹ Hansard Official Report, HL Deb 18 April 2007, c. 236 (Lord Hunt of Wirral).

¹²² Hansard Official Report, HL Deb 18 April 2007, c. 238.

¹²³ Hansard Official Report, HL Deb 18 April 2007, c. 238 (Lord Hunt of Wirral).

¹²⁴ Hunt (2009, London), page 81.

¹²⁵ See Finch et al. (2010) *Baseline survey to assess the impact of legal services reform* (London, Ministry of Justice) (available at: <http://www.justice.gov.uk/publications/docs/legal-services-reform-survey.pdf>).

4.3 Addressing the regulatory gap

There are frequent calls for the regulatory gap to be reviewed and ‘plugged’ by the introduction of regulation. In this final report, Sir David Clementi wrote¹²⁶:

a provider, such as a solicitor, who is authorised to provide one or more of the reserved, or inner circle, services will also be regulated in the provision of the unreserved or outer circle services. However, these services can also be provided by an unauthorised individual, and in this case would not be subject to regulation at all. There can, therefore, be an asymmetry in the regulatory reach as regards individuals providing the same legal service.

Although expressing concern about the existence of such asymmetry, Sir David came to the conclusion that¹²⁷:

within the appropriate legislative framework, it is for Government to decide which legal services should be reserved, after appropriate consultation, in particular with the Regulator. Whereas there should not be a gap in regulation once it is determined that something is within the regulatory net, there are asymmetries in the regulatory system of which the Regulator should take note. Any changes to the regulatory net to deal with such matters should be subject to careful cost/benefit analysis.

The Legal Services Act 2007 now provides the appropriate legislative framework for addressing the gap (which we shall review in our second paper).

¹²⁶ Clementi (2004), Chapter E, para 19.

¹²⁷ Clementi (2004), Chapter E, para 38.

5. Conclusions

5.1 Introduction

As we noted at the outset, the origins of many of the reservations of legal activities are remarkably obscure. We consider that the often non-existent, and sometimes limited, evidence of Parliamentary consideration and debate at the time the reservations were created or confirmed provides little basis for suggesting a common policy rationale that justifies their existence. Instead, what we most often find is statutory confirmation of then current practice without any exploration of continuing justifications for reservation. Occasionally, there is evidence of a consultation or review leading to recommendations that are adopted by Parliament (such as the Royal Commission's suggestion that the conveyancing reservation should be extended to the contract).

What we tend to hear, therefore, are after-the-event rationalisations and justifications for reservation, based on the proponents' or opponents' views of what should happen. In our view, this does not provide a sound basis for the Legal Services Board to propose adding legal services to the list of reserved activities or removing current activities from the list. Further, we believe that it would be unwise to consider any particular legal activity for inclusion or exclusion in the absence of a broader set of criteria that could be generally applied.

We intend as part of our second paper to explore the basis on which such a general set of criteria might be proposed. However, to complete this review, we deal briefly with some of the suggestions that have been, or might be, made. As we conclude in paragraph 5.7 below, however, even these leave a somewhat *ad hoc* feel to an important issue of regulation.

5.2 Consumer protection

Consumer protection is one of the regulatory objectives in section 1 of the Legal Services Act, and is the rationale that could possibly be attributed to all of the reserved activities. The thinking behind it is that the need for the provision of a reserved activity will coincide with a highly important event in the consumer's life, which if handled incorrectly would have significant adverse effects on that individual. The consumer should therefore be afforded the protection of knowing that the service provider is regulated, and that recourse is available if necessary.

Although this fits with current thinking, there is little evidence that it was behind any of the original reservations. Not only is there no discussion about consumer protection in Hansard for any of the original reserved activities, but for at least some of them evidence exists that the reservations were introduced for the predominant benefit of the legal profession. For example, in paragraph 2.4.2 above we recorded Abel-Smith & Stevens' contention that the reservation of conveyancing to lawyers in 1804 was given in return for their acceptance of higher taxes (1967: 23), and had nothing to do with protecting their clients.

However, the Abel-Smith & Stevens assertion is somewhat diluted by the statement in the final report of the Royal Commission on Legal Services that before 1804 complaints about

lay conveyancers were common¹²⁸. It might follow, therefore, that once lawyers were the only people who could transfer property, then consumers received a better service. Nevertheless, there is no evidence of this or the possibility that consumer protection was considered at all at the time. Further, the term 'consumer' is itself of far more recent origin than any of the reserved activities. To assert that the protection of consumers was the rationale behind reservation appears to be using modern constructions after the event to attribute motives to past events, rather than finding the real reason behind those events.

5.3 The administration of justice

The final report of the Royal Commission on Legal Services¹²⁹ suggested that the need for effective administration of justice is validation for the reservation of rights of audience (Chapter 18, with a particular emphasis on the skills required and independence) and the conduct of litigation (paragraph 19.17, which emphasises the knowledge and integrity of officers of the court), in that the proper discharge of these responsibilities assists in the smooth functioning of the court system. This analysis could be applied to the other four reserved activities by reasoning that if they were performed incorrectly any subsequent disputes arising from the problems caused could lead to litigation, which in turn could impose additional burdens on the courts.

However, this reasoning seems to be stretching a point. Whereas the quality of advocacy and litigation clearly would directly affect the court in which the proceedings are taking place, the other four reserved activities can easily be carried out without any connection to a courtroom. Therefore, despite being a persuasive argument for the reservation of advocacy and litigation, the proper administration of justice as assisted by properly trained people appearing in court is not convincing as a common rationale for all reserved activities.

5.4 Assurance for the State

It could be suggested that legal services have been reserved to lawyers when they bring the client into some degree of contact with the State, and the State requires some assurance that the activities have been correctly carried out. This proposition is true in varying degrees for each of the currently reserved activities. For example, someone accused of a crime and in need of counsel in court has much greater contact with the State than a person requiring a notary's services in relation to documents to be used in an international business transaction.

Perhaps because of the differing levels to which this rationale can be applied to each of the reserved activities, it does not seem totally compelling. As with 'consumer protection' (cf. paragraph 5.2 above), it has the sense of trying to force an explanation on existing circumstances, rather than truly being their original basis. In addition, there is no mention of this line of thinking in any Hansard debates surrounding the reservations.

¹²⁸ Cmnd. 7648 (London, HM Stationery Office), para 21.5.

¹²⁹ Cmnd. 7648 (London, HM Stationery Office).

5.5 Public interest

Protection and promotion of the public interest is the first regulatory objective in the Legal Services Act. The Act itself differentiates between consumer protection and public interest, and it is clear that the two do not always coincide in the case of the reserved activities. For example, for someone guilty of a serious crime, as a consumer of legal services, it is important to them to have access to a good quality advocate during their trial. But it is not in the public interest for that advocate to deal at great length with every possible point, however weak, and in so doing take up court time and resources.

Equally open to question is whether the public interest was a concern of those legislators who originally created or confirmed the current reserved activities – and, in fact, with evidence existing to the contrary. For example, in paragraph 2.2.3 above, we noted that both attorneys and barristers originally had rights of audience in the county courts. Despite the public benefit that this provided by simplifying the rights of audience at the time, the provision concerned was repealed and replaced by one prohibiting the appearance of one attorney engaged as an advocate by another. This amendment was pushed through by the then Attorney-General, in the face of arguments against losing the public benefit of the 1846 provision¹³⁰, who said that no complaints had been made by the public against the system as it then stood. This last point¹³¹ indicates that Parliament changed a system that the public supported with one allowing them a narrower choice of service provider. This does not support a more generalised argument that reservations were introduced in the public interest.

Another aspect of public interest could include requiring appropriate qualification or certification where the legal activities are of such inherent complexity that the knowledge and skill of those who provide services to the public for reward need to be assured before the event rather than insured or protected after it. This could also be extended to a public interest in assuring trust in practitioners – especially where they are handling clients' money or owe them fiduciary duties.

5.6 Professional protectionism

Although few are likely to suggest that professional protectionism provides a foundation on which the reserved activities should be based, it is unfortunately a rationale which substantiates some of the original reservations. For example, in the discussion in paragraph 5.5 above about rights of audience in the county courts, the Attorney General argues for a change in the scope of that reservation by prohibiting the appearance of attorneys retained as advocates by other attorneys. His basis for this is the opinion that attorneys were monopolising the market by excluding barristers¹³². The prevention of a monopoly is undoubtedly a reasonable basis for action by Parliament, especially according to modern thinking, because of the negative impact it would have on the market and consumers. What shows a protectionist motive is that the Attorney-General does not argue against the existence of any monopoly, but rather that such dominance should be held by his own

¹³⁰ Hansard Official Report, HC Deb 15 July 1851, Vol. 118, c. 783 (Sir George Strickland MP).

¹³¹ Hansard Official Report, HC Deb 15 July 1851, Vol. 118, c. 781 (Mr Fitzroy MP).

¹³² Hansard Official Report, HC Deb 15 July 1851, Vol. 118, c. 780.

profession of barrister and not by the “inferior class”¹³³ of attorneys.

Abel-Smith & Stevens (1967: 203-206) highlight the historical vigilance of the Law Society in maintaining the high prices its members charged for conveyancing services, by disciplining those who undercut the scale fees. The Society has also attempted to prosecute bodies encroaching on solicitors’ probate rights¹³⁴, and continually pushed throughout the 1950s and 1960s to be able to increase the charges payable for the conduct of litigation¹³⁵.

5.7 Next steps

The noticeable absence of Parliamentary debates, as evidenced by Hansard, concerning the original reservations makes it impossible to know what Parliament’s true intentions were when passing the relevant legislation. However, in our view the difficulty of being able to identify a common rationale for the reserved activities, combined with evidence that at least some of them were intended for the protection of the legal profession, points to the need for further work to establish a contemporary basis for reservation. It may be that a single rationale for all is neither necessary nor desirable. But there should at least be a set of criteria that provide the foundations for justifying future recommendations.

The final report of the Royal Commission on Legal Services stated, first, in relation to rights of audience, that¹³⁶:

As a general rule, restrictive practices must be shown to be in the public interest.

And, second, in relation to conveyancing, it suggested that¹³⁷:

A monopoly or restrictive practice should be regarded as against the public interest unless shown to serve it.

This is also the view taken by the Office of Fair Trading in its report on competition in the professions in 2001¹³⁸:

The professions are entrusted with the delivery of services of considerable public importance. They work within a framework of law, but within that framework their governing bodies have important degrees of freedom to control rights to enter and practise the relevant professions. The exercise of these powers can have a significant impact on the economy, on the interests of consumers, and on society generally, especially where the professions concerned have exclusive rights to supply certain services. Restrictions on supply in the case of professional services, just as with other goods and services, will tend to drive up costs and prices, limit access and choice and cause customers to receive poorer value for money than they would under properly competitive conditions. Such restrictions will tend also to inhibit innovation in the supply of services, again to the ultimate detriment of the public.

¹³³ Hansard Official Report, HC Deb 15 July 1851, Vol. 118, cc. 779-780: see para 2.2.3 above.

¹³⁴ The Law Society took a firm of law stationers to court for preparing documents for probate using copies of wills from Somerset House, but lost the case in the House of Lords: *Law Society v Waterlow Bros* (1883) LR 8 AC 407: see Abel-Smith & Stevens (1967: 206).

¹³⁵ Abel-Smith & Stevens (1967: 394-395)

¹³⁶ Cmnd. 7648 (London, HM Stationery Office), para 18.6.

¹³⁷ Cmnd. 7648 (London, HM Stationery Office), para 21.30.

¹³⁸ *Competition in professions*; a report by the Director General of Fair Trading (March 2001), page 1.

Restrictions may be justified under competition law if they are in the public interest, if they serve economic progress, if the benefits are shared with consumers and if the restrictions do not go further than is necessary or eliminate competition.

We agree, and believe that any and all reserved legal activities would only justify their reservation if this can be shown to be in the public interest. We must also be mindful of the efficacy and costs of regulation. The following comment of Sir David Clementi is also highly pertinent¹³⁹:

it is important to recognise that regulation does not constitute a guarantee¹⁴⁰: it should be acknowledged that no framework can regulate against all risks. Equally, it should be recognised that the cost of regulation ultimately falls to the consumer and would divert regulatory resources. Regulation should be in place primarily to protect consumers of legal services, not to enhance the standing of provider.

What we are currently faced with, though, is an unsatisfactory mix of approaches to regulation¹⁴¹:

- (1) Some legal *activities* are reserved: these are the substance of this paper, and we have sought to demonstrate their somewhat eclectic history and disappointing lack of underlying policy or rationale.
- (2) Some legal *activities* are regulated (but not reserved) because they are the subject of legislation that imposes a regulatory structure to them, alongside the reserved activities. In some instances (immigration and insolvency), the regulators of these activities include those who are approved for reserved activities; in another (claims management), there is another regulator.
- (3) These two forms of similar, but nevertheless distinct, regulation of activity are supplemented by the regulation of activities carried out by regulated *persons* – whether individual practitioners or entities, with an increasingly complex categorisation to accompany it. So, there might be authorised persons, who could be individuals or legal services bodies, recognised bodies or licensed bodies. And the individual authorised person might not be authorised in respect of all legal activities, but only those that their regulator has been approved to authorise.
- (4) Finally, as we have already noted, as a result of the ‘regulatory gap’ there are some legal activities that are not regulated if they are not provided by an authorised person.

For the consumer, this represents a bewildering – and often surprising – array of regulation and non-regulation. Rather than a narrow consideration of whether more activities should be added to the list of those that are reserved to authorised persons, we believe that now might be the time for a more policy-driven approach. This should address the following questions:

¹³⁹ Clementi (2004), Chapter E, para 33.

¹⁴⁰ This point was also forcefully (and rightly) emphasised by Lord Hunt of Wirral in his review of legal regulation when he wrote that “any implication that regulation can and must never fail is frankly preposterous” (see Hunt (2009), page 40).

¹⁴¹ Sir David Clementi alluded to this mix in his final report: see Clementi (2004), Chapter E, para 2.

1. On what public interest basis should *any* legal activity be regulated?
2. If there is a case for regulation, should it be one for *reservation* or some other form of regulation (and what should be the difference in effect between regulated and reserved activities)?
3. If there is a case for regulation, should it be of the *activity*, of the *individual* who provides the service, or of the *entity* within which an individual is engaged?

Our second paper will therefore explore these issues in order to suggest a contemporary policy approach to regulation and reservation.

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Appendix: Summary of origin of reserved activities

Approved Regulator	Reserved Legal Activity	Basis of Right	Paragraph
The Law Society	Right of audience: Magistrates Court	Trials for Felony Act 1836, s. 2	2.2.2
	Right of audience: County Court	County Courts Act 1846, s. 91	2.2.3
	Right of audience: Crown Court	Courts Act 1971, s. 12	2.2.4
	Right of audience: higher courts	Courts and Legal Services Act 1990, s. 32	2.2.5 2.2.6
	Conduct of litigation	Attorneys and Solicitors Act 1729, s. 3	2.3.2
	Reserved instrument activities	Stamp Act 1804, s. 14	2.4.2
	Probate activities	Ecclesiastical Courts Act 1813, s. 9	2.5.2
	Administration of oaths	Oaths in Chancery Act 1853, s. 2	2.7.2
The General Council of the Bar	Right of audience: Magistrates Court	Trials for Felony Act 1836, s. 2	2.2.2
	Right of audience: County Court	County Courts Act 1846, s. 91	2.2.3
	Right of audience: Crown Court	Courts Act 1971, s. 1	2.2.4
	Right of audience: High Court	Judges acting as a collegiate body, followed by Courts and Legal Services Act 1990, s. 31	2.2.5
	Right of audience: Court of Appeal and Supreme Court	Judges acting as a collegiate body, followed by Courts and Legal Services Act 1990, s. 31	2.2.6
	Conduct of litigation	Courts and Legal Services Act 1990, s. 28	2.3.3
	Reserved instrument activities	Stamp Act 1804, s. 14	2.4.3
	Probate activities	Solicitors Act 1932, s. 49	2.5.3
	Administration of oaths	Courts and Legal Services Act 1990, s. 113	2.7.4
The Master of the Faculties	Reserved instrument activities	Stamp Act 1804, s. 14	2.4.4
	Probate activities	Solicitors Act 1932, s. 49	2.5.4
	Notarial activities	Public Notaries Act 1801, s. 1	2.6.2
	Administration of oaths	Commissioners for Oaths Act 1889, s. 1	2.7.5

RESERVED LEGAL ACTIVITIES: HISTORY AND RATIONALE

The Institute of Legal Executives	Rights of audience	Institute of Legal Executives Order, SI 1998 No. 1077 [made under Courts and Legal Services Act 1990, s. 29]	2.2.7
	Administration of oaths	Commissioners for Oaths (Prescribed Bodies) Regulations, SI 1995 No. 1676 [made under Courts and Legal Services Act 1990, ss. 113 and 119]	2.7.6
The Council for Licensed Conveyancers	Reserved instrument activities	Administration of Justice Act 1985, s. 11	2.4.5
	Administration of oaths	Commissioners for Oaths (Prescribed Bodies) Regulations 1994, SI 1994 No. 1380 [made under Courts and Legal Services Act 1990, ss. 113 and 119]	2.7.7
	Probate activities	Probate Services (Approved Bodies) Order, SI 2008 No. 1865 [made under the Courts and Legal Services Act, s. 55]	2.5.5
The Chartered Institute for Patent Attorneys	Rights of audience	Chartered Institute of Patent Agents Order, SI 1999 No. 3137 [made under Courts and Legal Services Act 1990, s. 29]	2.2.8
	Conduct of litigation	Chartered Institute of Patent Agents Order, SI 1999 No. 3137 [made under Courts and Legal Services Act 1990, s. 29]	2.3.5
	Reserved instrument activities	Trade Marks Act 1994, Sch. 4, para 5	2.4.6
	Administration of oaths	Courts and Legal Services Act 1990, s. 113	2.7.8
The Institute of Trade Mark Attorneys	Rights of audience	The Institute of Trade Mark Attorneys Order, SI 2005 No. 240 [made under Courts and Legal Services Act 1990, s. 29]	2.2.9
	Conduct of litigation	The Institute of Trade Mark Attorneys Order, SI 2005 No. 240 [made under Courts and Legal Services Act 1990, s. 29]	2.3.6
	Reserved instrument activities	Trade Marks Act 1994, Sch. 4, para 5	2.4.7
	Administration of oaths	Courts and Legal Services Act 1990, s. 113	2.7.9
The Association of Law Costs Draftsmen	Rights of audience	The Association of Law Costs Draftsmen Order, SI 2006 No. 3333 [made under Courts and Legal Services Act 1990, ss. 27-28]	2.2.10
	Conduct of litigation	The Association of Law Costs Draftsmen Order, SI 2006 No. 3333 [made under Courts and Legal Services Act 1990, ss. 27-28]	2.3.7
	Administration of oaths	Courts and Legal Services Act 1990, s. 113	2.7.10

RESERVED LEGAL ACTIVITIES: HISTORY AND RATIONALE

The Institute of Chartered Accountants of Scotland*	Probate activities	Probate Services (Approved Bodies) Order, SI 2008 No. 1865 [made under the Courts and Legal Services Act, s. 55]	2.5.6
The Association of Chartered Certified Accountants*	Probate activities	Probate Services (Approved Bodies) Order, SI 2009 No. 1588 [made under the Courts and Legal Services Act, s. 55]	2.5.7

* Added to the list of approved regulators and the table in paragraph 1 of Schedule 4 to the Legal Services Act 2007 by the Legal Services Act 2007 (Approved Regulators) Order (SI 2009 No. 3233), paragraph 3(b).

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The Legal Services Institute

The Legal Services Institute (originally the Legal Services Policy Institute) was established by the College of Law in November 2006. Its principal objectives are to:

- (a) seek a more efficient and competitive marketplace for legal services, which properly balances the interests of clients, providers, and the public;
- (b) contribute to the process of policy formation, and to influence the important policy issues, in the legal services sector and, in doing so, to serve the market and public interest rather than any particular party or sectional interest;
- (c) alert government, regulators, professional bodies, practitioners and other providers, and the wider public, to the implications of these issues; and
- (d) encourage and enable better-informed planning in legal services by law firms and other providers, government, regulators and representative bodies.

The Institute seeks to form and convey independent views that it believes reflect, support and promote the public interest rather than the preferences or views of other interested parties. Where the College might have views as a provider of education, these are expressed separately.

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