

What's in a name? Is the title of solicitor still relevant?

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The “solicitor” began emerging as a profession in England during the reign of King Edward I in the late thirteenth century.¹ The role gradually developed by consolidating several vocations of the time including the attorney of the common law courts, solicitor of the Court of Chancery, the scrivener and the classic conveyancer.²

By the sixteenth century, the initial handling of legal matters was being undertaken by solicitors in their acquired capacity as ‘men of affairs’.³ The genesis of the regulatory approach was also becoming evident with an overarching intention towards ensuring competency, and the recognition of authorisation to practice on a Roll of Attorneys.⁴ The desire to regulate stemmed from a perception that there was a legitimate need to eradicate the ‘pettyfoggers’ who sought to disgrace the profession.⁵

Over the centuries the profession, and the regulation accompanying it, has evolved markedly. Today, the Solicitors Regulation Authority (SRA) assumes the duty of regulator. One of the primary functions of the SRA is to ensure that individuals have obtained the requisite education and training to be awarded the title of solicitor.⁶ The title itself is a ‘landmark of our jurisdiction’.⁷ However, it has been the subject of much scrutiny in recent years.

In 2018, Professor Stephen Mayson embarked on an independent review of legal services and regulation in England and Wales.⁸ The review, which at the time of writing was entering its final stage, has sought to evaluate the current regulatory framework for legal services.⁹ A focal point of the review has been the analysis of profession titles and their use within legal regulation.¹⁰

Mayson’s Interim Report expressed a view that professional titles, such as “solicitor”, should not disappear from the legal regulatory framework, but there was scope for them to be re-strengthened.¹¹

¹ Anton-Hermann Chroust, ‘The Ranks of the Legal Profession in England’ (1960) 11 *Western Reserve Law Review* 561 <<https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=3899&context=caselrev>> accessed 24 November 2019

² *ibid* 563

³ Chroust (n 1) 563; Harry Cohen, ‘The Divided Legal Profession in England and Wales - Can Barristers and Solicitors Ever Be Fused?’ (1987) 12 *Journal of the Legal Profession* 7 <https://www.law.ua.edu/pubs/jlp_files/issues_files/vol12/vol12art01.pdf> accessed 24 November 2019

⁴ Chroust (n 1) 563 – 564.

⁵ C.W Brooks ‘*Pettyfoggers and Vipers of the Commonwealth – The Lower Branch of the Legal Profession in Early Modern England*’ (1st edn, Cambridge University Press 1986) 26

⁶ Solicitors Regulation Authority, ‘What we do – Setting standards for solicitors’ <<https://www.sra.org.uk/sra/how-we-work/what-we-do/>> accessed 28 November 2019

⁷ The Law Society, ‘UCL review of Legal Services Regulation: The Law Society response to the second stage of the review’ (24 July 2019) para 16 <[file:///C:/Users/user/Downloads/ucl-review-of-legal-services-regulation-law-society-response-july-2019%20\(4\).pdf](file:///C:/Users/user/Downloads/ucl-review-of-legal-services-regulation-law-society-response-july-2019%20(4).pdf)> accessed 25 November 2019

⁸ Legal Futures, ‘Mayson to lead review of legal regulation’ (*Legal Futures*, 7 June 2019) <https://www.law.ox.ac.uk/sites/files/oxlaw/oscola_4th_edn_hart_2012quickreferenceguide.pdf> accessed 25 November 2019

⁹ *ibid*

¹⁰ Legal Futures, ‘Mayson spells out hard choices in reforming legal regulation’ (*Legal Futures*, 7 June 2019) <<https://www.legalfutures.co.uk/latest-news/mayson-spells-out-hard-choices-in-reforming-legal-regulation>> accessed 25 November 2019

¹¹ Stephen Mayson, ‘Findings, Propositions and Consultations’ (LSR Interim Report, UCL Centre for Ethics and Law, September 2019) 13 <<https://www.ucl.ac.uk/ethics-law/sites/ethics>> accessed 25 November 2019

This assessment has projected the title of solicitor to the forefront of debate and leads one to question whether the title itself is still relevant.

This essay will argue that the title of solicitor is still relevant, firstly in respect of the protection it offers to consumers of legal services. Secondly, the title will be considered in an international context and it will be argued that its multi-jurisdictional recognition is a contributing factor to its relevance. References to “the title” throughout this essay will refer to the professional title of solicitor in England and Wales.

I. Consumer Protection

To achieve an understanding of why the title is relevant in the context of protecting consumers, it is necessary to consider its symbolic value. For the consumer, the title is a ‘quality mark’.¹² It provides an assurance to those unfamiliar with the intricacies of legal practice, that an individual has achieved a required level of qualification and training.¹³ The SRA has previously highlighted that the title conveys reliability and instils confidence in consumers of an individual’s abilities to provide legal services.¹⁴

Behind the symbolism, lies a technical regulatory framework operating in a way that undoubtedly safeguards consumers. The title provides authorisation.¹⁵ As an ‘authorised person’, a solicitor can undertake the six reserved legal activities defined in the Legal Services Act 2007.¹⁶ These ‘inner circle of legal services’¹⁷ are restricted to being performed by titleholders and include rights of audience, conducting litigation, reserved instrument activities, probate activities, notarial activities and the administration of oaths.¹⁸

The effect of having reserved activities exclusively bestowed upon those with the title, is that the activities are automatically subject to regulation by the SRA.¹⁹ Bialowolski notes the advantage of regulation is its ‘presumed ability to protect consumers and the wider public from incompetent and unscrupulous practitioners’.²⁰ The entwined relationship of title and regulation in England and Wales demonstrates Bialowolski’s principle and forms the basis of consumer protection.

The coupling of the title with regulation to provide consumer protection has been criticised. The reality is that *all* legal activities undertaken by a solicitor are subject to regulation, irrespective of whether they

¹² The Law Society (n 7) para 45

¹³ Stephen Mayson, ‘The Focus of Legal Services Regulation’ (March 2019) UCL Centre for Ethics and Law, Working Paper LSR-3, 20 <https://www.ucl.ac.uk/ethics-law/sites/ethics-law/files/irlsr_wp_lsr-3_focus_1903_v1.pdf> accessed 26 November 2019

¹⁴ Solicitors Regulation Authority, ‘Consumer attitudes towards the purchase of legal service’ (February 2011) 6 <<https://www.sra.org.uk/globalassets/documents/consumer-reports/consumer-research-2010-purchase-attitudes-overview.pdf>> accessed 26 November 2019

¹⁵ Legal Services Act 2007 (LSA 2007) s 18 (1)(a)

¹⁶ LSA 2007 s 12 and Sch 2

¹⁷ Sir David Clementi, ‘Review of the Regulatory Framework for Legal Services in England and Wales – Final Report’ (December 2004) Chapter E, para 14 <http://www.avocatsparis.org/Presence_Internationale/Droit_homme/PDF/Rapport_Clementi.pdf> accessed 26 November 2019

¹⁸ LSA 2007, Sch 2

¹⁹ Stephen Mayson, ‘Assessment of the Current Regulatory Framework’ (March 2019) UCL Centre for Ethics and Law, Working Paper LSR-0, 10 <https://www.ucl.ac.uk/ethics-law/sites/ethics-law/files/irlsr_wp_lsr-0_assessment_1903_v2.pdf> accessed 28 November 2019;

²⁰ Bialowolski et al, ‘Effects of Regulation on Service Quality’ (DOI:10.2873/910094, 2018) part I.A.1 <https://www.academia.edu/38447129/Effects_of_regulation_on_service_quality> accessed 26 November 2019

are reserved activities or not.²¹ Mayson notes this ‘inflexibility’ of the title.²² It results in low risk legal activities being undertaken by solicitors when they do not necessarily need to be.²³ For solicitors, costs are greater because they are regulated, which means this burden is transferred to the consumer.²⁴ It is argued that it would potentially be more beneficial for consumers to have non-reserved legal activities carried out by non-title holders who provide legal services.²⁵ Non-reserved legal activities could for example include will writing or providing legal advice at a police station.²⁶

There are three main difficulties with this argument that will be considered. The first underlying presumption is that consumers prefer to pay less for legal services. Price however, has proven not be the deciding factor when an individual is choosing a provider.²⁷ Research undertaken by LawNet suggests that only four per cent of new business is won on price, and characteristics such as reputation and trust are more persuasive.²⁸ The title of solicitor embodies trust.²⁹ It is therefore possible to align the two and conclude that the title itself is a key feature that consumers will look for when considering a legal provider. This only serves to emphasise the relevance of the title.

Secondly it is presumed consumers would be content with a ‘provider of legal services’³⁰ handling their legal matters. Practically speaking, if legal matters are not being handled by a solicitor, they will not be subject to legal professional privilege or litigation privilege.³¹ The concepts prevent certain communications between lawyer, client and third parties being disclosed.³² A consumer’s communications with a provider of legal services therefore loses this layer of protection immediately. Albeit, legal professional privilege and litigation privilege may not be concepts widely discussed outside of the legal profession, therefore a consumer may not be aware of them. Nonetheless, it highlights a potential flaw in consumer protection, where providers of legal services are concerned.

Thirdly, it is presumed that the high level of regulatory protection provided by the title is not *needed* by consumers, where low risk activities are being undertaken. The changing legal landscape, and the rise in providers of legal services that do not hold a title, would support this view.³³ However, what a consumer *needs* is very different to what a consumer may *want*. The title seeks to uphold the Kantian principle of autonomy and allows consumers to act as rational agents making decisions based on the

²¹ Legal Services Institute, ‘The Regulation of Legal Services: Reserved Legal Activities – History and Rationale’ (August 2010) 2 <<https://assets.publishing.service.gov.uk/media/5887374d40f0b6593700001a/legal-services-market-study-final-report.pdf>> accessed 26 November 2019

²² Mayson (n 11) 3

²³ Mayson (n 11) 11 and 43 - 47

²⁴ Mayson (n 11) 4

²⁵ Mayson (n 11) 43 - 47

²⁶ Legal Services Institute (n 21) 2

²⁷ Legal Futures, ‘Is trust more important than price when choosing a law firm?’ (*Legal Futures*, 25 November 2019) <<https://www.legalfutures.co.uk/blog/is-trust-more-important-than-price-when-choosing-a-law-firm>> accessed 26 November 2019

²⁸ *ibid*

²⁹ The Law Society (n 7) para 46

³⁰ Mayson (n 11) 43 - 44

³¹ DLA Piper Legal Professional Privilege, ‘Powers of the Regulators’ (17 September 2018) <<https://www.dlapiper.com/en/uk/insights/publications/2018/09/powers-of-the-regulators/legal-professional-privilege/>> accessed 26 November 2019

³² *ibid*

³³ Jonathan Goldsmith, ‘What to do about unregulated legal services providers’ (*The Law Society Gazette*, 30 September 2019) <<https://www.lawgazette.co.uk/commentary-and-opinion/what-to-do-about-unregulated-legal-services-providers/5101577.article>> accessed 26 November 2019

rules that one sets oneself.³⁴ This philosophy is also respected within the statutes of our jurisdiction.³⁵ One can therefore assert that the title exists to provide consumers with a ‘meaningful choice’ when considering what protection they require for their legal matters.³⁶ It is accepted that consumers may not fully comprehend the regulatory framework and protection provided behind their choice. Mayson notes that consumers can find it difficult to make assessments,³⁷ but this is something that can be addressed through education.³⁸ The very existence of the title as a choice, in a sea of legal services providers, is key.

II. Multi-jurisdictional Recognition

The UK is Europe’s largest legal market³⁹ and the title plays a ‘crucial role’ in maintaining its international standing.⁴⁰ In 2018, there were over 200 international law firms with offices within the UK.⁴¹ The London based firms included within this total had between forty-five and sixty-five per cent of their lawyers working outside of the UK.⁴²

The multi-jurisdictional benefit of the title is apparent when mutual recognition of title agreements are considered. A mutual recognition agreement (MRA) is an international agreement under which countries agree to recognise, in whole or part, another's regulatory authorisations.⁴³ The Lawyers’ Establishment Directive,⁴⁴ the Lawyers’ Services Directive⁴⁵ and the Professional Qualifications Directive⁴⁶ (PQD) can all be presented as examples of MRA’s being in place that benefit the UK.

The PQD in particular has facilitated the implementation of the Qualified Lawyers Transfer Scheme Regulations (QLTS).⁴⁷ The QLTS is a unique mechanism enabling qualified lawyers, from recognised jurisdictions, to qualify as solicitors in England and Wales.⁴⁸ In October 2019 there were over 7,000

³⁴ Mark D. White ‘*Kantian Ethics and Economics: Autonomy, Dignity and Character*’ (Stanford University Press, 2011) 19

³⁵ Mental Capacity Act 2005; Select Committee on the Mental Capacity Act 2005, *Mental Capacity Act 2005: Post-legislative scrutiny* (HL 2013-14, 139-I) 139

³⁶ The Law Society, ‘UCL review of Legal Services Regulation: The Law Society Position Paper’ (February 2019) para 5(e) <[file:///C:/Users/user/Downloads/position-paper-future-of-regulation%20\(5\).pdf](file:///C:/Users/user/Downloads/position-paper-future-of-regulation%20(5).pdf)> accessed 26 November 2019

³⁷ Mayson (n 11) 8

³⁸ The Law Society (n 36) para 83 and 92

³⁹ Max Walters, ‘Don’t put up barriers for EU lawyers in no-deal Brexit, Law Society urges’ (*Law Society Gazette*, 11 January 2019) <<https://www.lawgazette.co.uk/law/dont-put-up-barriers-for-eu-lawyers-in-no-deal-brexit-law-society-urges/5068845.article>> accessed 27 November 2019

⁴⁰ The Law Society (n 36) para 95

⁴¹ The City UK, ‘Professional Services Series – Legal Services’ (November 2018) 4 <<https://www.thecityuk.com/assets/2018/Reports-PDF/86e1b87840/Legal-excellence-internationally-renowned-UK-legal-services-2018.pdf>> accessed 27 November 2019

⁴² *ibid* 6

⁴³ Kalypso Nicolaidis, ‘Managed Mutual Recognition: The New Approach to the Liberalization of Professional Services’ (OECD Publications, 1997) para 4 <<http://users.ox.ac.uk/~ssfc0041/managemr.htm>> accessed 28 November 2019

⁴⁴ Council Directive 1998/5/EC of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained [1998] OJ L77/36

⁴⁵ Council Directive 1977/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services [1977] OJ L78/17

⁴⁶ Council Directive 2005/36/EC of 7 September 2005 on the recognition of professional qualifications [2005] OJ L255/22

⁴⁷ Solicitors Act 1974, s 2 and s 18

⁴⁸ The Bar Council, ‘EU lawyers in the UK - Practice rights under the draft Withdrawal Agreement and Q&A’ (UK Delegation Paper, 16 November 2018) 3 <https://www.barcouncil.org.uk/media/695906/eu-lawyers-in-the-uk-practice-rights-q-a_revised_nov_2018.pdf> accessed 28 November 2019

registered European and foreign lawyers practising in England and Wales.⁴⁹ This figure has almost doubled from only 3,940 practising in 2011.⁵⁰ The surge in international lawyers seeking to obtain the title, solidifies its importance on the international stage.

Solicitors initially qualifying in England and Wales also benefit from recognition of their title in European jurisdictions.⁵¹ The relevance of this is further emphasised when contrasted with the position in the USA. The inability for the titles of US lawyers to be easily recognised on an international level leaves many only able to practise in their home states.⁵²

The impact of “Brexit” on mutual recognition must also be considered. The UK’s impending exit from the European Union threatens the title’s international standing. It is also accepted that this is a concerning issue for international lawyers and could effectively damage the UK’s international reputation in legal services.⁵³

The UK’s Withdrawal Agreement makes provisions for the recognition of professional titles under the PQD to remain.⁵⁴ However, if a “no deal” Brexit is secured, the PQD is likely to become redundant.⁵⁵ This will adversely affect EU lawyers practising in England and Wales as their ability to have their European qualifications recognised, to obtain the title of solicitor, would become much more challenging.⁵⁶

The effect of Brexit does however remain to be seen. Preparations are underway in the form of statutory instruments to assist EU lawyers if a no deal Brexit occurs.⁵⁷ It should however be noted that the substance of the title will not become any less “relevant” after Brexit. The particular ways in which individuals can acquire the title may change, but it will continue to be desirable internationally.

The legal system in England and Wales is world renowned for its common law and respect for the rule of law.⁵⁸ The title is an extension of the system. It epitomises the separation of the profession from the institutions of state. The existence of the SRA as an independent regulatory body distinguishes England and Wales from other countries.⁵⁹ This element of the title will still be capable of serving as an incentive to the foreign lawyer drawing them to the UK.

⁴⁹ Solicitors Regulation Authority, ‘Population of solicitors in England and Wales’ (2019) <https://www.sra.org.uk/sra/how-we-work/reports/statistics/regulated-community-statistics/data/population_solicitors/> accessed 28 November 2019

⁵⁰ *ibid*

⁵¹ The Bar Council (n 48) 1

⁵² Lucy Williams, ‘Brexit and practising rights for lawyers’ (*Kingsley Napley*, 9 July 2018) <<https://www.kingsleynapley.co.uk/insights/blogs/brexit-blog/brexit-and-practising-rights-for-lawyers>> accessed 28 November 2019

⁵³ The Economist, ‘Brexit could deprive British law firms of business in two ways’ (*The Economist*, 25 November 2017) <<https://www.economist.com/britain/2017/11/25/brexit-could-deprive-british-law-firms-of-business-in-two-ways>> accessed 28 November 2019

⁵⁴ HM Government, ‘Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community’ (19 October 2019) 47 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840655/Agreement_on_the_withdrawal_of_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland_from_the_European_Union_and_the_European_Atomic_Energy_Community.pdf> accessed 28 November 2019

⁵⁵ Solicitors Regulation Authority, ‘Brexit’ <<https://www.sra.org.uk/home/hot-topics/brexit/>> accessed 28 November 2019

⁵⁶ *ibid*

⁵⁷ *ibid*

⁵⁸ The Law Society, ‘England and Wales – Global Legal Centre’ (2018) 2 <[file:///C:/Users/user/Downloads/england-and-wales-global-legal-centre-leaflet%20\(1\).pdf](file:///C:/Users/user/Downloads/england-and-wales-global-legal-centre-leaflet%20(1).pdf)>

⁵⁹ The Law Society, ‘The Regulatory Regime’ <<https://www.lawsociety.org.uk/support-services/advice/articles/regulation-key-facts/>> accessed 28 November 2019

III. Conclusion

The title has specific connotations in the mind of the consumer. It epitomises qualification and quality. The combining of regulation with the title establishes it as fundamental tool for signalling and providing consumer protection. There is scope for the protection and regulation provided by the title to be better explained to consumers. Nonetheless, its existence is crucial in providing a choice to consumers when they are faced with a legal services market that is littered with different providers. With the number of providers of legal services on the increase, there is no better time to advocate for the relevance of the title as a mechanism for ensuring the protection for consumers.

The title has worldwide recognition attracting lawyers from afar and allowing solicitors of England and Wales to work internationally. The existence of MRA's with the UK has undoubtedly been able to facilitate this. The title is therefore instrumental in maintaining and advancing the UK's position as a leader in the legal services sector. From an economic perspective, this can only be beneficial for the UK.

The threat of a no deal Brexit could potentially de-rail the harmonious mutual title recognition set up that currently exists. However, it cannot alter the fundamental principles on which the UK legal system is based. These have been embodied in the title, which only adds to its continuing appeal in the international legal sector.

The solicitor is a distinct, unrivalled, international brand that is not likely to go out of fashion any time soon.

(1919 words, excluding subheadings and footnotes)