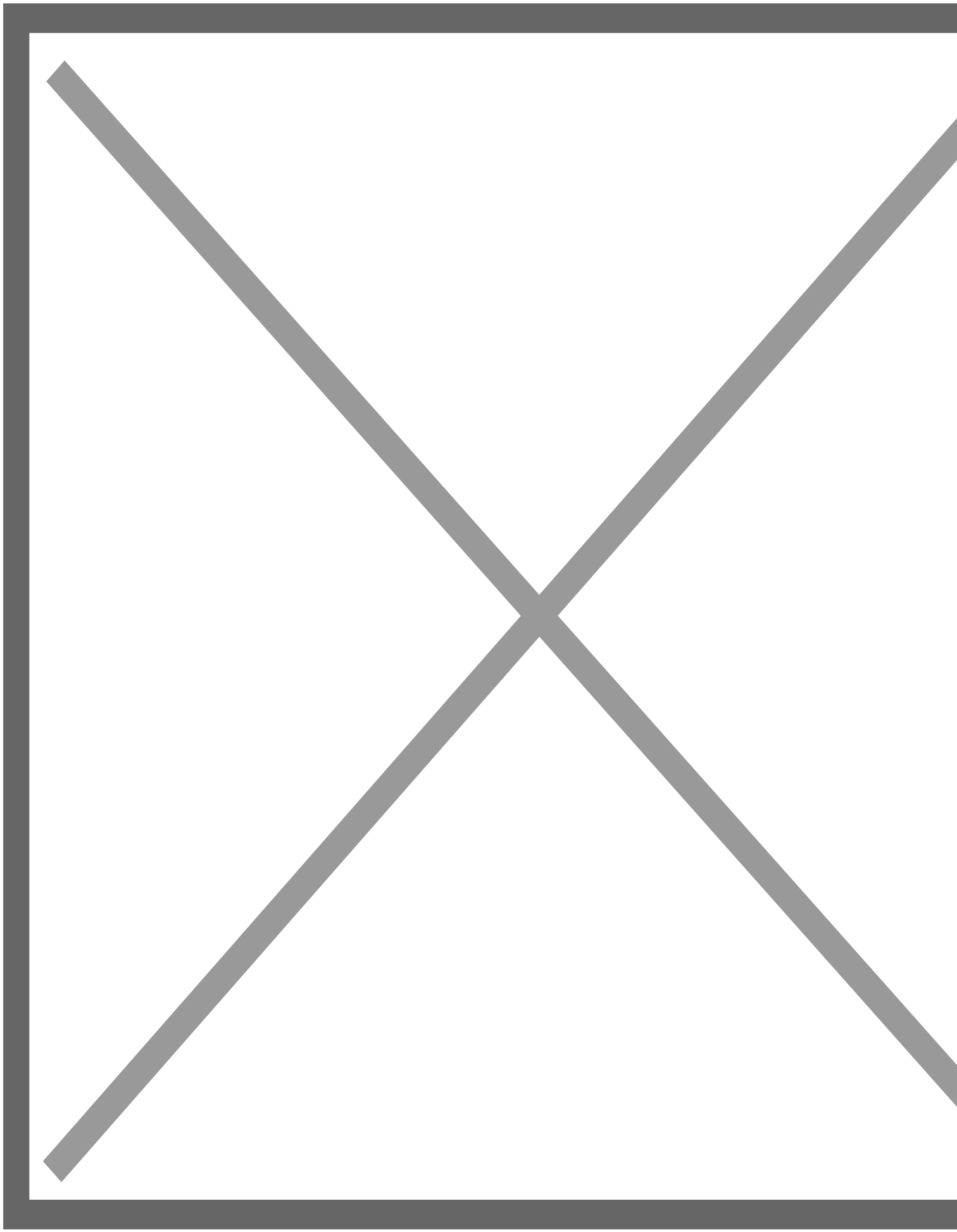
A revised approach to regulation

Professional standards



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In his Chartered Tax Advisers' Address, Stephen Mayson examined the future regulation of legal services and its possible application to tax advice

Professor Stephen Mayson is a barrister and legal commentator who recently concluded a two-year assessment of the regulation of legal services in England and Wales. This article is abridged from his CTA Address speech.

My subject is the future regulation of legal services and its possible application to tax advice and advisers. I have recently submitted a report to the Lord Chancellor following a two-year independent review of legal services regulation. The recommendations cover both long-term and short-term reform.

When I began the review in 2018, I knew that reform for the longer term was not likely in the near future. However, the Covid-19 pandemic has further highlighted the present difficulties. I hope that short-term reform might soon be considered.

The problems

The principal flaws and shortcomings in the current regulatory framework derive from the structure of the Legal Services Act 2007. These include the inflexibility arising from statutory prescription, as well as competing and inappropriate regulatory objectives. A pivotal set of reserved legal activities are anachronistic, distorting the approach to activities that ought to be regulated. Title-based authorisation for reserved activities leads to additional burdens and cost because they are more heavily regulated than they need to be.

The nature of the separation of regulation and representation is unsatisfactory, and unregulated providers cannot be brought within the current regulatory framework. Some activities are not regulated when they ought to be, also putting legally qualified practitioners at a competitive disadvantage.

The increasing costs of legal advice and representation further reduce access to legal services, resulting in more litigants in person, and an increased use of unregulated providers. The rapid development of lawtech, offering legal advice and services at scale and independently of any human or legally qualified input, is also beyond the reach of the current framework.

Consumer confusion results from the existence of both regulated and unregulated providers, and from a profusion of differently regulated professional titles. Additionally, variability in the competence and quality of legal services, as well as inadequate or incomplete consumer protection, result in falling public confidence in legal services and their regulation.

The proposals

Might there be a better way to tackle these issues? In formulating a new approach to regulation, I offer the following seven proposals.

1. The overriding objective of regulation should be the public interest, whether relating to the public good or the protection of consumers.
2. The scope of regulation should be extended to include all 'providers' of 'legal services', including those who are currently unregulatable and providers of lawtech. There should be limited exemptions for most self-representation, advice from family and friends, and information-only services.
3. A single independent, sector-wide regulator of legal services – the Legal Services Regulati on Authority (LSRA) – should replace the current Legal Services Board, approved regulators and regulatory bodies. It should

have the power to delegate defined and limited regulatory powers to other designated bodies.
4. The LSRA would maintain a public register of providers. It would apply regulatory conditions for before, during, and after-the-event regulation, as appropriate to the importance and risk of particular legal services or the relative vulnerability of the clients concerned. These conditions would be monitored and enforced on a sector-wide basis, irrespective of provider.
5. Minimum conditions of registration would require common standards and disclosures, access to complaints investigation and redress, and protection through indemnity insurance. A revised and more extensive ombudsman scheme would provide a single point of entry for individual consumers or micro-organisations.
6. The current reserved activities should be replaced with a requirement for prior authorisation in order to secure the public interest. Where this is required for advocacy and litigation, there would be a dedicated advocacy and litigation regulator as part of the LSRA.
7. Professional titles should not be the only route for entry by individuals into legal services regulation. The LSRA would establish the conditions for personal authorisation or accreditation (with or without a professional title). It would also approve the arrangements for the award and removal of legal professional titles, but the professional bodies would actually confer or remove them.

A key part of the proposed scheme is the assessment of risk by reference to protecti ng the public interest; the complexity of the underlying law; the complexity of the transaction or dispute; the vulnerability of the client; and the nature and extent of any consequences. I expect that tax advice will score significantly on all of these.

For the highest risk services, prior authorisation by the regulator would be required before any practitioners could offer their services to the public. This would apply, in my view, to most advocacy and litigation.

For low risk services, only registration and compliance with minimum conditions would be required. I do not envisage that this would generally involve tax advice.

For intermediate risk services, other regulatory conditions would be imposed by the LSRA, which could include accreditation under an approved scheme for specialist activities, a specific code of conduct, and additional indemnity insurance. Unlike the current position, these intermediate conditions would apply to practitioners only if they undertake the relevant activities.

Practitioners would not need prior approval to undertake intermediate risk services. However, if regulatory conditions apply, their registration entry would have to demonstrate compliance. This would need to declare, for example, the form of approved accreditation they hold, or which method of holding money on behalf of clients was being used.

The LSRA would decide which authorisations or accreditations could be conferred on individuals by virtue of their professional title (qualification). Professional bodies would play a role in education and training, and in forms of specialist accreditation. They could also promote and enforce professional standards above those required by regulation.

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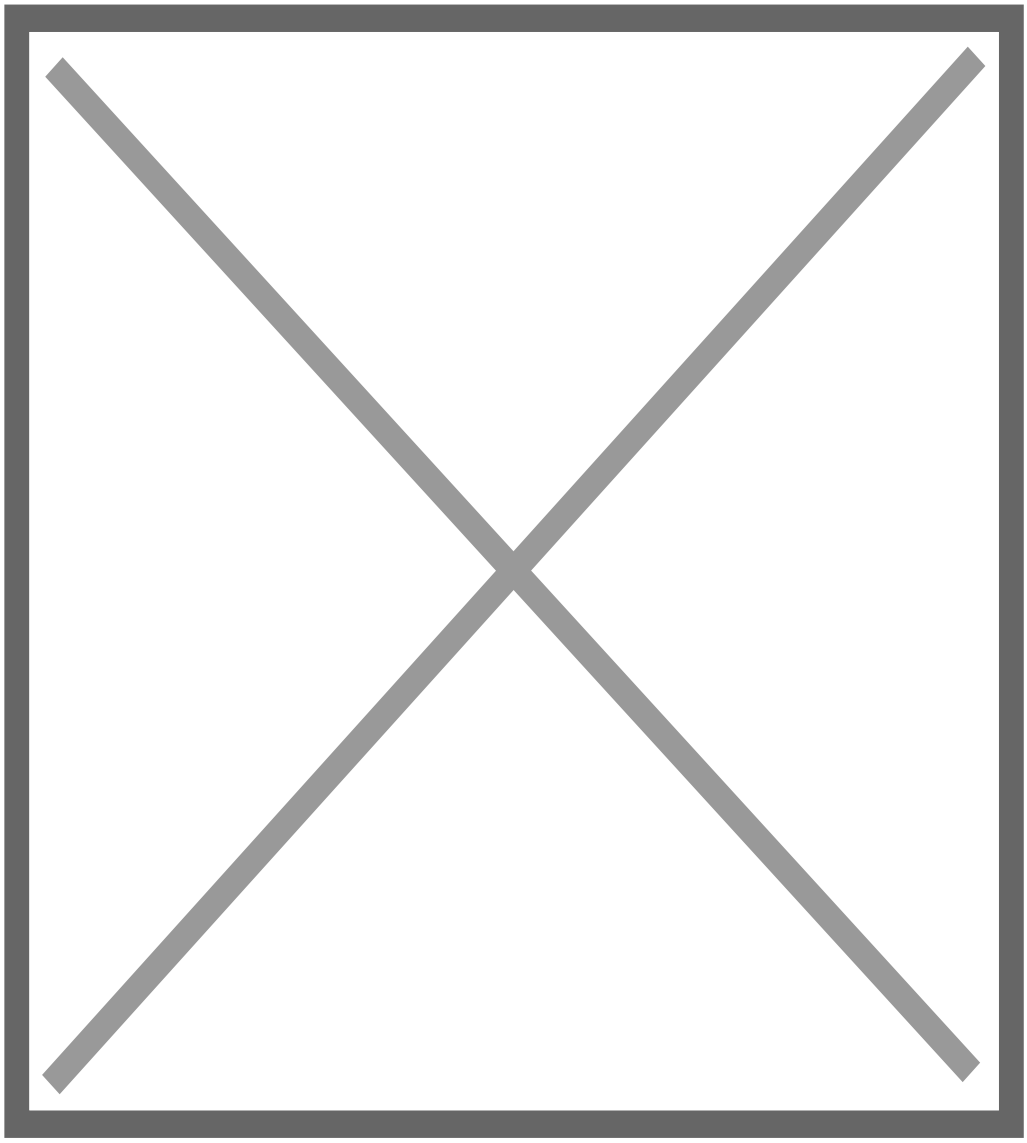

Application to tax practitioners

How might such an approach affect tax practitioners? What follows are personal views, and I cannot guarantee that any new regulator would agree with me in every respect! However, I would first like to make two caveats.

The first is that the report envisages an exemption for any services, including tax advice, that are ‘subsidiary but necessary’ to the provider’s main business. However, there would be no exemption for any legal service for which prior authorisation or personal accreditation is required.

The second caveat is that the principal purpose of registration is for the information and protection of individual consumers and small organisations. Many law firms and accountancy practices provide highly specialist tax advice to extremely wealthy individuals and large businesses. I do not expect them to be subject to mandatory accreditation requirements.

Personal regulation of tax advisers Qualified lawyers who are tax advisers would need to be registered and authorised personally if they conduct tax advocacy or litigation. They would also need to be registered and accredited to the extent required by the LSRA for all or some aspects of tax advice. That accreditation could potenti ally come from bodies such as the CIOT, the Law Society, the Chartered Institute of Legal Executives,

and the Society of Trust and Estate Practitioners. These accreditations should, in my view, be available more widely than their own membership, but that is obviously a matter for them.

Similarly, accountants who are tax advisers would need to be registered and authorised by the LSRA if they conduct tax advocacy or litigation. Accreditation requirements would also apply to them, and accountancy professional bodies would also be sources of approved accreditation.

Accountants providing non-contentious tax advice could benefi t from the LSRA's power to recognise alternative regulatory arrangements. It could, for instance, approve the ICAEW as a designated body to carry out the regulation of legal services provided by chartered accountants.

Chartered tax advisers, tax technicians or similar that are not qualified as either a lawyer or accountant would occupy a new position in the proposed framework.

In offering advice or representation on tax matters, they would be a provider of legal services. As such, they would have to be registered, and meet any regulatory conditions for authorisation (for contentious) and accreditation (for non-contentious) work.

I imagine that the CIOT and ATT would wish to provide the appropriate routes to authorisation or accreditation for their members. In my view, the rules for the award and retention of their respective titles could be approved by the LSRA. Given the highly specialist nature of the work, designated body status with delegated regulatory powers could be achieved.

That brings me to the potential treatment of recognised tax agents who are not affiliated to any professional body. I believe that a tax agent should be treated as a provider of legal services – unless they are simply sources of information or the conduit for information or documents, without any advice being offered. As providers, registration and regulation should offer certainty and consistency to consumers.

Though not a member of a professional body, a tax agent would therefore need to be registered and, for instance, carry a defined minimum level of indemnity insurance. If the agent is providing services that the LSRA has identified as carrying higher risk, then additional regulatory conditions would apply, such as specialist accreditation or compliance with a specialist code of conduct.

The CIOT or the ATT might wish to provide appropriate programmes for accreditation for tax agents. In fact, tax agents may wish to become a member of either or both of those bodies.

Regulation of tax technology

The new approach is designed to apply to legal services provided through technology where no other regulated person is involved in provision or referral. It is not, however, intended to apply to technology that is simply a source of information.

The dividing line between information and advice can be blurred. However, a platform that simply sets out tax law and practice, or allows the completion and submission of tax returns and forms, should not fall within the scope of this proposed regulation. Like other aspects of lawtech, tax technology will no doubt extend its reach, and the regulatory framework should be capable of bringing tech within its remit.

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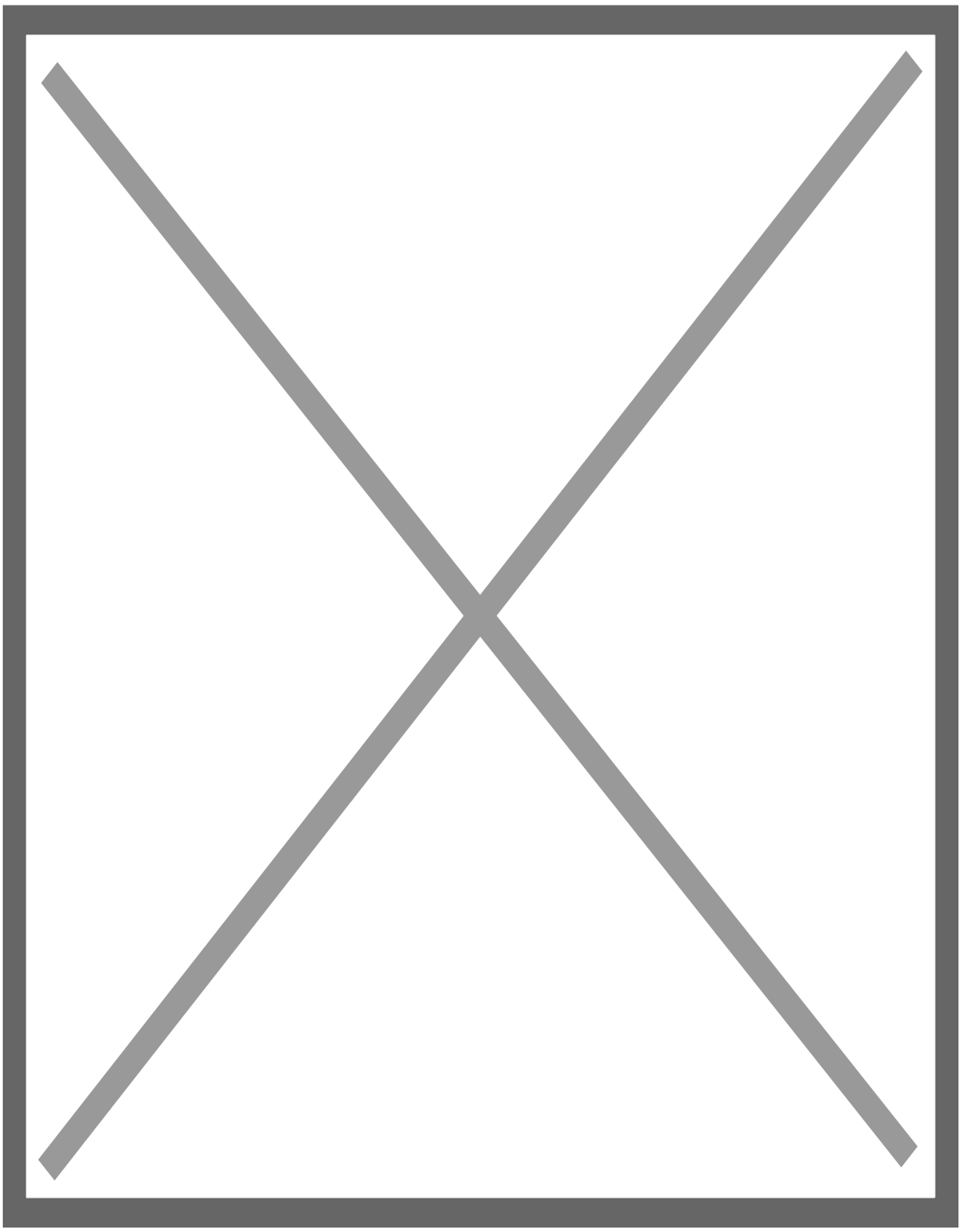

Regulation of entities

In addition to personal registration in respect of higher risk legal services, the registration of a firm or other entity providing tax advice is also necessary under these proposals.

A law firm providing advice will naturally be registered as a provider of legal services. Dedicated tax advisory businesses that are not law or accounting firms would need to be registered as entities, ensuring that their staff are appropriately qualified and registered if personal authorisation or accreditation is required.

Registration would be required for the provision of legal services by multidisciplinary businesses, though it need not apply to the whole business. For an accounting or business advisory firm for which law-based tax advice is a key component of their offering, this could have been an unwelcome imposition.

The solution offered in the report is for the business to register a discrete ‘business unit’, which becomes the registered provider of legal services for the purposes of registration and regulation. Like all other registrants that are not individuals, there would need to be a ‘registered manager’, responsible to the regulator for compliance.

Unlike the current structure, which often requires the regulation of an ‘alternative business structure’ as a separate legal entity, the report proposes the identification and registration of a business unit as if it were a separate legal entity. There would be no requirement for complex legal or structural arrangements with duplicated overheads and compliance functions. Full separation would remain an option for those businesses that preferred it.

Conclusion

The common system of registration would allow any client of any regulated provider of tax advice, whether legally qualified or otherwise, to be assured that the same minimum regulatory requirements are met and that some form of redress will be available if something goes wrong.

Obligations on tax practitioners would be proportionate to the risk and range of the services they were offering, and would build on existing qualifications and accreditations. For those who were not lawyers, although registration at an expected minimal cost would be required, their existing qualifications and regulatory oversight could remain intact.

I have not sought the perfect future system of legal services regulation. No regulatory approach can ever be perfect. Nor can it eradicate all risks to the public interest or to consumers. But I am sure that we could do better, and I hope that my report is a step on that journey.