What's reserved?

The meaning of what exactly constitutes a 'reserved legal activity' is becoming increasingly hard to define, says John Gould

IN BRIEF

- It is an offence to carry out 'reserved legal activities' as defined under s 12(1) of the Legal Services Act 2007 if not properly authorised.
- However, each of the areas of reserved activity has its own particular issues in determining where the line is, and who is and is not authorised to carry it out.
- There is therefore a strong case for the modernisation of the current framework of reserved activities.

It is a well-known fact that, under the law in the UK, lawyers and legal services are regulated. What is not well known, however, is what that bald statement actually means. Most services which look legal are not regulated, and neither are those who provide them. With increasing numbers of non-regulated providers, the boundaries of what they can and cannot do are ever more important. Yet these boundaries are not impenetrable barriers, but rather a zone of jeopardy within which an unauthorised entrant may either find that they can enjoy commercial success, or else be guilty of a criminal offence.

Keeping it exclusive

Regulated lawyers essentially enjoy two forms of regulatory exclusivity. The right to use their particular professional title may be restricted, and some of their activities are limited by law to those authorised to undertake them.

Taking solicitors as the paradigm, s 20 of the Solicitors Act 1974 (SA 1974) makes it a criminal offence for an unqualified person to act as a solicitor:

> '20 **Unqualified person not to act as solicitor**
> (1) No unqualified person is to act as a solicitor.
> (2) Any person who contravenes subsection (1) is guilty of an offence and liable on conviction on indictment to imprisonment for not more than 2 years or to a fine, or to both.'

Surely nobody could doubt whether they were or were not a solicitor. But it is perfectly possible to be included on the roll of solicitors and still commit this criminal offence. In theory such a person might be imprisoned. This is because to be 'qualified', a solicitor must also have a practising certificate.

Pretending to be a solicitor carries another risk. Solicitors are 'officers of the court' and are therefore subject to the court's supervision. This status is sufficient to provide a legal basis for a range of compensatory, disciplinary and punitive orders (the jurisdiction was preserved by s 50, SA 1974). If you pretend to be a solicitor when you are not, the court still considers itself to have jurisdiction over you—see *Assaubayev v Michael Wilson & Partners Ltd* [2014] EWCA Civ 1491, [2014] All ER (D) 239 (Nov).

The second type of regulatory exclusivity relates to certain types of activity called 'reserved activities'. These reserved activities are set out in s 12(1) of the Legal Services Act 2007 (LSA 2007):

> '12 (1) In this Act "reserved legal activity" means—
> (a) the exercise o f a right of audience;
> (b) the conduct of litigation;
> (c) reserved instrument activities;
> (d) probate activities;
> (e) notarial activities;
> (f) the administration of oaths.'

It is an offence for a person to carry on a reserved activity unless authorised (under s 14, LSA 2007). There is a statutory defence for the accused to show that they did not know, and could not reasonably have been expected to know, that the offence was being committed.

There is now something of a sub-industry of legal service providers who are undertaking activity which, from the consumers' point of view, is difficult to distinguish from the activities of regulated firms undertaking reserved activity. It is as though the border can be crossed as long as the traveller doesn't fall into a few formal and marked traps along the way. If that is correct, reserved activity compliance is a ritual with little connection to the objectives of statutory regulation. Once there is no longer a substantive difference between the regulated and the unregulated, the justification for having reserved activities at all drops away. If restrictions are not to be simply barriers to competition, they must make a meaningful difference in pursuit of some acknowledged public interest.

What's included?

So far as activity is concerned, the challenge is to define the restriction widely enough to mitigate the risk that unauthorised activity would pose, but not so widely as to catch useful activity by non-regulated providers whose work is actually in the public interest.

Broadly notarial activities and the administration of oaths are sufficiently formal to leave little doubt as to what is or is not included. This leaves four areas of activity which colloquially might be described as advocacy, conveyancing, litigation and probate. On the face of it, these include the core services provided by solicitors and barristers, but not everything included within the general understanding of these areas is within their definition. Schedule 2 of LSA 2007 offers some more restrictive definitions of what is included.

- A 'right of audience' means the right to appear before and address a court, including the right to call and examine witnesses, but it does not include rights in particular courts or types of proceedings which existed before LSA 2007 came into force.
- The 'conduct of litigation' means the issuing of proceedings before any

court in England and Wales or the commencement, prosecution or defence of such proceedings or the performance of any 'ancillary functions'.

- 'Reserved instrument activities' means preparing any instrument of transfer or charge for the purposes of the Land Registration Act 1925, making an application for registration or preparing any other instrument relating to real or personal property for the purpose of the law of England and Wales or relating to court proceedings in England and Wales. Instruments for court proceedings are excluded if no restriction was in place before LSA 2007.
- 'Instrument' includes a contract for the sale or other disposition of land (other than a short lease, such as is referred to in s 54(2) of the Law of Property Act 1925) but does not include a will or other testamentary instrument, an agreement not intended to be entered as a deed unless it relates to land, a power of attorney, or a transfer of stock containing no trust.
- 'Probate activities' means preparing any probate papers for the purpose of the law of England and Wales or in relation to any proceedings. Probate papers are those on which to found or oppose a grant of probate or letters of administration.

The reasons why reserved activities are defined exactly in the terms they are does not appear to derive from any appetite in modern times to reformulate from a foundation of basic principles. The Legal Services Institute criticised them as long ago as 2011 as having no 'coherent policy or rationale underpinning them' (Professor Stephen Mayson, 'Where should reserved legal activities apply?', *Law Society Gazette*, 17 February 2011).

There are two types of justification for having reserved activities. The first is that there are particular areas in which the consumer of legal services is at risk of very serious harm from unregulated providers. This rationale is important in various areas of non-legal activity regulation in which no one would seriously suggest that improvements to competition or access would justify deregulation. There may be many would-be doctors who would be happy to carry out surgery cheaply and quickly, or would-be banks that would happily look after peoples' savings or pensions and provide a handsome return. To allow that, however, would be to risk too much.

The second justification is a systemic one. There are some systems which are so important to society that those central to their operation must be accredited as reliable, and held properly to account if they are not. Three obvious examples of such systems are the administration of justice, land ownership, and succession upon death.

The gold standard: out of reach?

If once the issue was shady representatives or advisers with narrow integrity and broad lapels, it is more likely now to be the needs of those with no representation or advice at all. No one should be denied access to legal systems because they are not represented by a lawyer, but as the proportion of those acting or transacting 'in person' increases, the priorities of the system need to be reassessed.

The gold standard may be a lawyer who is fully trained, experienced and regulated, but, in the justice system particularly, this may in many cases be unattainably expensive. Systems have adapted to cater better for those who are unrepresented, but it should come as no surprise that they are fundamentally what they have always been—namely legalistic, technical and difficult. Where litigants in person are insufficiently supported, they occupy a disproportionate amount of the system's resources. The right support for those litigating in person or extracting grants of probate would actually mean that the objective of safeguarding the integrity of the system might be easier to achieve.

If, however, models develop in which the support becomes a form of backdoor unregulated representation, the system itself could be undermined by the unreliability of those who, by a nod and a wink, are allowed to operate within it when the law says they cannot.

Each of the areas of reserved activity has its own particular boundary issues. Is an instrument prepared by an unqualified person and rubber-stamped by a regulated one permissible? Is the preparation of an inheritance tax form required to obtain a grant preparing probate papers? Is someone who speaks for their friend in court exercising a right of audience? Can an unregulated person do more or less everything required to progress litigation for a 'litigant in person' as long as they don't go on the court record?

Providing legal advice is not a reserved activity and so everyone may, and probably does, give legal advice in some way at some time. It makes no difference if the advice is in writing. In principle, advice may take the form of a draft document.

The problem is that a regulated lawyer who prepares and sends a reserved instrument to a client for approval must, by the same logic, also be providing advice. Both individuals are preparing a document and providing advice.

One approach to the problem is to look for some additional formal element of distinction, such as who identifies themselves as acting in the reserved capacity in official documents, but it seems unlikely that a person committing a criminal offence would produce multiple written confessions along the way by formally signing documents. The client (if that is what they are) will always be recorded as being 'in person', whether in litigation or to extract a grant of probate.

Identifying particular actions as points of distinction may also be problematic. The law has long recognised that reserved activity requires acts by unauthorised individuals such as process servers and that these rude mechanicals are not, thankfully, committing a criminal offence. This may mean that even submitting the document a person has drafted to, say, a court may not be determinative.

A blunt instrument

So what principles should be applied to determine whether an unqualified person is engaging in reserved activity?

The question is fact-specific, and it is the substance of the person's actions which matters rather than the form in which they appear. A good starting point is to compare the person's actions as a whole with the actions of a qualified person engaging in the reserved activity. Do the actions involve an assumption of responsibility for the activity that is greater than might be expected from simply giving advice or guidance? The responsibility assumed might be to the client but also should include a responsibility assumed to third parties by communication particularly the courts, registries and lawyers. The motivation of the supporter is relevant. It is more likely that the actions of someone assisting over a period, who provides assistance to multiple cases for a fee, is engaging in a reserved activity than a family member or charity whose motivation is not commercial.

There is a strong case for the modernisation of the framework of reserved activities. The present activities are a blunt instrument of consumer protection, omitting obvious areas of risk such as will-writing and the actual administration of estates. So far as the existing reserved activities are concerned, an approach which made the commercial provision of support more difficult and unpaid support easier may well have benefits. A new system might recognise that even a regulated lawyer is unlikely to be a specialist or even competent in every reserved area. It is unlikely, however, that the principles of activity regulation can be detached from the reform of legal services regulation as a whole, and there is no sign of that happening any time soon. For now, we must continue to be guided by the evolving application of the existing ill-defined rules by the courts to particular facts, and trust that they will know it when they see it. **NLJ**

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