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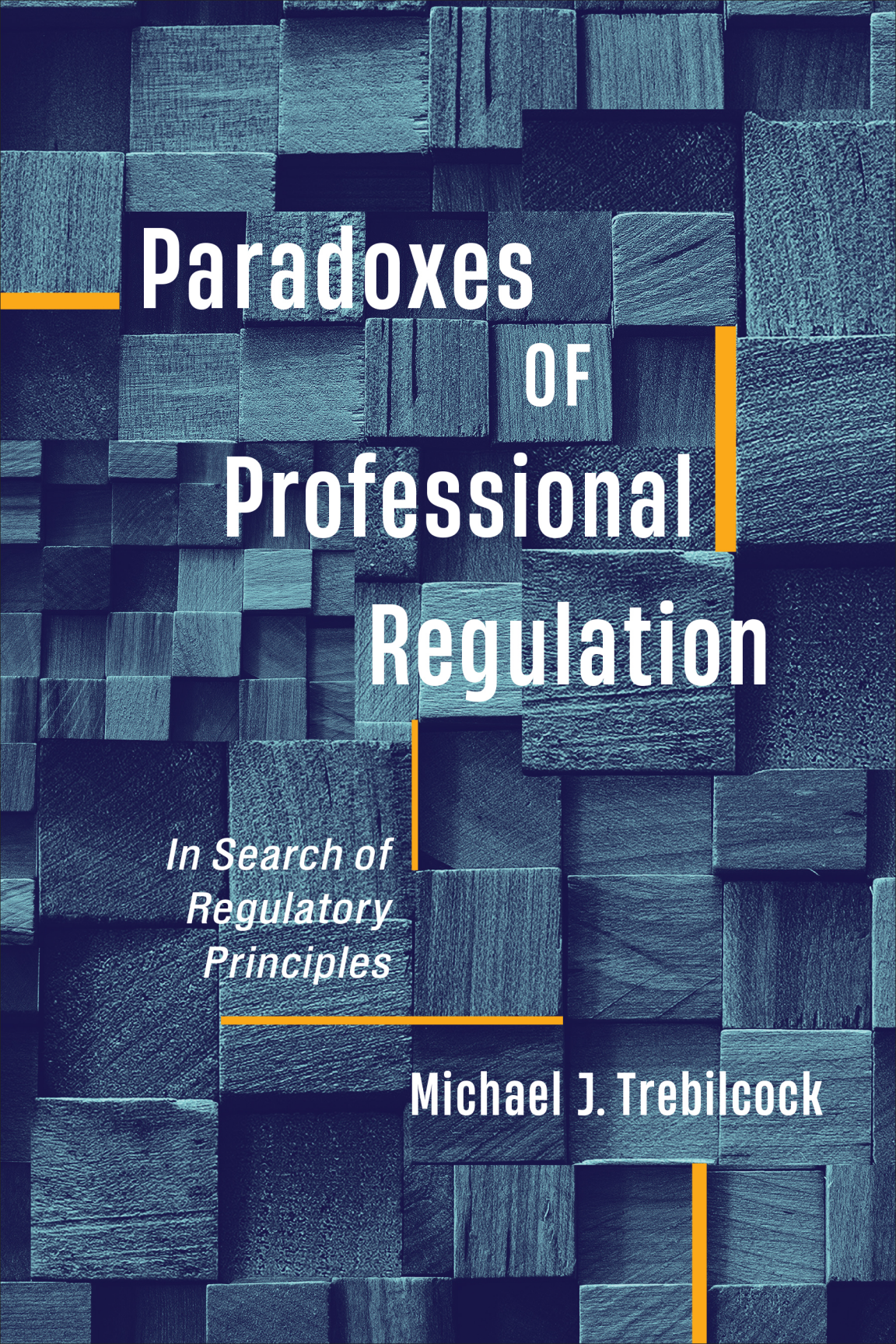
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**Paradoxes
OF
Professional
Regulation**

*In Search of
Regulatory
Principles*

Michael J. Trebilcock

PARADOXES OF PROFESSIONAL REGULATION

In Search of Regulatory Principles

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Paradoxes of Professional Regulation

In Search of Regulatory Principles

MICHAEL J. TREBILCOCK

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Preface

In developing the case-studies that form the core of this book, I am greatly indebted to several Research Assistants whose contributions were so substantial that they should be thought of as co-authors with me of several of the case-studies: Kanksha Mahadevia Ghimire with respect to the case-studies on alternative medicines and mental health care providers (the former originally published as a CD Howe Institute Commentary and subsequently revised and included with permission of the Institute), and Isaac Gazendam with respect to the case-study on immigration consultants. The case-study on the regulation of financial planners/advisors is co-authored with my colleague Anita Anand and Francesco Ducci, a recent doctoral graduate, and was published in the *Canadian Business Law Journal* and is reproduced here, with minor revisions, with kind permission of the publishers. The case-study on the regulation of legal services draws on several recent papers of mine, as acknowledged in the text.

While each of these areas of professional regulation warrant study in given jurisdictions in their own right, this book proceeds on the premise that much insight is to be gained by examining each of them in a comparative perspective in terms of alternative regulatory approaches across jurisdictions, and also by comparing regulatory approaches across professions. From both of these comparative perspectives disconcerting incongruences emerge, suggesting a lack of a settled analytical framework for evaluating alternative paradigms of professional regulation, rendering regulatory regimes that one observes often the product of special interest group politics rather than the application of any defensible set of regulatory principles. This has led to what I call in the title to this book paradoxes of professional regulation: over and under regulation of professional services. All five case-studies that form the core of this book illustrate these paradoxes in one form or another and illuminate the more general challenges of developing a coherent framework for professional regulation – challenges rendered more urgent with the increasing dominance of the service sector in most developed country economies

and citizens' pervasive involvement in service sectors as producers or consumers (or often both).

I am indebted to my co-authors of several of these case-studies, to two anonymous reviewers of earlier drafts of this book, and to Daniel Quinlan of the University of Toronto Press for much helpful advice and efficient oversight along the publication route. And as always, in developing this book I am enormously indebted to my wonderful assistant for the past twenty years, Nadia Gulezko, for handling many of the logistics of turning raw material into coherent a manuscript with consummate skill and patience.

Michael Trebilcock

PARADOXES OF PROFESSIONAL REGULATION

In Search of Regulatory Principles

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1 Introduction: Paradoxes of Professional Regulation: Under- and Over-Regulation of Professional Service Markets

Occupational licensure, including regulation of the professions, dates back at least to the medieval guilds. While these guilds have long since vanished in their original form, occupational licensure, including regulation of the professions, is alive and well and indeed thriving. A 2015 study by the US government finds that today fully 22 per cent of American workers must hold a licence simply to do their jobs, up from just 5 per cent in 1950, while unionization in the private sector has declined by about the same percentage.¹ The same study finds that more than 1,100 occupations are regulated in at least one state, but fewer than 60 are regulated in all 50 states, reflecting substantial differences regarding which occupations states choose to regulate. For example, funeral attendants are licensed in nine states, hair braiders in a few states, and florists in only one state. States also have very different requirements for obtaining a licence. For example, Michigan requires three years of education and training to become a licensed security guard, while most other states require only 11 days or less. South Dakota, Iowa, and Nebraska require 16 months of education to become a licensed cosmetologist, while New York and Massachusetts require less than eight months. While the long-established professions such as medicine, dentistry, pharmacy, law, engineering, and architecture reflect more settled regulatory

1 See report prepared by the US Department of the Treasury Office of Economic Policy, the Council of Economic Advisers, & the Department of Labor, "Occupational Licensing: A Framework for Policy-Makers" (Washington, DC, July 2015); see also Morris Kleiner & Evgeny Vorotnikov, "Analyzing Occupational Licensing among the States" (2017) 52 *Journal of Regulatory Economics* 132; Brink Lindsey & Steven Teles, *The Captured Economy: How the Powerful Enrich Themselves, Slow Down Growth, and Increase Inequality* (Oxford University Press, 2017), ch. 5; "License to Kill Competition: America Should Get Rid of Oppressive Job Licensing," *The Economist* (17 February 2018).

paradigms in the US and other developed countries, the case studies in this book – complementary and alternative medicines; mental health care providers; financial advisers; and immigration consultants – present a stronger case for regulation than the dubious if not spurious case for the occupational regulation of florists, hair braiders, and cosmeticians in that incompetent services provided to uninformed or ill-informed consumers may pose serious risks to their physical, mental, or emotional health, financial well-being, or legal status. However, those case studies also reveal a highly unsettled regulatory landscape across jurisdictions – that is, more unsettled than for the longer-established professions. Even the legal profession has begun to encounter major policy divergences in its regulatory regimes, as reflected in this book’s final case study.

As illustrated in the case studies I present in this book, the patchwork quilt of regulations the covers many professions in the developed world reflects an interaction of two sets of factors: one normative, and one positive. From a normative perspective, this patchwork quilt reflects the lack of a robust normative consensus regarding the regulation of professional service markets, including when such regulation is justified, who should administer it, and what form it should optimally take. Terms such as “licensed,” “certified,” “registered,” and “accredited” are used loosely and confusingly. From a positive perspective, the lack of a robust normative consensus on rationales for regulation and choice of regulatory instrument invites relatively undisciplined political economy factors – interest group politics – to shape the demand for and supply of professional regulation and the choice of regulatory instruments. Again, this tension dates back to the medieval guilds, which protected producers while sometimes being rationalized as protecting consumers as well. The inconsistent – indeed often incoherent – pattern of professional regulation we observe in many jurisdictions today reflects the same tension between producers and consumers (i.e., who is really being protected?), although this pattern defies the simple political economy explanation that producer interests are typically more concentrated and thus tend to prevail over diffuse consumer interests in the political process.²

In many professional markets, the most compelling rationale for regulation is information breakdowns in those markets and, less commonly, negative externalities. Consumers may be led to make inappropriate

2 See Gabriel Schaffer & Ryan Nunn, “Occupational Licensing and the Limits of Public Choice Theory,” Research Paper no. 19–18, University of Pennsylvania Institute for Law and Economics (2020); cf. Milton Friedman, *Capitalism and Freedom* (University of Chicago Press, 2009), ch. 9; Walter Gellhorn, “The Abuse of Occupational Licensing” (1976) 44 U Chicago L Rev 6.

(non-optimal) purchases of professional services as a result of possessing imperfect information about the characteristics of alternative service providers or about the specific service being provided. Thus, the principal argument for regulation of professional markets derives from an apprehension that in unregulated markets the quality of the service delivered will often be unsatisfactory. Given the high costs of error faced by clients (or sometimes third parties) with respect to many kinds of professional services, the dominant regulatory objective becomes defined as quality control (as is typically also the rationale for product safety regulations).

However, while quality control may be the objective, it is worth stressing that the case for controlling the quality of professional services derives from an information failure in such markets. In a world of perfect information, there would rarely, if ever, be a quality problem. Consumers would be perfectly informed about the skills and prices of alternative providers, the relative risks associated with particular or alternative service offerings, and the existence of defaults in performance in the event that these should occur. Providers in turn would be fully aware that consumers would be able to make perfectly discriminating choices of providers before service and to perfectly identify shortcomings in performance after service. In the latter event, transaction costs aside, providers would know there was an absolute certainty that they would have to face the full social costs of any default in performance by virtue of civil liability suits for breach of contract or tortious misconduct. Where informed consumers make choices that negatively affect third parties, again civil liability may internalize these externalities (transaction costs aside).

Before examining the principal regulatory instruments available for the regulation of service quality in professional markets, some clarification of what is meant by “quality” in this context may be useful.

First, it is clear that here, as elsewhere, optimal quality is at least in part a function of price. Other things being equal, there is no single standard of quality that is socially more desirable than another if the price charged varies proportionately with the quality of service rendered. For one price one can get tax advice or criminal advocacy from one’s family lawyer; for another price one can get tax advice or criminal advocacy from the top experts in the country in their respective fields. In this sense “quality” means to some extent “value for money,” and it will not always be easy to determine whether dissatisfied consumers are complaining about quality or price. Other things are not always equal, of course, and consumer ignorance of serious risks being run at a given level of service and price, or a risk of serious third party effects, may call for prescribed quality standards, although with a sensitivity to the fact that excessively stringent standards may price some consumers out of the market and deny them

access to any of the services in question, even those of less exacting quality or delivered through lower-cost innovative service modalities.

Second, “quality” in the present context obviously comprehends not only an appropriate level of technical competence and due care in its application in particular cases, but also other service characteristics often deemed important by consumers, for example, the ability to explain clearly the nature of the procedures involved and the regular reporting of progress in a matter, as well as promptness in execution, ability to empathize with a consumer, and so on. It is important to recognize that consumers often regard these service characteristics as important dimensions of quality when one is evaluating the effectiveness of alternative quality control mechanisms in the professions.

It is useful, for clarity of analysis, to divide regulatory options into *ex ante* and *ex post* options: *ex ante* forms of regulation are directed to the entry qualifications of those seeking to provide a professional service, while *ex post* forms of regulation address post-entry forms of conduct. Most regulated professions have historically placed more emphasis on *ex ante* forms of regulation than on *ex post* regulation, that is, on input rather than output or outcome regulation.

With respect to *ex ante* regulation, three broad regulatory options are available: (a) *exclusive licensure* of a defined category of professional services; (b) *certification* of certain classes of service providers as meeting prescribed entry qualifications, but without precluding non-certified providers from offering the category of service in question (i.e., exclusive or reserved titles as opposed to exclusive or reserved fields of practice); and (c) *registration*, where all individuals providing services in a given field are required to register in a publicly accessible central registry, but without any entry qualification requirements, although registrants may be required to provide information on the registry of formal education and training, relevant job experience, and organizational and professional affiliations (if any). I review briefly each of these regulatory options in terms of their strengths and weaknesses, which are often not carefully distinguished in the literature on occupational licensing (including the empirical studies noted at the outset of this chapter).

With respect to professional or occupational licensure, it has the virtue of excluding *ab initio* from a field of practice practitioners or aspiring practitioners who cannot meet prescribed minimum educational and training standards or who have unacceptable prior records of criminal or unethical behaviour. This provides consumers of these services with some assurance of minimum standards of competence and integrity on the part of any licensed practitioner.

Recent critical analyses of the proliferation of occupational or professional licensure regimes (at least in the US) emphasize various costs or deficiencies in many such regimes.³ First, the issuance of a licence to practise in a defined occupation or field of professional services rarely signifies equal competence to provide services across the entirety of the licensed domain, and hence provides limited assurance of a licensee's competence with respect to all services falling within this domain. Second, even if the initial issuance of a licence provides some reasonable assurance of competence at that point in time, it provides limited assurance of competence over the course of an ensuing career within the licensed domain. Third, exclusive licensure regimes restrict competition in the licensed domain, which raises incomes for licensed practitioners but also raises the prices faced by consumers of the licensed services; as with product safety standards, this requires increased costs to be compared to safety gains (ideally through empirically rigorous methodologies).⁴ Fourth, perhaps surprisingly, empirical research has found (at least in the US context) that exclusive licensure regimes often do not significantly enhance the quality of services relative to those provided by comparable service providers in unregulated or less strictly regulated jurisdictions.⁵ Fifth, because occupational or professional licensure regimes are often adopted at the sub-national level (at least in federal jurisdictions), requirements often vary sharply from one jurisdiction to another, creating major impediments to job mobility both within and across jurisdictions (absent mutual recognition agreements). Finally, because most occupational or professional licensure regimes are both promoted and administered (either *de jure* or *de facto*) by members of the licensed profession itself on the grounds that only they have the technical expertise to determine *ex ante* and *ex post* qualifications for practice, an inherent conflict of interest arises between protecting the public or consumer interest and protecting the interests of members of the occupation or profession in question (as with the medieval guilds). This may be reflected in attempts to suppress socially desirable forms of vertical competition (e.g., doctors, midwives, and nurse practitioners; lawyers and paralegals) or horizontal competition with alternative service providers (e.g., physicians and alternative health care providers; lawyers and online legal advice services). These concerns may be mitigated by tempering self-regulation through,

3 *Supra* note 1.

4 See Jeremy D. Fraiberg & Michael J. Trebilcock, "Risk Regulation: Technocratic and Democratic Tools for Regulatory Reform" (1998) 43 McGill L J 835.

5 See research appendix in "Occupational Licensing: A Framework for Policy Makers," *supra* note 1.

for example, prescribed representation on governing bodies of organized demand-side interests, para-professionals, and adjacent professions, who can provide an internal set of checks and balances and an external whistle-blower function; requiring government approval (in the form of regulations) of proposed rules governing entry and post-entry competence; and perhaps designating an ombudsperson independent of the profession to oversee the complaints/disciplinary process.

With respect to certification regimes, depending on their design, their principal virtue is that they provide more reliable signals of competence and integrity than a completely unregulated occupational or professional service market, while avoiding the inflexibility and other disadvantages of an exclusive licensure regime. However, as with occupational licensure, certification regimes suffer from some significant costs and disadvantages. First, many occupational, professional, and trade associations already provide private forms of certification of the members of their association. The proliferation of these private certification regimes does little to reduce confusion or ambiguity for consumers in choosing among certified service providers. Second, while this ambiguity and confusion can be reduced through government-accredited certification bodies, challenges arise in designing such regimes in terms of determining which bodies qualify for government-accredited certification powers and appropriate entry and post-entry competence requirements in order to qualify for government accreditation. Third, even assuming that these design issues can be satisfactorily resolved, even a government-accredited certification regime does not resolve completely the uncertainty in competence differentials facing consumers as they choose between certified and uncertified service providers, nor does it provide any assurance in itself that a certified practitioner is equally competent across all types of services embraced by the certification regime or that a practitioner appropriately certified as competent at the point of initial issuance of a certification remains competent thereafter for the duration of his or her career (as with the case of occupational or professional licensure). Fourth, certification regimes, even government-accredited certification regimes, may impede job mobility within and across jurisdictions, albeit in a more muted form than occupational or professional licensure regimes. Finally, even government-accredited certification regimes are likely to be administered by members of the occupational or professional body in question, which raises similar, albeit more muted, conflicts of interest between protecting consumer interests and protecting the interests of the professionals in question as under licensure regimes.

With respect to registration regimes, anybody active in providing professional services within a defined field could be required by regulation to

register themselves on a central, publicly accessible registry, ideally along with certain basic information (such as formal education and training, relevant job experience, relevant organizational and professional affiliations), disciplinary complaints or civil liability claims and their disposition, but with no regulatory prerequisites for any of these qualifications (although subject to laws on false or misleading advertising as well as civil liability for misrepresentation). Relative to exclusive occupational or professional licensure, or government-accredited certification regimes, registration is obviously the most flexible and least restrictive *ex ante* regulatory option, although it comes with some obvious concomitant disadvantages. Most prominently, it places a large burden on often imperfectly informed consumers in choosing among alternative service providers on the basis of often highly heterogeneous information furnished by individual providers on the public registry, and thus may have only a modest impact on ameliorating the information asymmetries between providers and consumers that are the central normative rationale for the regulation of professional service markets (although online rating systems may have some potential to mitigate these problems, subject to resolving the risks of gaming such systems).⁶

With respect to *ex post* forms of regulation of professional service markets, under both exclusive licensure regimes and many forms of certification regimes (especially government-accredited certification regimes), various forms of post-entry misconduct or incompetence would be rendered subject to the disciplinary procedures of the governing bodies of the regulatory regimes in question, leading at the limit to suspension or cancellation of a licence or certification or less severe mandatory remedial training, substance abuse treatment, or practice restrictions. Such procedures may be (and historically have been) mainly passive in nature, precipitated by a consumer complaint or pattern of complaints, but they may be more active in nature through practice audits and the like designed to uncover cases of misconduct or incompetence, and they may be augmented by recommended or prescribed checklists (at least for more routine procedures).⁷ Such disciplinary regimes may be reinforced by criminal sanctions for various forms of fraud, embezzlement, or other cases of gross misconduct, or for false or misleading forms of advertising, marketing, or promotion, and by civil liability for some of these forms of incompetence and misconduct, typically through the tort of negligence. However, historically at least, most of these forms of *ex post* professional regulation have relied heavily on victim initiation and hence often rely

6 See US Federal Trade Commission, “The Sharing Economy: Issues Facing Platforms, Participants, and Regulations” (2016), ch. 2.

7 See Atul Gawande, *The Checklist Manifesto: How to Get Things Right* (Picador, 2011).

on heroic assumptions about the ability or willingness of many consumers to initiate such processes after the fact, especially in situations where they offer little or no prospect of fully redressing whatever harm consumers may have suffered from the conduct in question. Moreover, the information costs facing consumers in evaluating whether they are the victims of incompetent professional services are often significant. After all, in most lawsuits, one party will be the loser, however well-represented; and many medical procedures have only an outside chance of ameliorating the underlying health condition, however well-executed. In both these cases, however, professional incompetence may be the explanation for negative outcomes. Concerns over ongoing competence may be partly addressed through mandatory continuing professional development (CPD) requirements addressed to all regulated practitioners, or to areas of practice that have been found to exhibit abnormally high levels of professional deficiencies, or to particular practitioners who have been found to exhibit these deficiencies. More sharply focused CPD requirements have typically been found to be more effective at changing practitioners' practising modalities than generalized CPD requirements.⁸

By way of concluding this introduction, a note of explanation is appropriate for the choice of the five case studies that comprise the balance of this book. For me, they cap off an academic and policy advisory career that has focused episodically on the professions,⁹ including my time in the late 1970s as research director of an Ontario government task force on the regulation of the professions of law, accountancy, engineering, and architecture;¹⁰ then in the 1990s as research director of an Ontario government task force on the design of the legal aid system in Ontario;¹¹ then in 2008 as the sole author of a government-commissioned evaluation of the reformed legal aid system in Ontario following the implementation of the recommendations of the earlier task force;¹² and in 2011 as the co-organizer of an international conference at the University of

8 See Don Dewees, David Duff, & Michael Trebilcock, *Exploring the Domain of Accident Law: Taking the Facts Seriously* (Oxford University Press, 1996), ch. 3.

9 See Philip Slayton & Michael Trebilcock, eds, *The Professions and Public Policy* (University of Toronto Press, 1978); Robert Evans & Michael Trebilcock, eds, *Lawyers and the Consumer Interest* (Butterworths, 1982).

10 Michael Trebilcock, Carolyn Tuohy, & Alan Wolfson, *Professional Regulation* (Staff Study, Government of Ontario, 1979); Report of the Professional Organizations Committee (Government of Ontario, 1980).

11 *A Blueprint for Publicly Funded Legal Services*, Report of the Ontario Legal Aid Review (Government of Ontario, 1997, 3 vols.).

12 Michael Trebilcock, Report of Legal Aid Review, 2008 (Ontario Ministry of the Attorney General).

Toronto on middle-income access to justice that resulted in a co-edited collection of essays on the topic.¹³ The regulation of the legal profession and its impact on access to justice have attracted substantial recent scholarly interest (reviewed briefly in the fifth case study in this book).¹⁴ The case study of the regulation of immigration consultants in this book raises similar issues with respect to access to justice. With respect to the medical profession, most developed countries, faced with relentless pressure on public health care budgets, have wrestled intermittently with issues pertaining to the organization of their health care delivery systems with a view to addressing the formidable challenge of containing costs while enhancing access, and these efforts have generated a vast literature.¹⁵ I do not propose in this book to engage with these debates except to note that two of my case studies deal centrally with health care issues: the regulation of complementary and alternative medicines (CAM), and the regulation of mental health care providers. Both topics have attracted much less attention in the mainstream health policy literature than many other issues, in part because many of the services provided in these two sectors are typically not covered by public health care insurance. The case study on financial planners/advisers shares with the first three case studies the characteristic that information asymmetries in the relevant markets may often be quite severe and that the cost of error for consumers in choosing an incompetent or an inappropriate service provider can potentially be very serious, given increased life expectancies and the importance of saving and investing for extended periods of life post-retirement.

Taken together, I consider that these five case studies helpfully illuminate the three key questions pertaining to the case for regulating professional service markets more generally:

- 1 *Why* regulate a specific profession or occupation at all beyond general background rules of contract law, tort law, and misleading advertising?
- 2 *How* to regulate a specific profession or occupation in the event that the answer to the first question is affirmative.
- 3 *Who* should administer the regulatory regime, once the case for regulation and the modes of regulation have been resolved?

13 Michael Trebilcock, Anthony Duggan, & Lorne Sossin, eds, *Middle Income Access to Justice* (University of Toronto Press, 2012).

14 See e.g., Trevor Farrow & Lesley Jacobs, eds, *The Justice Crisis: The Cost and Value of Accessing Law* (UBC Press, 2020).

15 For a recent survey see Carolyn Tuohy, *Remaking Policy: Scale, Pace, and Political Strategy in Health Care Reform* (University of Toronto Press, 2018).

The *why*, *how*, and *who* questions are central threads that run through all of the following case studies. Each is broadly organized as follows: first, I explore the case for regulation; then I conduct a comparative review of contemporary regulatory approaches to modes of regulation and common law jurisdictions that share the same legal heritage (i.e., Canada, the US, the UK, Australia, and New Zealand); then I propose a set of regulatory principles. The comparative approach I have adopted in this book – both across highly disparate professions and within each profession – sheds important light on the paradoxes of professional regulation in many professional service markets, and how to resolve them.

2 Regulating Alternative Medicines: Disorder in the Borderlands*

2.1 Introduction¹

One of several tragic incidents in recent years highlighted by the media involving the use of alternative medicines in Canada was the death of seven-year-old Ryan Lovett in Alberta. Ryan died in March 2013 from a combination of illnesses including jaundice, pneumonia, and early meningitis.² Examination of Ryan's body revealed that his death could easily have been prevented had he received medical attention and been administered the simple treatment of penicillin, an antibiotic, in the earlier stages of his illness.³ Ryan's mother chose to treat him with alternative medicines, including dandelion tea, relying on her own knowledge and information obtained through internet searches.⁴ In 2017, the Alberta Court of Queen's Bench found Ryan's mother guilty under the Criminal Code of Canada⁵ of criminal negligence and failing to provide the necessities of life to her son,⁶ and sentenced her to three years in prison.⁷ This case raises in microcosm and dramatic form the question of

* With Kanksha Mahadevia Ghimire.

1 This case study is a revised version of a study published by the C.D. Howe Institute, Toronto, 2019.

2 *R v Lovett*, 2017 ABQB 46, [2017] AJ No 69 (ACQB), at para 2, 30–46, 50, 112 [*Lovett case*].

3 *Ibid*, at para 2, 57, 105, 110, 121.

4 *Ibid*, at para 57, 72–90, 113, 120, 123, 129.

5 RSC, 1985, c C-46.

6 *Lovett case*, *supra* note 16 at 117, 138–41.

7 Lauren Krugel, "Calgary Woman Found Guilty in Son's Strep Death Sentenced to Three Years," *Globe and Mail* (17 November 2017), <https://www.theglobeandmail.com/news/alberta/calgary-woman-found-guilty-in-sons-strep-death-sentenced-to-three-years/article37017782>.

the appropriate regulation of complementary and alternative medicines (CAMs), which has long proved a vexing challenge in many jurisdictions and is the central focus of this case study.

The field of CAMs groups together a vast array of medical treatments such as homeopathy, chiropractic, osteopathy, naturopathy, Ayurveda, Siddha, Unani, traditional Chinese medicine, and spiritual therapies.⁸

In many Western countries the use of CAMs has been growing.⁹ A 2016 study by the Fraser Institute found that in 2016 “more than three-quarters of Canadians (79%) had used at least one complementary or alternative therapy sometime in their lives. This compares to 74% in 2006 and 73% in 1997.”¹⁰

Relative to many other product and service classes, health-related products and procedures often pose severe information asymmetry problems for consumers: most individuals lack the expertise to diagnose disease or choose appropriate medical treatments. Moreover, although a medical professional claims expertise in diagnosing and treating disease, the potential patient faces an information asymmetry in evaluating the quality of the practitioner’s services. The information asymmetry is aggravated when professionals misrepresent their skills or the benefits of their services.¹¹ Regulation can play a critical role in addressing these information asymmetries by establishing standards of practice that assure potential patients that a practitioner provides competent services.

Most Western countries, however, recognize an individual’s fundamental right to security of the person, including the right to informed consent to treatment (or to refuse it).¹² The central regulatory challenge is how to enable individual autonomy in selecting treatment while addressing

8 Gerard Bodeker et al., *The WHO Global Atlas of Traditional, Complementary, and Alternative Medicine*, vol. 2 (Kobe: WHO, Centre for Health Development, 2005) [Bodeker et al.].

9 Robert Crouch et al., *Complementary/Alternative Health Care and HIV/AIDS: Legal, Ethical, and Policy Issues in Regulation* (Montreal: Canadian HIV/AIDS Legal Network, 2001), 1, 12–15, 117–21; Tainya C. Clarke et al., “Trends in the Use of Complementary Health Approaches among Adults: United States, 2002–2012” (2015) *National Health Statistics Reports* 79: 1–16; EUROCAM, *CAM 2020: The Contribution of Complementary and Alternative Medicine to Sustainable Healthcare in Europe* (EUROCAM, 2014), <http://www.camdoc.eu/Pdf/CAM%202020%20final.pdf>.

10 Nadeem Esmail, *Complementary and Alternative Medicine: Use and Public Attitudes 1997, 2006, and 2016* (Fraser Institute, 2017) at ii, <https://www.fraserinstitute.org/sites/default/files/complementary-and-alternative-medicine-2017.pdf>.

11 E.g., see Michelle Cohen, “Why Can Naturopaths Mislead the Public about Their Credentials? Because No One Bothers to Stop Them,” *CBC News* (5 November 2018), <https://www.cbc.ca/news/opinion/naturopath-credentials-1.4890971>.

12 The discussion in this chapter concerns non-dependent adults with the capacity to choose their own treatment. Issues of treatment for children and other dependents and for those with mental incapacity are largely beyond the scope of this study.

information asymmetry problems. As well, once a regulatory regime is imposed, regulation may become a barrier to entry. Specifically, (1) the design of regulations may be “captured” by established practitioners who limit entry by other professionals; and (2) established practitioners may be averse to new approaches to practice, including new treatments or technologies.

Most Western societies strictly regulate both medical practitioners and the medicines they prescribe. For example,

- many medications may be accessed only with a prescription from a licensed medical practitioner and must be dispensed by a licensed pharmacist;
- medications are available only after extensive clinical trials and approval by a government drug safety agency that evaluates their scientific efficacy and the risk of negative side effects;
- non-prescription medicines must often be accompanied by warnings of potential side effects or prior vulnerable predispositions;
- entry to medical professions is restricted, and those practising without a licence are subject to criminal prosecution; and
- physicians, medical specialists, pharmacists, dentists, and nurses must undertake rigorous training programs and meet entry requirements established by applicable professional bodies.

Many Western countries have delegated regulation to self-governing professional organizations. These organizations are responsible for the ongoing integrity and competence of their members through disciplinary regimes and continuing education requirements.¹³ For medical practitioners, the main emphasis is on input regulation, with the focus on ensuring that practitioners meet minimum educational and training requirements to qualify to practise. Less focus is placed on output or outcome regulation, which is addressed through the disciplinary procedures of self-governing bodies and the tort system (in cases of alleged medical malpractice or defective products).

Regarding CAM products (non-biomedical medicines) and practitioners, the regulatory landscape is much more unsettled, as briefly reviewed below.¹⁴ In principle, the regulation of CAMs should be calibrated to the degree of risk entailed.¹⁵ Some commentators object to the regulation of

13 See Don Dewees, Michael Trebilcock, & David Duff, *Exploring the Domain of Accident Law: Taking the Facts Seriously* (Oxford University Press, 1996), 122–35.

14 For a more detailed discussion and citations, see our longer paper by the same title (available from the authors).

15 Certain reviewers of this chapter noted that “quality,” “risk,” and even “scientific efficacy” are not “neutral” concepts and do not involve consistent, objective standards. Thus, we recommend an institutional approach to provide government with an independent perspective to delineate appropriate context-specific thresholds.

Table 2.1. Regulatory principles for complementary and alternative medicines

CAM products and procedures	Principle
CAM products and procedures that treat non-life-threatening health conditions	If treatment is not harmful, no government intervention
CAM products and procedures that treat potentially life-threatening health conditions as a complement to biomedical products and procedures	If treatment is not harmful, minimal government intervention to ensure that practitioners do not misrepresent therapeutic potential
CAM products and procedures that treat potentially life-threatening health conditions as a substitute for biomedical products and procedures	If treatment lacks minimum standard of proven scientific efficacy, it should be prohibited

CAMs on the basis that regulation would provide legitimacy to practices that many regard as having questionable therapeutic value. Where CAM treatments may displace biomedical treatments, however, there is a role for tailored regulation to balance respect for individual autonomy with the public interest in protecting individuals from misrepresentations.

More specifically, if a particular CAM treatment is not harmful and is not marketed to displace biomedical treatments, government should not intervene and should not inhibit individuals from accessing that treatment. However, where CAMs are promoted as substitutes for, rather than a complements to, biomedicine in treating serious biomedical health conditions, government should require a minimum standard of scientific efficacy and should use appropriate penalties to restrain representations of CAM treatments that do not meet that standard. [Table 2.1](#) outlines how these principles would apply to regulate certain forms of CAMs. Governments should create appropriate institutional machinery to delineate the appropriate thresholds for risk and contextual tests for “minimum scientific efficacy.” In this respect, governments might convene CAM advisory councils to provide independent advice to government on the application of these principles and measures to ensure compliance with them by practitioners.

2.2 Major Schools of CAM and Their Regulation

Approaches to regulating CAM products and service providers differ widely across the six jurisdictions sampled in this case study: the US, Canada, the UK, Europe,¹⁶ New Zealand, and Australia. This diversity

16 The 2012 CAMbrella study (see *infra* 17) by Wiesener et al. has surveyed thirty-nine European countries, including the United Kingdom, although in our tables we have reported on the UK separately.

is highlighted in a 2012 study¹⁷ that examined the regulation of CAMs in 39 European countries. Here we discuss regulatory approaches to seven of the most common CAMs: naturopathy, homeopathy, chiropractic, osteopathy, acupuncture, traditional Chinese medicine, and Western herbal medicine. For each, we provide a brief description as well as a table showing how each jurisdiction regulates the particular practice.

The three typical modes of regulation of CAMs are:

- *exclusive licensing regimes*, typically accompanied by government-delegated self-regulation, which reserve certain fields of practice to licensed practitioners and render it illegal for unlicensed practitioners to practise in the reserved domains;
- *official certification*, which reserves certain titles to certified practitioners, typically under a government-delegated self-regulatory regime, but does not preclude uncertified practitioners from practising in the defined domains under different designations; and
- *voluntary private certification regimes* administered by private professional associations (akin to private trademarks).

2.2.1 Naturopathy

Naturopathy seeks to prevent and cure illnesses by using materials “that nature supplies.” It promotes holistic health care by promoting a healthy lifestyle.¹⁸ To treat illnesses, naturopaths use an array of modalities – for example, they advise on nutrition and diet and prescribe botanical medicines and hydrotherapy.¹⁹

Naturopathy as a practice is rather ill-defined,²⁰ with opinions differing as to whether it is distinct from or overlaps with other CAMs, particularly

17 The study was undertaken by CAMbrella, a pan-European research network for complementary and alternative medicine. The research project was funded by the 7th Framework Programme of the European Commission. The research group consisted of sixteen partner institutions from twelve European countries. It is asserted that the objective was to research CAMs, not advocate for them. Solveig Wiesener et al., “Legal Status and Regulation of Complementary and Alternative Medicine in Europe” (2012) 19:s2 *Forschende Komplementärmedizin / Research in Complementary Med* 29 [Wiesener et al.].

18 World Health Organization, *Benchmarks for Training in Naturopathy* (Geneva, 2010), 3–4 [WHO Benchmarks].

19 *Ibid* at 4.

20 Edwin C. Webb et al., *Report of the Committee of Inquiry into Chiropractic, Osteopathy, Homeopathy, and Naturopathy* (Australian Government Publishing Service, 1977).

homeopathy.²¹ This matters, because the definition of naturopathy affects regulation – for example, whether to permit or promote the practice of homeopathy/acupuncture by licensed or certified naturopaths. Notwithstanding these definitional controversies, [Table 2.2](#) summarizes the regulation of naturopathy across the jurisdictions.²²

Table 2.2. Regulation of naturopathy, selected jurisdictions

Jurisdiction	Regulatory approach
Canada	<ul style="list-style-type: none"> • Five provinces – British Columbia, Alberta, Saskatchewan, Manitoba, and Ontario – statutorily regulate naturopathy, undertaken through a licensure regime. Unlicensed naturopaths are prohibited from practising. • Nova Scotia has enacted <i>The Naturopathic Doctors Act, 2008</i>. The act is limited in scope, the primary objective being to grant title protection for naturopathic doctors in Nova Scotia.
United States	<ul style="list-style-type: none"> • 19 states statutorily regulate naturopathy, some through licensing (in these states, unlicensed naturopaths are prohibited from practising) and some through government-approved certification. • Other states: voluntary, private certification.
United Kingdom	No statutory regulation; voluntary, private certification.
New Zealand	No statutory regulation; voluntary, private certification.
Australia	No statutory regulation; voluntary, private certification.
Europe	<ul style="list-style-type: none"> • Of 39 countries, only 8 statutorily regulated as of 2012, some through a licensure regime and others through government-approved certification. • Some countries categorize naturopathy as a “health profession.” Germany recognizes naturopathy as a “distinct therapeutic system” under the <i>Code of Social Law</i> (1998).²³ In Switzerland, naturopaths fall under the category of “natural health practitioner,” a statutorily regulated profession.²⁴

21 Edzard Ernst, *Homeopathy – The Undiluted Facts: Including a Comprehensive A–Z Lexicon* (Springer International, 2016), 293–4 [Ernst].

22 Additional citations for sources in these following tables in the case-study are available from the author.

23 Solveig Wiesener, T. Falkenberg, G. Hegyi, et al. (2012) “Deliverable 9 – Report No. 1 – CAM Regulations in the European Countries,” in Solveig Wiesener & V. Fønnebo, eds, *CAMBrella Project FP7-HEALTH-2009, GA No241951; Work Package 2; Deliverable 9 - Legal Status and Regulation of CAM in Europe*, 38–9, 110 [Wiesener et al. 2012].

24 *Ibid.*, 38–9, 202.

2.2.2 Homeopathy

Homeopathy was developed in the 1790s by Samuel Hahnemann, a German physician.²⁵ The foundational principle of homeopathy is “like cures like.”²⁶ To treat an illness, homeopaths prescribe “minute doses of [potentized] natural substances that in larger amounts would produce symptoms of the ailment.”²⁷ These substances are intended to stimulate the body to fight the disease, unlike biomedicine, which fights the disease directly.²⁸ A crucial difference between homeopathic medicines and natural remedy treatments such as naturopathy and Western herbal medicines is that the former are made by potentizing natural substances, while the latter often use plant extracts in their crude form.²⁹ Multiple schools of thoughts have evolved within homeopathy. Some schools oppose certain principles espoused by other schools. Table 2.3 shows how homeopathy is regulated in selected

Table 2.3. Regulation of homeopathy, selected jurisdictions

Jurisdiction	Regulatory approach
Canada	<ul style="list-style-type: none"> Statutorily regulated only in Ontario through self-regulation via a certification regime, limiting the use of the title “homeopath” to certified practitioners. Other provinces: voluntary, private certification.
United States	<ul style="list-style-type: none"> Regulation varies across states. Typically, states include homeopathy under chiropractic, naturopathy, and physical therapy. Some states limit homeopathy to medical professionals and other licensed health care professionals (e.g., chiropractors).
United Kingdom	<ul style="list-style-type: none"> Recognized as a distinct medical treatment system. Can be practised by doctors (biomedicine), non-medical practitioners who are voluntarily registered with professional associations, and others who choose not to be registered. Has established a self-regulatory registration system, and non-medically qualified homeopathy practitioners can register voluntarily with professional associations subject to meeting certain conditions.
New Zealand	No statutory regulation; voluntary, private certification.

(Continued)

25 Bodeker et al., *supra* note 8, at xiii; WHO Benchmarks, *supra* note 18, at 3–4; Roy Porter, *Blood and Guts: A Short History of Medicine* (Allen Lane, 2002), 48 [Porter].

26 Irvine Loudon, “A Brief History of Homeopathy” (2006) 99:12 *Journal of the Royal Society of Medicine* 607.

27 Ernst, *supra* note 21, at 36–7, 225.

28 Bodeker et al., *supra* note 8, at xiii.

29 European Committee for Homeopathy, “Homeopathy – Got Questions? We’ve Got Answers!,” <https://homeopathyeurope.org/practice/fa-q>.

Table 2.3. Regulation of homeopathy, selected jurisdictions (*continued*)

Jurisdiction	Regulatory approach
Australia	No statutory regulation; voluntary, private certification.
Europe	<ul style="list-style-type: none"> Of 39 countries, statutorily regulated in 24 as of 2012. Recognized as a distinct medical treatment system in some countries, such as France and Germany.³⁰ In others, falls under a more general category of alternative medicines or is included under other CAM practices (similar to the United States).³¹ Some countries strictly control the qualifications needed to practise, others permit a range of practitioners to practise. For example, in Austria, France, and Italy, only biomedical practitioners such as doctors and dentists can practise homeopathy.³² In Germany, doctors (of biomedicine) with additional qualification in homeopathy and <i>Heilpraktiker</i> can prescribe homeopathic medicines.³³ <i>Heilpraktiker</i> are entitled to practise CAMs, including homeopathy, subject to passing certain examinations and being licensed.

Table 2.4. Efficacy requirements of homeopathy, Canada and the United States

Jurisdiction	Regulatory approach
Canada	<ul style="list-style-type: none"> Proof of efficacy is accepted if listed in homeopathic pharmacopeias, which may rely on historical use. The Natural Health Products Regulations (SOR/2003-196) require that homeopathic products be approved by Health Canada prior to being sold. However, a 2015 CBC investigation concluded that Health Canada issued licences and permitted marketing of natural health products (which includes homeopathic medicines) without requiring submission of any scientific evidence.³⁴
United States	<ul style="list-style-type: none"> Homeopathic medicines are regulated by the <i>Food, Drug, and Cosmetic Act</i>, but the Food and Drug Administration does not actively assess homeopathic medicines for their safety and efficacy.³⁵

30 The European Committee for Homeopathy, "Regulation," <https://homeopathy-europe.org/regulatory-status> [*The European Committee for Homeopathy, Regulation*]; Wiesener et al., 2012, *supra* note 23, at 104–5, 110, 216.

31 National Center for Complementary and Integrative Health, "Homeopathy," <https://nccih.nih.gov/health/homeopathy>.

32 Wiesener et al., 2012, *supra* note 23, at 104–5, 134; E. Rossi, et al., "Integration of Homeopathy and Complementary Medicine in the Public Health System in Italy: National Regulation and Regional Experiences" (2015) 13 J Med Pers 45, at 46 [*Rossi et al. 2015*].

33 Wiesener et al., 2012, *supra* note 23, at 110.

34 Canada, Jeannine Ritchot, Acting Director General, *Regulation of Homeopathic Medicines in Canada*, Natural and Non-Prescription Health Products Directorate, Health Canada, 2015.

35 US Food and Drug Administration, "CPG Sec. 400.400 Conditions under Which Homeopathic Drugs May Be Marketed"; Jordannah Bangi, "The Food and Drug

jurisdictions. As Table 2.4 shows, homeopathic medicines are typically not required to meet proof of scientific efficacy to the same degree as biomedicine.

2.2.3 Chiropractic

Chiropractic was developed by Daniel David Palmer, a Canadian-born storekeeper from Iowa. He treated his first patient in 1895, restoring the patient's hearing by adjusting his spine.³⁶ Palmer defined chiropractic as “a system of adjusting the segments of the spinal column by hand only, for the correction of the cause of the [disease].”³⁷ Chiropractic treats illnesses by associating the spine with the nervous system and relying on the self-healing attributes of the human body.³⁸ Some chiropractors favour vertebral subluxation of infants, and some are opposed to vaccination of children.³⁹ Chiropractors themselves hold diverse, indeed conflicting views on the nature of illnesses that chiropractic is efficacious in treating.⁴⁰

Practitioners fall within two groups: the first heals illnesses solely through the manipulation of spinal joints, while the second combines chiropractic methods with other forms of CAMs, predominantly naturopathy, homeopathy, and acupuncture; most chiropractors are believed to fall into the latter group.⁴¹

Chiropractic and its practitioners are more closely regulated than are other CAMs, with the exception of osteopathy (see Table 2.5).

Administration versus the Federal Trade Commission: Reconciling Their Interests in Regulating Homeopathic Products” (2016) 49 J Marshall L Rev 1193, at 1203.

36 Jacalyn Duffin, *History of Medicine: A Scandalously Short Introduction*, 2nd ed. (University of Toronto Press, 2010), 159–60 [Duffin]; Porter, *supra* note 25 at 50.

37 R.W. Stephenson, *The Chiropractic Text Book* (Palmer School of Chiropractic, 1927).

38 Bodeker et al., *supra* note 8, at xiii.

39 Sharon Kirkey, “‘This Hurts. Babies’: Doctors Alarmed at Weekend Courses Teaching Chiropractors How to Adjust Newborn Spines,” *National Post* (2 July 2019), https://nationalpost.com/news/this-hurts-babies-doctors-alarmed-at-weekend-courses-teaching-chiropractors-how-to-adjust-newborn-spines?video_autoplay=true.

40 Paul Benedetti & Wayne Macphail, “Chiropractors at a Crossroads: The Fight for Evidence-based Treatment and a Profession’s Reputation” *Globe and Mail* (1 November 2018), <https://www.theglobeandmail.com/canada/article-chiropractors-at-a-crossroads-the-fight-for-evidence-based-treatment>.

41 Michael F. Azari, “Commentary: The Role of the Chiropractor” (1999) 8:2 Australasian Chiropractic & Osteopathy: Journal of the Chiropractic & Osteopathic College of Australasia 54.

Table 2.5. Regulation of chiropractic, selected jurisdictions

Jurisdiction	Regulatory approach
Canada	<ul style="list-style-type: none"> • Statutorily regulated through a licensure regime in all provinces and in Yukon. • Subject to self-regulation by colleges (set up under provincial statutes).
United States	<ul style="list-style-type: none"> • Statutorily regulated through a licensure regime in all states. • In some states, the practice is subject to self-regulation; in others, it is a combination of “self-regulation under an interdisciplinary board” (e.g. a medical licensing board⁴²).
United Kingdom	Statutorily regulated through a licensure regime.
New Zealand	Statutorily regulated through a licensure regime.
Australia	Statutorily regulated through a licensure regime.
Europe	<ul style="list-style-type: none"> • Statutorily regulated in 26 out of 39 countries as of 2012. • Regulations vary: in Italy, chiropractic can be practised only by biomedical practitioners who have obtained a qualification in chiropractic,⁴³ while in Germany, chiropractic is not specifically statutorily regulated and there are few restrictions on who may practise and call themselves a chiropractor.⁴⁴

2.2.4 Osteopathy

Andrew Taylor Still, a physician from the United States, developed osteopathy in 1874 after he found biomedicine to be ineffective in curing his three children of meningitis.⁴⁵ Osteopathy is a form of musculoskeletal therapy that aims to restore movement and relieve pain by massaging bones and muscles, optimizing the body’s self-healing capabilities. Therapy is combined with advice on diet and exercise. Some practitioners also use acupuncture to heal patients.⁴⁶ Table 2.6 shows how osteopathy is regulated in selected jurisdictions.

42 D.A. Chapman-Smith, “Legislative Approaches to the Regulation of the Chiropractic Profession” (1997) 16:3 *Medicine and Law* 437, at 443.

43 Rossi et al., 2015, *supra* note 32, at 46; Wiesener et al., 2012, *supra* note 23, at 132.

44 World Federation of Chiropractic, *Legal Status of Chiropractic by Country*, https://www.wfc.org/website/index.php?option=com_content&view=article&id=123&Itemid=139&lang=en; Chiropraktik Zentrum Stuttgart, *Chiropractic Center*, <http://www.chiropraktik-stuttgart.de/index.php/en>.

45 Duffin, *supra* note 36, at 159; Hans Baer, *Toward an Integrative Medicine: Merging Alternative Therapies with Biomedicine* (Altamira Press, 2004), at 26.

46 See National Academy of Osteopathy, “Frequently Asked Questions,” <http://www.nationalacademyofosteopathy.com/faq.html>; OM Osteopathy, “What Is Osteopathy?,” http://www.osteopathy.co.uk/omo_brochure.pdf; Ontario School of Osteopathy

Table 2.6. Regulation of osteopathy, selected jurisdictions

Jurisdiction	Regulatory approach
Canada	<ul style="list-style-type: none"> In Ontario, British Columbia, and Alberta, only licensed biomedical practitioners registered with the province's College of Physicians and Surgeons and fulfilling certain educational qualifications can call themselves osteopaths or osteopathic physicians. In these three provinces, non-medical practitioners refer to themselves as <i>manual osteopathic practitioners</i> and are subject to voluntary, private certification. Other provinces: voluntary, private certification.
United States	<ul style="list-style-type: none"> Can be practised by osteopathic physicians and osteopaths. Osteopathic physicians, also referred to as doctors of osteopathy (DO), are biomedical doctors who have also studied osteopathy. Osteopaths are non-biomedical practitioners and cannot prescribe biomedicines or perform surgery. All states statutorily regulate DOs and osteopaths through licensure regimes. Licensed osteopaths/DOs may choose to be certified by the American Medical Association or osteopathy specialty boards in specialized areas of practice.
United Kingdom	<ul style="list-style-type: none"> Statutorily regulated through a licensure regime: only individuals registered in the UK Statutory Register of Osteopaths are permitted to practise and call themselves an osteopath.
New Zealand	<ul style="list-style-type: none"> Statutorily regulated through a licensure regime: only individuals registered with the Osteopathic Council of New Zealand are permitted to practise and call themselves an osteopath.⁴⁷
Australia	<ul style="list-style-type: none"> Statutorily regulated through a licensure regime: only individuals registered with the Osteopathy Board of Australia are permitted to practise and call themselves an osteopath.⁴⁸
Europe	<ul style="list-style-type: none"> Of 39 countries, statutorily regulated in 15 as of 2012. Some countries have taken a strict view on who may practise osteopathy, while others have left the practice statutorily unregulated. For example, in Italy, osteopathy can be practised only by biomedical practitioners who have obtained a qualification in osteopathy; in Austria, osteopathy is neither recognized nor prohibited and can be practised by individuals with or without medical training.⁴⁹ In Germany, osteopathy is not a distinct profession; osteopathic practice is limited to biomedical physicians, physiotherapists, and <i>Heilpraktiker</i>, but the training required for the three categories of professionals to be eligible to practise osteopathy differs.⁵⁰

and Alternative Medicine, "FAQ about Osteopathy," <http://www.osteopathycollege.com/faq-about-osteopathy.html>.

47 The Osteopathic Council of New Zealand, "Home," <http://www.osteopathiccouncil.org.nz>.

2.2.5 Acupuncture

Acupuncture, developed in China more than 2,000 years ago,⁵¹ involves inserting fine needles at specific points in the body to treat illnesses. Originally considered to be a feature of traditional Chinese medicine (TCM),⁵² today acupuncture is practised under the theoretical frameworks of both TCM and biomedicine.⁵³ TCM acupuncture aims to correct the strength and quality of *qi* – energy that flows through the body – while biomedical practitioners such as doctors, physiotherapists, nurses, and midwives diagnose and treat patients based on physiological and anatomical knowledge.⁵⁴ Table 2.7 summarizes the regulatory regime for acupuncture in the sample jurisdictions.

Table 2.7. Regulation of acupuncture, selected jurisdictions

Jurisdiction	Regulatory Approach
Canada	<ul style="list-style-type: none"> • Medical doctors are permitted to practise in all provinces. • Practice by non-medical professionals is regulated through a certification regime in British Columbia, Alberta, Quebec, Ontario, and Newfoundland and Labrador, and the title “acupuncturist” is protected. Non-medical professionals may include massage therapists, chiropodists, chiropractors, occupational therapists, and TCM practitioners. • Saskatchewan and Yukon have issued guidelines on the practice of acupuncture.

48 Osteopathy Board of Australia, “Registration,” <http://www.osteopathyboard.gov.au/Registration.aspx>.

49 Rossi et al., 2015, *supra* note 32, 46; Wiesener et al., 2012, *supra* note 23, 63, 133.

50 Wiesener et al., 2012, *supra* note 23, at 111.

51 Linda L Barnes, *Needles, Herbs, Gods, and Ghosts: China, Healing, and the West to 1848* (Harvard University Press, 2005).

52 Sandy Welsh & Heather Boon, “Traditional Chinese Medicine and Acupuncture Practitioners and the Canadian Health Care System,” in Nicola K. Gale & Jean V. McHale, eds, *Routledge Handbook of Complementary and Alternative Medicine: Perspectives from Social Science and Law* (Routledge, 2015) [Gale & McHale, *Routledge Handbook of CAM*], 248; A. Vickers & C. Zollman, “ABC of Complementary Medicine” (1999) Acupuncture, *British Medical Journal* 319 [Vickers & Zollman].

53 Vickers & Zollman, *supra* note 52; Wiesener et al., *supra* note 16, 61; Bridie Andrews, *The Making of Modern Chinese Medicine, 1850–1960* (University of British Columbia Press, 2014).

54 Vickers & Zollman, *supra* note 52; Nicola K. Gale & Jean V. McHale, “Understanding CAM in the Twenty-first Century – the Importance and Challenge of Multi-Disciplinary Perspectives,” in Gale & McHale, *Routledge Handbook of CAM*, *supra* note 52.

Table 2.7. Regulation of acupuncture, selected jurisdictions (*continued*)

Jurisdiction	Regulatory Approach
United States	<ul style="list-style-type: none"> • Most states statutorily regulate either through certification or licensure regimes.
United Kingdom	<ul style="list-style-type: none"> • Medical and non-medical practitioners may practise. • Practise by medical professionals is statutorily regulated – for example, practise by GPs, nurses and physiotherapists is regulated by the General Medical Council, the Nursing and Midwifery Council, and the Health and Care Profession Council. • Non-medical members who practise acupuncture may choose to become members of private self-regulating associations. • Anyone practising acupuncture (whether a member or not) can call themselves an acupuncturist.
New Zealand	No statutory regulation; voluntary, private certification.
Australia	<ul style="list-style-type: none"> • Medical and non-medical professionals may practise. To call oneself an acupuncturist and claim to practise acupuncture, an individual must be registered with the Chinese Medicine Board of Australia (CMBA).⁵⁵ <p>The CMBA is established under the governance of the Australian Health Practitioner Regulation Agent (AHPRA), which is responsible for the registration of all health practitioners in Australia.⁵⁶</p>
Europe	<ul style="list-style-type: none"> • Of 39 countries, statutorily regulated in 26 as of 2012 through a range of regulatory regimes: in some countries via government-approved certification, in others, practice is limited to physicians with specialization in acupuncture. • A few countries, such as Italy and France, have chosen to limit practice to biomedical professionals, such as doctors and midwives.⁵⁷ • In Denmark and Sweden, both medical and non-medical professionals may perform acupuncture.⁵⁸ There are no statutory qualification criteria that practitioners must fulfil prior to treating individuals. The only requirement is that patients must not be put at risk.

55 Zhen Zheng, “Acupuncture in Australia: Regulation, Education, Practice, and Research” (2014) 3:3 *Integrative Medicine Research* 103 [*Zheng 2014*]; Australian Acupuncture and Chinese Medicine Association, “Improving Productivity and Quality in Human Services: Extending Acupuncture Provider Status to Registered Acupuncturists,” Letter to Human Services Inquiry, Productivity Commission, Australia, 2016, http://www.pc.gov.au/_data/assets/pdf_file/0006/207078/sub287-human-services-identifying-reform.pdf.

56 Zheng 2014, *supra* note 55.

57 Wiesener et al., 2012, *supra* note 23, at 103–4, 131.

58 Wiesener et al., 2012, *supra* note 23, at 90, 196.

2.2.6 Traditional Chinese Medicine

Traditional Chinese medicine (TCM) originated more than 3,000 years ago.⁵⁹ Based on the Chinese philosophies of *yin* and *yang*, and *qi*, TCM treats illnesses by restoring balance and appropriate energy flow in the body.⁶⁰ TCM practitioners use a variety of methods to prevent and treat illnesses, often combining Chinese herbal medicines with nutritional advice, exercises (such as *tai chi* and *qigong*), massages (such as *tui na*), acupuncture, and moxibustion (a form of heat therapy), to name a few.⁶¹ Table 2.8 shows how TCM is regulated in the sample jurisdictions. Several countries also regulate the sale of Chinese herbal medicines, but in different ways, as Table 2.9 indicates.

Table 2.8. Regulation of traditional Chinese medicine, selected jurisdictions

Jurisdiction	Regulatory approach
Canada	<ul style="list-style-type: none"> Regulated only in British Columbia and Ontario. Only registered members of the College of Traditional Chinese Medicine Practitioners and Acupuncturists of British Columbia and the College of Traditional Chinese Medicine Practitioners and Acupuncturists of Ontario, respectively, are allowed to call themselves a TCM practitioner. Only registered members are permitted to prescribe a TCM diagnosis based on TCM philosophy. Other provinces: voluntary, private certification.
United States	<ul style="list-style-type: none"> Most states regulate through certification or licensure regimes.
United Kingdom	No statutory regulation; voluntary, private certification.
New Zealand	No statutory regulation; voluntary, private certification.
Australia	<ul style="list-style-type: none"> Regulated through a licensure regime: only “Chinese medicine practitioners” registered with the Chinese Medicine Board of Australia are permitted to practise.⁶²

59 See Paul U. Unschuld, *Medicine in China: A History of Ideas* (University of California Press, 1985); F. Yu et al., “Traditional Chinese Medicine and Kampo: A Review from the Distant Past for the Future” (2006) 34:3 *The Journal of International Medical Research* 231 [Yu et al.].

60 Chen Keji & Xu Hao, “The Integration of Traditional Chinese Medicine and Western Medicine” (2003) 11:2 *European Review* 225; College of Traditional Chinese Medicine Practitioners and Acupuncturists in Ontario, “About TCM,” <https://www.ctcmpao.on.ca/public/about-tcm> [CTCMPA].

61 Kelvin Chan et al., “Challenges and Opportunities of Integrating Traditional Chinese Medicine into Mainstream Medicine: A Review of the Current Situation” (2015) *European Journal of Integrative Medicine*, 68; Yu et al., *supra* note 40; see also CTCMPA, *supra* note 56.

62 Australia, Chinese Medicine Board of Australia [CMBa], “Registration,” <http://www.chinesemedicineboard.gov.au/Registration.aspx>.

Table 2.8. Regulation of traditional Chinese medicine, selected jurisdictions (*continued*)

Jurisdiction	Regulatory approach
Europe	<ul style="list-style-type: none"> • Statutorily regulated in 10 of 39 countries as of 2012. • In some countries, such as Italy and Austria, the practise of TCM is restricted to medical doctors.⁶³ Several countries have permitted non-medical practitioners to practise subject to fulfilling conditions such as minimum educational requirements; others have not restricted who may be eligible to practise.

Note: In Newfoundland and Labrador, although the College of Traditional Chinese Medicine Practitioners and Acupuncturists of Newfoundland and Labrador has been established, acupuncture is regulated, while TCM is not.

Table 2.9. Regulation of Chinese herbal medicines, Canada and the United States

Jurisdiction	Regulatory approach
Canada	<ul style="list-style-type: none"> • Fall under the category of “natural health products” along with vitamins, minerals, and probiotics.⁶⁴ Natural health products are available without prescription but can be sold only after being licensed and issued a natural product number from Health Canada. The standard of safety and efficacy proofs needed to qualify for licensing differ from those needed for biomedicines, as continued historical use is accepted as evidence of efficacy.
United States	<ul style="list-style-type: none"> • Sale of Chinese herbal medicines that qualify as “dietary supplements” are not subjected to mandatory review or testing for purity or potency of active ingredients.⁶⁵

2.2.7 Western Herbal Medicine

Western herbal medicine (WHM) is often viewed as having its roots in Greco-Roman medicine.⁶⁶ To prevent and treat illnesses, practitioners use plants and their parts – root, stem, flower, bark – in their natural

63 Wiesener et al., 2012, *supra* note 23, 44, 63, 133.

64 World Health Organization, *Legal Status of Traditional Medicine and Complementary/Alternative Medicine: A Worldwide Review* (Geneva, 2001); Canada, Health Canada, *About Natural Health Products*, www.canada.ca.

65 National Center for Complementary and Integrative Health, “Traditional Chinese Medicine: In Depth,” nccih.nih.gov; Canada, Health Canada, *Questions from Consumers – Regulation of Natural Health Products*, www.hc-sc.gc.ca.

66 Michael Tierra, “Traditional Western Herbal Medicine” (2017), East West School of Planetary Herbology, <http://www.planetherbs.com/history/traditional-western-herbal-medicine.html>; Susan Francia & Anne Stobart, eds, *Critical Approaches to the History of Western Herbal Medicine: From Classical Antiquity to the Early Modern Period*

form, unlike biomedicine, which typically uses synthesized forms.⁶⁷ Currently, two forms of WHM are practised: traditional WHM and phytotherapy. WHM relies primarily on traditional knowledge and emphasizes holistic and individualistic treatment,⁶⁸ while phytotherapy relies on contemporary knowledge of physiology and anatomy and uses herbs whose efficacy and safety are substantiated by scientific empirical studies.⁶⁹

WHM is often also referred to as “herbal medicine.” Although other CAMs such as traditional Chinese medicine also use herbs to treat illnesses, WHM practitioners argue that WHM is a distinct herbal medical practice. The commonly cited differences are that the principles behind the treatments are vastly different – *yin* and *yang* and *qi* in TCM, in contrast to anatomy and physiology in phytotherapy – and that herbal medicines used in TCM are a complex mix of herbs, whereas WHM typically employs a single herb or only two or three.⁷⁰ Table 2.10 shows how WHM is regulated in the sample jurisdictions. As Table 2.11 shows, herbal medicinal products are more extensively regulated than WHM in most jurisdictions.

Table 2.10. Regulation of Western herbal medicine providers, selected jurisdictions

Jurisdiction	Regulatory approach
Canada	No statutory regulation; voluntary, private certification.
United States	No statutory regulation; voluntary, private certification.
United Kingdom	No statutory regulation; voluntary, private certification.
New Zealand	No statutory regulation; voluntary, private certification.
Australia	No statutory regulation; voluntary, private certification.
Europe	Of 39 countries, 10 statutorily regulate as of 2012.

(Bloomsbury, 2014); see also Australia Natural Therapists Association, “Western Herbal Medicine,” <http://www.australiannaturaltherapistsassociation.com.au>.

67 See International Holistic Center of Natural Medicine, “Western Herbal Medicine,” <http://www.ihcnm.com>; Therapy Directory, “Western Herbal Medicine,” <http://www.therapy-directory.org.uk>.

68 Baer, *supra* note 49; I.D. Coulter, “Integration and Paradigm Clash: The Practical Difficulties of Integrative Medicine,” in P. Tovey et al., eds, *The Mainstreaming of Complementary and Alternative Medicine* (Routledge, 2004).

69 M. Heinrich et al., *Fundamentals of Pharmacognosy and Phytotherapy* (Churchill Livingstone, 2004); see also Australia Traditional Medicine Society, “Western Herbal Medicine,” <http://www.atms.com.au>; Victoria Community Acupuncture, “Phytotherapy and the Benefits of Plant Medicine,” <http://www.vcaspa.com>.

70 See Healing Foundations, “Chinese Herbs and Western Herbs: Is There a Difference?” <https://patch.com>; LAN Acupuncture and Herbal Medicine, “Herbal Medicine FAQ,” <http://www.lanacupuncture.com>.

Table 2.11. Regulation of herbal medicinal products, selected jurisdictions

Jurisdiction	Regulatory approach
Canada	Fall under the category of “natural health products” and are subject to a similar approval process.
United States	Fall under the category of “dietary supplements” subject to lower scrutiny than over-the-counter medicines.
United Kingdom	Sales and products regulated at the EU level since 2011 (see below); this might be subject to change on account of Brexit.
Australia	<ul style="list-style-type: none"> Regulates as therapeutic substances through a two-tiered system categorized on the basis of risk, requiring products to be either registered or listed prior to sale. Higher-risk medicines, including WHM, can be sold only after being registered with the Australian Register of Therapeutic Goods (ARTG), pursuant to which each product is individually evaluated for quality, safety and efficacy.⁷¹ Traditional use as proof of safety or efficacy is accepted to a very limited extent. Lower-risk medicines comprising pre-approved, low-risk ingredients and making limited claims are listed on the ARTG, and are not subject to the same individualized scrutiny as higher-risk medicines.
Europe	<ul style="list-style-type: none"> Prior to sale, all herbal medicinal products must obtain market authorization or be registered under the Traditional Herbal Registration process.⁷² Efficacy and safety must be substantiated, although, unlike biomedicines, they may be validated through traditional historical use since it was recognized that many herbal products would be unable to fulfil the evidentiary requirements imposed on biomedicine.

2.3 Disorder in the Borderlands

2.3.1 Divergences in Regulatory Practices and Reform Proposals

A striking, even disconcerting, feature of the evolution and regulation of the various CAMs is the lack of anything approaching consistency of approach across jurisdictions and categories of CAMs. Indeed, a range of regulatory options have found favour in Western jurisdictions, with little evidence of convergence on a dominant paradigm.

71 Australia, Therapeutic Goods Administration, “Complementary Medicines,” <https://www.tga.gov.au/complementary-medicines>.

72 David R. Walker, *Report on the Regulation of Herbal Medicines and Practitioners*, 2015, British Herbal Medical Association, <http://bhma.info>, 11–13.

This discordance in regulatory practice is echoed in scholarly and public policy literature debating the merits of various regulatory approaches to CAMs. Some authors oppose regulation of CAM practitioners and products, arguing that typical forms of regulation protect mainstream biomedicine and hinder innovation and competing methods of healing, including traditional CAM practices, some of which are of cultural significance to their communities of origin even where not based on biomedical epistemology.⁷³ Other commentators argue against regulation of CAM practitioners and products from opposing premises: that any form of regulation of CAMs is likely to legitimize and promote their use by the public, even though many, if not most, CAM practices and products lack adequate scientific justification or verification.⁷⁴

Among scholars who favour some form of regulation of CAM practitioners, proposals vary widely. Some argue for state-sanctioned forms of self-regulation for individual classes of CAMs, modelled on standard approaches to self-regulation of mainstream professions.⁷⁵ Other scholars argue for an umbrella regulatory body that would regulate all or most CAM practitioners according to a uniform and consistent set of principles.⁷⁶ As to what form professional regulation should take, some scholars

73 Michael H. Cohen, "Holistic Health Care: Including Alternative and Complementary Medicine in Insurance and Regulatory Schemes" (1996) 38 *Arizona Law Review* 83 at 86; Nadine Ijaz et al., "State Risk Discourse and the Regulatory Preservation of Traditional Medicine Knowledge: The Case of Acupuncture in Ontario, Canada" (2016) 170 *Social Science & Medicine* 97 at 97, 104; Brink Lindsey & Steven Teles, *The Captured Economy: How the Powerful Enrich Themselves, Slow Down Growth, and Increase Inequality* (Oxford University Press, 2017), ch 5.

74 Jean V. McHale & Nicola K. Gale, "Concluding Chapter," in Gale & McHale, *Routledge Handbook of CAM*, *supra* note 37, 375; Martin Robbins, "Quacks Fly in All Directions as Alternative Medicine Regulation Fails," Lay Scientist blog, *The Guardian* (2010), www.guardian.co.uk/science/2010/apr/16/quacks-alternative-medicine-regulation; Julie Robotham, "Chinese Medicine Register Criticised" *Sydney Morning Herald* (2012), <http://www.smh.com.au/national/chinese-medicine-register-criticised-20120401-1w6t0.html>.

75 Michael Weir, "Regulation of Complementary and Alternative Medicine Practitioners" (2005) 23:3 *Law in Context* 171 at 179–80 [Weir]; L.A. Walker & S. Budd, "UK: The Current State of Regulation of Complementary and Alternative Medicine" (2002) 10:1 *Complementary Therapies in Medicine* 8 at 10; Jonathan Lee Wardle, "Holding Unregistered Health Practitioners to Account: An Analysis of Current Regulatory and Legislative Approaches" (2014) 22 *Journal of Law & Med* 22.

76 Peter J. Van Hemel, "A Way Out of the Maze: Federal Agency Preemption of State Licensing and Regulation of Complementary and Alternative Medicine Practitioners" (2001) 27 *American Journal of Law & Medicine* 329, at 330; Nola M. Ries & Katherine J. Fisher, "The Increasing Involvement of Physicians in Complementary and Alternative Medicine: Considerations of Professional Regulation and Patient Safety" (2013) 39 *Queen's Law Journal* 273, 295–6.

favour a form of licensure, on the grounds that only licensure regimes are capable of mandating appropriate training regimes, post-entry codes of conduct, and disciplinary and continuing education protocols, which in combination ideally would exclude inadequately trained, fraudulent, incompetent, or deviant practitioners or aspiring practitioners from the domain of practice in question.⁷⁷ Other scholars argue – convincingly – that any attempt to create multiple mutually exclusive licensure regimes across the entire landscape of health care provision inevitably would entail arbitrary boundary drawing, rigidities, and interprofessional conflicts, besides impeding innovation and discouraging the closer integration of biomedical and CAM health disciplines.⁷⁸

This case study of CAMs does not presume to offer detailed regulatory protocols for each individual category of CAM or for CAMs as a broader encompassing category. Rather, it proposes general guiding regulatory principles for CAM products and practitioners.

2.3.2 Risk Calibration

First, recognizing the two principal rationales for regulating health care provision generally – severe information asymmetries between health care practitioners and patients and, to a lesser extent, negative externalities associated with patients’ or caregivers’ health care decisions – it seems a relatively uncontroversial starting premise that regulatory responses should be calibrated to the degree of risk entailed, principally for patients, but in some cases for third parties. Risk is commonly thought of as a product of the probability of a negative contingency occurring and the severity of the consequences in the event it does occur – often characterized as the “expected cost” of a decision to assume the risk in question. This approach to health-related risks would seem to explain much, albeit not all, of the detailed regulation of biomedicine (both procedures and

77 Thomas R. Clark, “Licensing Alternative Approaches to The Naturopathic Doctors’ Act of 2003” (2004) 35 *McGeorge L Rev* 387, 392.

78 Daniel B. Hogan, “Effectiveness of Licensing, History, Evidence, and Recommendations” (1983) *Law & Human Behavior*, 126; Walter Gellhorn, “The Abuse of Occupational Licensing” (1976) *U of Chicago L Rev* at 6; Paul A. Olson, “Credentialism as Monopoly, Class War, and Socialization Scheme” (1983) 7 *Law & Human Behavior* 291; Weir, *supra* note 65, 182–3; Charles H. Baron, “Licensure of Health Care Professionals: The Consumer’s Case for Abolition” (1983) 9 *American Journal of Law & Medicine* 336, 346; Michelle Poncetta, “Against Licensing Non-Invasive Complementary and Alternative Treatments: An Ineffective and Harmful Measure for Consumer Protection” (2013) 11:2 *Georgetown Journal of Law & Public Policy* 661.

products) commonly observed in almost all Western countries. One implication of the biomedical regulatory paradigm now deeply entrenched and widely observed in most Western jurisdictions is that it is difficult, if not impossible, for the state to sustain a purely *laissez-faire* approach to the provision of CAM products or services. The consequence of not regulating CAMs might be that individuals erroneously believe that a public authority has determined that these products or services are at worst harmless and at best helpful in alleviating the medical conditions that proponents often claim they are able to address. Often, however, the lack of regulation of CAMs does not reflect a considered decision by government: certain CAM products or services, such as Western herbal medicines or naturopathy, might be harmful if taken in concentrated form or in excessive doses or for protracted periods of time. Perhaps of greatest concern, claims of efficacy in dealing with serious health conditions often might be unwarranted, and might deflect patients or caregivers from pursuing more efficacious biomedical treatments.⁷⁹

Second, on the scale of risk, from trivial to severe, some CAM products and services clearly fall toward the trivial end of the spectrum. For example, CAM products or services that address dietary or lifestyle concerns or common coughs and colds and aches and pains of the kind that many individuals treat with home remedies or over-the-counter medications would seem to warrant minimal regulation beyond mandatory warnings of potentially serious side effects if (as in the case of herbal medicines) taken in excess. In such cases, the absence of appropriate warnings might trigger penal sanctions and potential tortious liability, and providers would remain subject to general prohibitions against fraudulent, false, or misleading advertising claims.

Third, other forms of risk fall toward the more serious end of the scale, with proponents claiming that certain CAM products or services are able to address serious and even life-threatening health conditions, including infectious diseases, as alternatives to conventional forms of biomedicine whose efficacy has been scientifically validated. Obviously, less risk is entailed where CAM practices or products are promoted as complements to biomedical treatments, rather than as substitutes, although negative interactions between two types of treatment for the same condition might increase risk factors in some contexts.

Fourth, some general policy orientations emerge from this risk calibration approach to the regulation of CAM products or services. For

79 Jane E. Brody, "The Risk of Alternative Cancer Treatments," *New York Times* (1 October 2018), <https://www.nytimes.com/2018/10/01/well/live/the-risk-of-alternative-cancer-treatments.html>.

CAMs that fall toward the trivial end of the risk spectrum, light-handed *ex ante* regulation seems appropriate, so as to allow relatively large scope for patients' autonomy in the choice of medical treatments. For CAMs that fall toward the higher end of the risk spectrum, it seems difficult to justify a completely *laissez-faire* position on the part of the state. In effect, where a CAM treatment is not directly harmful and is not promoted to displace biomedical treatments for serious health conditions, a "negative regulation" approach that exempts the treatment from regulation beyond general misleading advertising laws seems appropriate.

2.3.3 Certification but Not Licensure

In general, with respect to the *ex ante* regulation of CAM practitioners, there seems to be a compelling case for state-sanctioned forms of delegated self-regulation of certification regimes by practitioners themselves, where designated titles would be reserved for accredited members of the state-recognized governing bodies, but not mutually exclusive areas of practice, as under licensure regimes. Formal certification regimes are likely to create a strong incentive for certification bodies and their members to promote their brand and reputational status among the public and medical practitioners generally. This would solidify internal norms by proscribing outlier practices, but it would do so without all the negative features of an exclusive licensure regime (noted earlier). Without being entitled to the protection of an exclusive licensure regime, members in good standing of an official certification regime might be granted immunity from prosecution for the unauthorized practice of medicine; this would be a further inducement to seek and maintain accreditation. Members disciplined for malpractice could be decertified, but without being prohibited from continuing as uncertified practitioners. Public records of suspensions and decertification of practitioners could partly address information asymmetry concerns on this score.

2.3.4 Supervised Self-Regulation

To minimize the risk of overreach in the health care claims of CAM professional certification bodies and their members, the government might create an overarching advisory body – a CAM advisory council – to which the various self-regulatory regimes would be required to submit their regulations governing education and training, codes of conduct, and disciplinary procedures. The council would review these and advise government whether to adopt or reject the proposed regulations (though it

would not call for government to initiate regulations). In exercising this review function, such an advisory body – ideally comprised of representatives of the various CAM disciplines, patient or consumer groups, and the medical and scientific research communities – would identify practices that are high-risk and that members of these governing bodies would be prohibited from engaging in or promoting, as well as practices that would facilitate the greater integration of CAMs and biomedicine. Prohibition of defined practices might also be extended to non-members.

As it exercises this oversight function – in particular, as it determines prohibited practices – such an advisory body might adopt a standard that, in the presence of scientific controversy or disagreement, might reflect minority, as opposed to mainstream, scientific opinion, provided that the minority opinion comes from qualified and respected sources, recognizing that government would want to act from perspectives of prudence and caution where risks of irreversible damage to human health are concerned.

For an appropriate standard for regulated CAM treatments as substitutes for biomedical treatments for serious health conditions, there seems a compelling case for adopting the “minimum standard of proven scientific efficacy” threshold. In the trade law context, this standard was employed by the World Trade Organization’s Appellate Body to adjudicate whether regulations restricting imports of beef raised on growth hormones were an unjustified discriminatory trade measure or a legitimate health-protective measure.⁸⁰ The Appellate Body held that a country imposing such restrictions for a purported precautionary purpose was not required to establish full scientific proof, but must show some minimum scientific basis for supporting a precautionary measure. We suggest that this is also an appropriate standard for determining whether CAM treatments that displace biomedical therapies for serious health conditions nonetheless should be permitted. This “minimum scientific basis” threshold would distinguish a zone for individuals to choose their own treatment from one where a treatment lacks a basis for any reasonable claim of therapeutic effectiveness such that the risk of misrepresentation is unacceptable.

This approach seems appropriate for CAM products as well as services. In the context of the regulation of CAM practitioners and products, this would require that at least the minimum scientific justification be met in situations where CAM services or products are promoted as

80 See the Appellate Body decision in the *Beef Hormones* case (1998), https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds26_e.htm.

an alternative to biomedicine in treating conditions entailing potentially irreversible damage to human health.

2.3.5 CAMs as Complements to or Substitutes for Biomedicine

In the absence of scientific evidence that CAM products or services cause direct harm or raise the risk of serious side effects, a somewhat less demanding standard might be appropriate as a means to promote the greater integration of biomedicine and CAMs. Integration is a valuable tool for reducing information asymmetries and potentially decreasing negative externalities, as it might foster better referral practices between biomedical and CAM practitioners and better communication between practitioners and their patients.

CAM products should be subject to scrutiny by food-and-drug-safety agencies, given that they are often purchased without the intermediation or advice of a CAM practitioner, but there are limitations to this. For example, herbs prescribed in their natural form are likely to be freely available in markets, and hence would not fall under such agencies' scrutiny or be subjected to prescribed labelling standards; some CAM prescriptions are individualized, as in TCM; and agencies' limited resources of funds or time would preclude their scrutinizing each CAM product. Bearing in mind these limitations, the regulation of commercial preparations of CAM products by food-and-drug-safety agencies should apply the following principles:

- for minor illnesses for which over-the-counter biomedicines are commonly purchased for self-medication, a “no harm” principle should apply to commercial preparations of CAMs;
- where CAM products are promoted as complements to biomedicine, even for serious illnesses, a “no harm” principle should also apply to commercial preparations of CAMs; and
- where CAM products are promoted as an alternative to biomedicine in the treatment of serious health conditions, the minimum standard of proven scientific efficacy should apply.

2.3.6 *Ex Post* Regulation of CAM Products and Services

The *ex post* regulation of CAM products and services by courts, whether falling toward the trivial or the higher end of the risk spectrum, remains critical so as to ensure that persons responsible (including non-certified practitioners and other third parties) are held liable for fraudulent, false, or misleading advertisements or claims, tortious liability for

negligence, or criminal liability for gross negligence. When determining such violations, a minimum standard of proven scientific efficacy should be applied in cases where claims or advertisements promote a CAM product or service as an alternative to biomedicine in the treatment of life-threatening health conditions.

2.4 Conclusion

This chapter has provided a framework for governments to structure the regulation of complementary and alternative medicines and develop appropriate institutions, such as a CAM advisory council, to provide independent advice to governments on appropriate standards for CAMs, especially when promoted as alternatives to biomedical treatments for serious health conditions.

Advice on medical treatments involves significant information asymmetries and potentially engages life-threatening risks for individuals. A principled and restrained approach to regulating CAMs would focus on calibrating regulatory responses to the seriousness of the risks involved and reflect an appropriate balance between personal autonomy/patient choice and the public interest in addressing misrepresentations.

While this articulation of general principles may not resolve regulatory debates on the ground with respect to the various classes of CAMs, growth in the use of CAM treatments indicates that consumer demand for them is here to stay, so that more fine-grained regulatory approaches are required than either outright prohibition of many or most CAMs for lacking scientific justification or a *laissez-faire* obliviousness to the risks CAMs pose to consumers in some contexts.

3 Regulating Mental Health Care Providers: Building Stronger Signposts through the Maze*

3.1 The Contemporary Context

According to recent evaluations, while the incidence of mental illness has not grown dramatically over the past three decades in high-income countries, as of 2017 nearly 971 million people, approximately 13 per cent of the global population (about 1 in 8), suffered from some form of mental illness.¹ The most common mental illnesses are clinical depression, anxiety, bipolar disorder, schizophrenia, substance abuse, post-traumatic stress disorder, eating disorders, and dementia.²

The history of mental illness – its claimed causes and cures – from ancient times to the present day is in many respects tortuous, unedifying, and unsettling.³ Early theories of mental illness focused on supernatural causes – gods, demons, devils, and witches – and sought cures in

* With Kanksha Mahadevia Ghimire.

1 Spencer L. James et al., “Global, Regional, and National Incidence, Prevalence, and Years Lived with Disability for 354 Diseases and Injuries for 195 Countries and Territories, 1990–2017: A Systematic Analysis for the Global Burden of Disease Study 2017” (2018) 392 *Global Health Metrics: Lancet* 1789–858, 1817; See also Mark Rice-Oxley, “Mental Illness: Is There Really a Global Epidemic?” *The Guardian* – “In Mind: Focus on Mental Health” (3 June 2019), <https://www.theguardian.com/society/2019/jun/03/mental-illness-is-there-really-a-global-epidemic> [Rice-Oxley, “Mental Illness”]; Mark Rice-Oxley, “Prevention: The New Holy Grail of Treating Mental Illness” *The Guardian* – “In Mind: Focus on Mental Health” (8 June 2019), <https://www.theguardian.com/society/2019/jun/08/prevention-the-new-holy-grail-of-treating-mental-illness> [Rice-Oxley, “Prevention”].

2 Rice-Oxley, “Mental Illness,” *supra* note 1.

3 Andrew Scull, *Madness and Civilization: A Cultural History of Insanity, from the Bible to Freud, from the Madhouse to Modern Medicine* (Princeton University Press, 2018) [Scull]; Anne Harrington, *Mind Fixes: Psychology’s Troubled Search for the Biology of Mental Illness* (W.W. Norton, 2019).

prayers and other religious observances. In ancient Greece, in contrast, Hippocratic theories of medical disorders were extended to mental disorders and were often attributed to misalignment of the four basic “humours” of the body.⁴ In much more recent times, beginning in the late nineteenth century and persisting until today, major fault lines have developed in the mental health field. On the one side are those (principally psychiatrists, who are also medical doctors) who attribute most forms of mental illness to biological/neurological/genetic causes and see its treatment as an extension of physical medicine entailing sometimes shock therapy⁵ or brain surgery but much more commonly today pharmacological interventions.⁶ On the other side of the fault line, beginning with the Freudian psychoanalytic revolution in the early part of the twentieth century, are mental health care professionals who distinguish mind from body and attribute many forms of mental illness to familial, social, and interpersonal factors that are more amenable to “talk” therapy rather than medical (physical) interventions (recognizing that some forms of mental illness may fall into one category rather than the other or entail a combination of both).⁷ By the early twenty-first century, reflecting the unsettled nature of the mental health field, the types of therapies (including variations within different types) used to treat mental illnesses had ballooned to more than 1,000⁸ (up from more than 250 in 1980⁹ and 450 in the late 1990s¹⁰).

Reflecting these trends, there has been a proliferation of psychotherapeutic practitioners including psychiatrists, psychologists, social

4 In the fifth century BCE Hippocrates, a Greek physician, linked mental disorders to physiological issues and asserted that mental illness is a disease of the brain caused by imbalances of the four “humors”: yellow bile (cholera), phlegm, black bile, and blood.

5 For example, malaria fever, insulin coma therapy, and electroconvulsive therapy.

6 See discussion in Petteri Pietikäinen, *Madness: A History* (London: Routledge, 2015), 186, 189, 216, 333–4 [Pietikäinen]; Dolly MacKinnon & Catharine Coleborne, “Psychiatry and Its Institutions in Australia and New Zealand: An Overview” (2006) 18:4 *Intl Rev Psychiatry* 371, 375; Edward Shorter & David Healy, *Shock Therapy: A History of Electroconvulsive Treatment in Mental Illness* (Rutgers University Press, 2007); Allan V. Horwitz, *Creating Mental Illness* (University of Chicago Press, 2002) [Horwitz]; Gerald N. Grob, *Mental Illness and American Society, 1875–1940* (Princeton University Press, 1983), 50; Kurt Andersen, *Fantasyland: How America Went Haywire: A 500-Year History* (Random House, 2017), 327–30 [Andersen].

7 Scull, *supra* note 3.

8 Jay L. Lebow, ed, *Twenty-First Century Psychotherapies: Contemporary Approaches to Theory and Practice* (John Wiley and Sons, 2008).

9 For a discussion see Richie Henrik, *The Psychotherapy Handbook: The A–Z Handbook to More Than 250 Psychotherapies as Used Today* (New American Library, 1980).

10 Nigel MacLennan, *Counselling for Managers* (Gower, 1996).

workers, psychometrists, psychotherapists, child-care workers, school “psychologists,” relationship, marriage, divorce, and sex counsellors, pastoral counsellors, life coaches, grief counsellors, and mind-development groups.¹¹ Although biological psychiatry continues to play a prominent role, cognitive behavioural therapies have gained popularity, and counselling has become a major industry. Individuals seek mental health-related help not only from “helping” professions but also by joining self-help groups, reading self-improvement books, seeking online advice, calling hotline numbers, and using mobile apps that claim to help manage certain mental health issues such as stress and anxiety.¹² This list of practitioners and platforms providing mental health-related help is far from exhaustive.

Section II of this chapter briefly discusses the rationales (principally information asymmetries and negative externalities) for regulating psychotherapeutic practitioners and describes the array of regulatory instruments available to regulate the services available for improving mental health and treating mental disorders. Section III provides a comparative overview of the modes of regulation for certain platforms (e.g., self-help groups) and classes of practitioners (e.g., psychiatrists, psychologists, social workers, and professional counsellors) endeavouring to improve mental health in common law developed countries (i.e., the US, Canada, the UK, Australia, and New Zealand, to limit the sample of jurisdictions to a tractable number). Section IV attempts to draw some lessons from the comparative experience.

Section IV proposes very limited reliance on exclusive licensure regimes (at least beyond the field of medical psychiatry). Instead, much greater reliance should be placed on a strengthened regime of reserved titles (certification) that would be subject to a range of conditions monitored by a multi-stakeholder advisory board to relevant governments, to ensure that mental health care providers seeking to qualify for reserved title status meet certain basic *ex ante* (entry) and *ex post* (post-entry)

11 Michael J. Trebilcock & Jeffrey Shaul, “Regulating the Quality of Psychotherapeutic Services,” in Donald N. Dewees, ed., *The Regulation of Quality: Products, Services, Workplaces, and the Environment* (Butterworth, 1983).

12 For a more detailed discussion on e-health, highlighting the increasing use of wearable computing and monitoring devices, virtual reality, robots, and gaming, refer to Canada, Mental Health Commission of Canada, *E-Mental Health in Canada: Transforming the Mental Health System Using Technology: A Briefing Document* (Ottawa: Mental Health Commission of Canada, 2014); “Doctor You: A Digital Revolution in Health Care Is Coming. Welcome It,” *The Economist* (3 February 2018); “Digital Health: Pill Crushers, Regulated Health Apps Are Starting to Compete with Conventional Drugs,” *The Economist* (3 February 2018) 55.

standards of competence and integrity. The salient features of our proposed certification approach are as follows:

- The state would establish certain input and output preconditions for the accreditation of a professional body with certification powers in the mental health care field.
- The preconditions would include: appropriate initial and ongoing educational and training requirements; the establishment of an effective complaints and disciplinary regime; a broadly accessible online description of the professional body's philosophy or school of treatment; a list of certified members; and a public record of disciplinary and civil liability complaints and dispositions.
- Most importantly, preconditions would include an online facility for patients or clients to rate individual certified practitioners, along with explanatory comments.
- "Feedback-informed therapy," emphasizing output regulation, might be used as an additional or alternative tool to the online facility proposed above and would make publicly accessible anonymized surveys of patients.
- A buffer or advisory body would be established between individual professional associations with accredited status in this field and the elected government of the day in approving the entry and post-entry regulations proposed by accredited associations.
- Purely private professional associations would be prohibited from describing their members as "certified" or as possessing professional designations employed by accredited associations, e.g., "psychologist," "social worker."

3.2 A Menu of Regulatory Instruments

A formidable regulatory dilemma arises in the mental health care field: individuals seeking or requiring mental health care services are often not well-placed to make rational decisions as to the kinds of services they require, while their needs are likely to be highly unique and subjective. Thus, it is impossible to make strong generalizations or correlations between particular classes of mental health care services or service providers and desired or desirable outcomes from interventions. Beyond questions of the appropriate role and design of *ex ante* (entry) and *ex post* (post-entry) forms of regulation of mental health care services, governments face a collateral set of issues with respect to which classes of services they should subsidize by including them in state-provided or sponsored health insurance plans or by subsidizing the education and training of particular classes of service providers.

An individual's decision to seek psychotherapeutic help (or not), or to choose particular sources of assistance, may be influenced by many factors, including imperfect information,¹³ diminished capacity, and comorbidity. Those afflicted with one or more mental disorders may suffer from diminished capacity and be unable to make the most appropriate decision based on the information available to them. In certain instances an individual diagnosed with severe mental disorder may be declared incompetent by a court and be placed under the supervision of a legal guardian or in some cases institutionalized. However, a declaration of incompetence is at one end of the spectrum, and an individual's decision-making capacity may vary depending upon his/her mental health or extent of mental disorder. Studies have revealed that comorbidity is common in individuals afflicted by mental disorders – that is, an individual may be diagnosed with more than one mental disorder and may also suffer from chronic physical conditions,¹⁴ further impairing his/her decision-making ability. Individuals requiring mental health care services or assistance often – indeed, typically – seek such assistance at times of high emotional, mental, or physical stress in their lives, and their ability to make rational choices among alternative types of services and providers is often likely to be impaired by the very circumstances requiring such assistance. It might, of course, be suggested that individuals requiring mental health care services will or should consult other professionals for advice on appropriate service providers, in particular their GP (family physician). However, some empirical studies have found that fewer than 50 per cent of people with common mental disorders are likely to be diagnosed as such by GPs;¹⁵

13 For a more extended discussion of the rationales for professional regulation, see our paper: Michael J. Trebilcock & Kanksha M. Ghimire, "Regulating Alternative Medicines: Disorder in the Borderlands" (2019) C.D. Howe Institute Commentary no. 541, Toronto [*Trebilcock & Ghimire*].

14 Mental Health Foundation of New Zealand, *Mental Health Foundation: Quick Facts and Stats 2014*, <https://www.mentalhealth.org.nz/assets/Uploads/MHF-Quick-facts-and-stats-FINAL.pdf> [*Mental Health Foundation of New Zealand*]; WHO, *Policies and Practices for Mental Health in Europe – Meeting the Challenges* (Geneva: 2008); WHO, Regional Office for Europe, *Data and Statistics*, <http://www.euro.who.int>.

15 Alan Cohen, "General Practice in the UK," in Irene Cormac & David Gray, eds, *Essentials of Physical Health in Psychiatry* (RCPsych, 2012), 25; see also National Collaborating Centre for Mental Health (UK), "Common Mental Health Disorders," in National Collaborating Centre for Mental Health, *Common Mental Health Disorders: Identification and Pathways to Care* (British Psychological Society, 2011) [*NCCMH*]; but see John Bushnell et al., "The Nature and Psychological Problems in New Zealand Primary Healthcare: A Report on Mental Health and General Practice Investigation (MaGPiE)" (2003) 116:1171 NZMJ 1.

moreover, there are large variations in GPs' referral rates, and their referrals are often not appropriately made.¹⁶ Even when a GP may wish to refer a patient for particular mental health services, those services may not be available due to geographic location or the patient's inability to pay.

As discussed in [chapter 1](#), a wide array of regulatory instruments are available that governments (directly or through delegation) can apply to address information asymmetry and negative externality concerns. Regulation may involve supply-side and/or demand-side regulation. Supply-side regulation – of services and products – can be undertaken through a variety of legal instruments that fall primarily under two rubrics: *ex ante* or *ex post* regulation. Each legal instrument has certain strengths and weaknesses.¹⁷

The *ex ante* regulation of services can be undertaken through one of three regimes: (a) an exclusive licensure regime; (b) certification administered by private self-regulating professional associations or a state-sanctioned self-regulatory professional body, which may be accompanied by exclusive rights to title but not exclusive rights to practise; and (c) registration, in which case no minimum qualification requirements are prescribed, but individuals are required to publish their credentials on a designated publicly accessible website. Advocates of licensing regimes typically argue that through entry requirements and ongoing educational and training requirements, exclusive licensure is best able to ensure quality of service, thus addressing many information asymmetries and negative externalities. Critics have argued that licensing does not automatically translate into high-quality service and depends for its utility on a variety of factors, including effective disciplining of violators of ethical and competence norms. Furthermore, licensing restricts competition and would entail dividing the plethora of mental health care providers into mutually exclusive domains of practice

16 NCCMH, *supra* note 15; Unni Ringberg et al., "Examining the Variation in GPs' Referral Practice: A Cross-sectional Study of GPs' Reasons for Referral" (2014) 64:624 *British Journal of General Practice* e426; Catherine A. O'Donnell, "Variation in GP Referral Rates: What Can We Learn from the Literature?" (2000) 17:6 *Family Practice* 462; Ateev Mehrotra et al., "Dropping the Baton: Specialty Referrals in the United States" (2011) 89:1 *Milbank Q* 39.

17 For a more detailed discussion on the various issues highlighted in this section see Trebilcock & Ghimire, *supra* note 13; Michael J. Trebilcock, "Regulating Service Quality in Professional Markets," in Donald N. Dewees, ed, *The Regulation of Quality: Products, Services, Workplaces, and the Environment* (Butterworths, 1983) at 276–89; Michael J. Trebilcock, "Regulating the Market for Legal Services" (2008) 45:5 *Alta L Rev* 215 at 217–232; Jeremy D. Fraiberg & Michael J. Trebilcock, "Risk Regulation: Technocratic and Democratic Tools for Regulatory Reform" (1998) 43:4 *McGill LJ* 835 at 839–40.

– a daunting and conflict-ridden challenge. Certification, unlike licensing, does not restrict competition or entail mutually exclusive domains of practice. While certified practitioners can be subjected to entry and ongoing training and educational requirements and be held accountable under a disciplinary regime, there are limits to the extent that certification may adequately address information asymmetry and negative externality concerns, for uncertified or decertified practitioners are not prohibited from practising and consumers may be unable to differentiate between certified and uncertified practitioners or members of competing certification regimes. As our comparative review of current regulatory regimes in Section III reveals, the terms “licensure,” “certification,” “registration,” “accreditation,” and “regulation” are currently employed in highly confusing and inconsistent ways.

The *ex post* regulation of services primarily involves four modalities: (a) codes of conduct; (b) disciplinary processes pursued by professional regulatory bodies; (c) civil or criminal sanctions against practitioners imposed by courts for misleading, false, or fraudulent advertisements or claims, and criminal liability for gross negligence; and (d) tortious liability for negligence. Post-entry regulation, however, typically depends on an aggrieved party actively enlisting the court or regulator (under passive regulation), and the victim may be constrained by either limited financial resources or access to relevant experts to substantiate his/her claims. Professional development requirements, either generally imposed on members or targeting high-risk practices or practitioners, are also common *ex post* forms of regulation.

Practitioners may prescribe medications to treat the symptoms of mental disorders.¹⁸ For example, psychiatrists may prescribe antidepressants to treat depression, insomnia, and sometimes bulimia, anti-anxiety medications to reduce panic attacks and extreme fears, stimulants to treat ADHD or increase energy and alertness, antipsychotic medications to manage generalized anxiety and hallucinations or delusions as a result of mental disorders such as schizophrenia or bipolar disorder, or mood stabilizers to control manic mood swings.¹⁹ Some complementary

18 US National Institute of Mental Health, *Mental Health Medications* (NIH Publication No 08-3929) (Washington, DC, 2008), 1.

19 US National Institute of Mental Health, “Mental Health Medications,” <https://www.nimh.nih.gov/health/topics/mental-health-medications/index.shtml>; Centre for Addiction and Mental Health (Canada), “Mental Health and Addiction Information A-Z,” http://www.camh.ca/en/hospital/health_information/a_z_mental_health_and_addiction_information/Pages/default.aspx; WHO, Division of Mental Health, *WHO Initiative of Support to People Disabled by Mental Illness, Essential Drugs in Psychiatry* (Geneva, 1993).

and alternative medicine (CAM) practitioners may also recommend herbal products for depression, anxiety, stress, and panic and sleep disorders, among others.²⁰ Consumers can buy some CAM health products over the counter or online without any intermediation by a CAM practitioner. The *ex ante* regulation of products would involve products being subjected to quality and safety standards; clinical trials to prove efficacy and safety; pre-market authorizations by a state drug safety agency; and labelling, including mandatory warnings. However, experience has shown that despite standards, clinical trials, and pre-market authorizations, some prescription medicines have resulted in unforeseen harm to some users; moreover, information asymmetry concerns may not be completely addressed by providing additional information through labelling, for consumers may be unwilling to read or unable to evaluate technical information.

The *ex post* regulation of products, similar to *ex post* regulation of services, would primarily involve civil or criminal sanctions against manufacturers/sellers by courts, including for misleading, false, or fraudulent advertisements or claims; or tortious claims for defective products that cause harm. *Ex post* regulation of products becomes particularly critical with respect to CAM products that are commonly available and inherently harmless, such as edible plants or herbs, since such products usually cannot be subjected to standard *ex ante* regulation. The strengths and weaknesses of *ex post* regulation of services identified above are also applicable to the *ex post* regulation of products.

Demand-side regulation focusing on mental illness may involve highly interventionist methods for curtailing negative externalities such as compulsory institutionalization or medication of those considered to be at serious risk to themselves or third parties. Alternatively, policies may “nudge” consumers toward certain “preferred” medical treatments with the aim of addressing information asymmetry and negative externality concerns, for example, by making certain products or treatments by licensed/certified practitioners reimbursable under public health insurance schemes.

The following section explores the regulatory instruments currently being used in common law developed countries to regulate psychotherapeutic services.

20 Mental Health America, *Complementary and Alternative Medicine for Mental Health* (2016), http://www.mentalhealthamerica.net/sites/default/files/MHA_CAM.pdf; National Alliance on Mental Illness, “Complementary Health Approaches,” <https://www.nami.org/Learn-More/Treatment/Complementary-Health-Approaches>.

3.3 A Comparative Review of the Regulation of Psychotherapeutic Services

3.3.1 An Inconsistent Regulatory Landscape

This section provides a comparative overview of the regulation of four classes of practitioners – psychiatrists, psychologists, social workers, and professional counsellors – in five common law developed countries: the US, Canada, the UK, Australia, and New Zealand. For each, a brief description and table shows how each jurisdiction regulates the particular class of practitioner. The section also briefly describes the regulation of platforms endeavouring to improve mental health – that is, self-help groups, be they physical and online. It explores each country’s reliance on *ex ante* regulation (Sections 3.2 to 3.4) and *ex post* regulation and the extent to which mental health services are covered under public health insurance schemes (Section 3.5).

As the following comparative review amply demonstrates, there is little consistency as to how the different classes of categories of mental health care providers across the five jurisdictions are regulated (and this lack of consistency would likely be amplified with a larger sample of countries). Indeed, reviews of approaches to the regulation of mental health care providers throughout Europe show radical inconsistencies.²¹ These divergences in regulatory approach stand in stark contrast to the relatively uniform regulation of biomedical service providers (e.g., physicians, medical specialists, and nurses) across many jurisdictions.²² In the five countries in the sample, a few classes of mental health care providers are subject to exclusive licensing regimes – in particular, psychiatrists must be licensed medical practitioners and are typically exclusively permitted to prescribe medications scheduled as such by relevant jurisdictions’ drug safety agencies. In some jurisdictions, social workers are licensed; in others, they are merely certified or not statutorily regulated. For many of the other myriad and proliferating classes of mental health care providers, and for online forums and self-help groups, there have been few if any systematic attempts at regulation; they have been left to regulate

21 European Commission, *Mutual Evaluation of Regulated Professions – Overview of the Regulatory Framework in the Health Services Sector – Psychologists and Related Professions* (2016), <https://ec.europa.eu/docsroom/documents/16683?locale=en>; Maria Borcsa, “Systemic Therapy and National Health Care Systems in Europe,” 1st European Conference on Systemic Research in Therapy, Education, and Organisational Development (Germany, 2014), <http://www.europeanfamilytherapy.eu/wp-content/uploads/2014/03/HeidelbergLectureBorcsa.pdf>.

22 See Trebilcock & Ghimire, *supra* note 13.

themselves through private professional associations, which often confer designations of one kind or another on their members in good standing.

Moreover, “licensure,” “certification,” “registration,” “accreditation,” and similar terms are often used loosely and ambiguously in many regulatory regimes. This ambiguity becomes particularly troublesome when we try to crystallize the differences in the scope of practices of mental health care providers providing “talk therapy” – specifically psychologists, social workers, and counsellors – so as to understand the exact “practice” that is sometimes protected and reserved (e.g., only for psychologists) (see [Table 3.2](#) – the definitions of “practice” of psychologists). The term “practice” is protected, yet it appears to be commonly accepted that there is an overlap in the nature of counselling provided by these groups (e.g., see discussion in Section 3.2.1 for overlap between services provided by psychologists and social workers). This would imply that services otherwise protected for one group of practitioners (since definitions of “practice” are typically broad, e.g., see [Table 3.2](#)) are to an extent also being provided by other mental health care providers, and that some of those services are statutorily regulated (through licensure or certification), and some not.

To the extent that regulation of some of these classes of providers exists, it is overwhelmingly *ex ante* in that it prescribes required educational and training inputs as preconditions for licensure, certification, registration, or accreditation (as the case may be). There is a paucity of empirical data on *ex post* forms of regulation in the form of disciplinary sanctions against unethical or incompetent practitioners or tortious claims for malpractice or professional negligence, which implies a relatively weak focus on *ex post* outcomes from mental health care provision, despite the importance of the maintenance of ethical standards, such as patient confidentiality, in mental health care provision.

3.3.2 *Ex Ante Regulation of the Predominant Psychotherapeutic Services*

This section explores the *ex ante* regulation of psychiatrists, psychologists, and social workers – professionals providing what may be viewed as the psychotherapeutic services predominantly statutorily regulated and commonly relied upon for mental health-related services – in the five countries in the sample.

3.3.2.1 SCOPES OF PRACTICES

Psychiatrists typically view mental disorders as occurring on account of human body abnormalities such as a chemical imbalances, while psychologists and social workers explore mental health issues arising from

a range of factors such as the social environment and one's life situation.²³ It is widely accepted that there is considerable overlap in the types of mental health-related issues handled and treatment approaches utilized by these three professional practices. The primary distinction between their scopes of practice is that only psychiatrists undergo biomedical training and are qualified medical doctors. Hence the right to prescribe medications is often limited to psychiatrists. Psychologists provide non-medication treatment (talk therapy), and the administration and assessment of psychological tests falls primarily under their exclusive domain of practice; social workers may provide talk therapy, but they are not typically permitted to diagnose a mental illness and must refer the patient to a psychiatrist or psychologist for diagnosis.²⁴

3.3.2.2 PSYCHIATRISTS: *EX ANTE* REGULATION

Table 3.1. Psychiatrists

Jurisdiction	Regulatory approach
All 5 countries	<ul style="list-style-type: none"> • Statutorily regulated through a licensure regime. Unlicensed individuals prohibited from practising psychiatry. • Regulated similarly to biomedical physicians.

3.3.2.3 PSYCHOLOGISTS: *EX ANTE* REGULATION

Table 3.2. Psychologists

Jurisdiction	Regulatory approach
All 5 countries	<ul style="list-style-type: none"> • Statutorily regulated. However, regulatory regimes adopted across the countries are incoherent, as there is a wide gap between what the regulations claim to be doing and what they are in fact doing. In the five countries the regulations state that the "practice" of psychology is protected, making it appear as though they have adopted a licensure regime, although in some

(Continued)

23 British Columbia Psychological Association, "What Is the Difference between Psychologists, Psychiatrists and Counsellors?," <https://www.psychologists.bc.ca>; American Psychological Association, "What Is the Difference between Psychologists, Psychiatrists, and Social Workers?," <http://www.apa.org>; Joti Samra, "What's the Difference between a Psychologist and Psychiatrist?" *Globe and Mail* (18 November 2010), <https://www.theglobeandmail.com>; Behavioral Care Services, "How to Select a Therapist," <http://www.behavioral-care.com>.

24 *Ibid.*

Table 3.2. Psychologists (*continued*)

Jurisdiction	Regulatory approach
	countries the qualification requirement is titled “certificate” or referred to as “registration” (see examples below). As a result of the claim that the “practice” of psychology is protected, non-qualified individuals are prohibited from practising psychology. However, psychology, by its nature, is a talk therapy, and if regulators strictly enforced this restriction then no individual other than a psychologist would be permitted to provide talk therapy. Yet there is a proliferation of talk therapists across the five countries, providing numerous services that may fall under the category of talk therapy. Consequently, in actuality psychologists seem to be regulated through a certification regime administered by state-sanctioned self-regulatory bodies, with the title protected.
	For example:
Canada (Ontario)	<ul style="list-style-type: none"> • The College of Psychologists of Ontario, a statutory regulatory body, states that to practise psychology in Ontario, an individual is required to hold a <i>certificate of registration</i> from the college. • The practice is protected. The College clarifies: “Only a member of the College of Psychologists of Ontario may offer psychological services in the province or use the title psychologist or psychological associate.”²⁵
UK	<ul style="list-style-type: none"> • Psychologists are required to “register” with the statutory board, and the title and scope of practice are protected. • The Health and Care Professions Council (HCPC) asserts that “people must be registered with us [HCPC] to work in the UK in any of the professions we regulate,”²⁶ which includes psychology.
New Zealand	<ul style="list-style-type: none"> • Psychologists are required to “register” and obtain a practising certificate from the statutory board, and the title and scope of practice are protected. • The statutory board defines the “practice of psychology” broadly as “rendering or offering to render to individuals, groups, organisations or the public any psychological service involving the application of psychological knowledge, principles, methods and procedures of understanding, predicting ameliorating or influencing behaviour, affect or cognition.”²⁷

25 College of Psychologists of Ontario, “For Employers, Insurers, and Third Party Payers,” http://www.cpo.on.ca/For_Employers_Insures.aspx.

26 Health and Care Professions Council, “About Us,” <https://www.hcpc-uk.org/aboutus>; Health and Care Professions Council, “Apply,” <https://www.hcpc-uk.org/apply>.

27 New Zealand Psychologists Board, “Use of the Title “Psychologist,” <http://www.psychologistsboard.org.nz/what-psychologists-do2/use-of-the-title-psychologist>.

Table 3.2. Psychologists (*continued*)

Jurisdiction	Regulatory approach
Australia	<ul style="list-style-type: none"> Some scholars argue that the regulation in Australia of psychologists by the Psychology Board of Australia (PBA) is through a certification regime as “[it] is the title ‘psychologist’ that is protected and not any psychological practice.”²⁸ However, the PBA prohibits unregulated individuals from “practising” psychology, and the term “practice” is widely defined as follows:²⁹ Practice means any role, whether remunerated or not, in which the individual uses their skills and knowledge as a health practitioner in their profession. For the purposes of this registration standard, practice is not restricted to the provision of direct psychological care. It also includes using professional knowledge in a direct non-clinical relationship with clients, working in management, administration, education, research, advisory, regulatory or policy development roles, and any other roles that impact on safe, effective delivery of services in the profession. The website of Australian Health Practitioner Regulation Agency (AHPRA), a statutory authority established under the National Registration and Accreditation Scheme, provides a brief description of cases decided by the tribunals and courts between 2012 and 2017 examining decisions made by the PBA.³⁰ However, the nature of the regulatory regime is not clarified by the cases described as all cases involving the practice of psychology by unregistered health practitioners involved the practitioner explicitly claiming to be a registered psychologist. None of the cases involved an unregistered practitioner performing the functions of a psychologist without utilizing the protected title.

3.3.2.4 SOCIAL WORKERS: *EX ANTE* REGULATION

The five countries have adopted diverse measures to regulate social workers: exclusive licensure, statutory certification, and no statutory regulation.

28 John O’Gorman and Peter Macqueen, “Licensing Organizational Psychologists: The Australian Experience” (2017) 10:2 *Industrial and Organizational Psychology* 217.

29 Psychology Board of Australia, “Renewals,” <http://www.psychologyboard.gov.au/Registration/Renewals.aspx>; periodic renewal of general registration is required and the Board clarifies: “If you wish to keep practising and do not renew registration by 31 December, you must submit a fast track application for registration ... If submitting a fast track application, you cannot practise until your application is processed and your registration details are updated on the national register.”

30 Australian Health Practitioner Regulation Agency, “Court and Tribunal Decisions,” <http://www.ahpra.gov.au/publications/tribunal-decisions.aspx>.

Table 3.3. Social workers

Jurisdiction	Regulatory approach
Canada	<ul style="list-style-type: none"> • Statutorily regulated through certification regimes in all provinces, and in the Northwest Territories; often described as “registration.” • Registered social worker is referred to by different titles in different provinces, e.g., “social worker,” “registered social worker,” “social service worker,” and “registered social service worker,” with slight differences in the scope of work between a “social worker” and a “social service worker.”
US	<ul style="list-style-type: none"> • “Social worker” is an umbrella term comprising multiple categories of social workers. As of 2009 across the US there were nearly 38 different titles. • Certain types of social workers are statutorily regulated through a licensure regime; other scopes of practice within social work are statutorily unregulated. • Among the multiple categories, “licensed clinical social worker” and “licensed master social worker” are more closely statutorily regulated through a licensure regime. Some states explicitly provide that this licensing does not prohibit other social workers from practising as long as it does not involve clinical social work.
UK	<ul style="list-style-type: none"> • Statutorily regulated through a certification regime.
New Zealand	<ul style="list-style-type: none"> • On 21 February 2019, the New Zealand Parliament passed a bill³¹ implementing a new regulatory regime, which is referred to as “mandatory registration”; amendments to come into effect in a phased manner from date of Royal Assent. • However, the regulatory system of “mandatory registration” appears to be a licensing regime, since practice is protected. The bill states: “No person can practice as a social worker unless they are registered, practise within their individual scope of practice, and hold a current practising certificate.”³²
Australia	No statutory regulation; voluntary, private certification.

3.3.3 Ex Ante Regulation of Professional Counsellors

Professional counsellors is an umbrella term that can include a plethora of therapeutic advisers such as psychotherapists, mental health counsellors, alcohol and drug counsellors, marriage and family therapists, pastoral counsellors, art therapists, dance/movement therapists, music therapists, and play therapists.

31 The Social Workers Registration Legislation Bill amending the Social Workers Registration Act 2003.

32 s6AAB of the Social Workers Registration Legislation Bill, <https://www.msdc.govt.nz/.../2018-11-timing-of-swrl-bill-commencement-stages.docx>.

3.3.3.1 DEFINING COUNSELLING AND PSYCHOTHERAPY

Professional “counselling” aiming to improve mental health is broadly defined across the countries in the sample. In the US, for example, professional associations governing counselling predominantly define professional counselling as “a professional relationship that empowers diverse individuals, families, and groups to accomplish mental health, wellness, education, and career goals.”³³ The Canadian Counselling and Psychotherapy Association, a private professional association, defines professional counselling as “a relational process based upon the ethical use of specific professional competencies to facilitate human change. Counselling addresses wellness, relationships, personal growth, career development, mental health, and psychological illness or distress.”³⁴

Hence, by implication there appears to be a consensus among practitioners, private professional bodies, and some regulatory bodies that professional counselling provides mental health-related services with respect to a wide range of issues. However, the nature of the expertise required to provide these services is widely debated, and that debate is most evident in the discussion of the differences between professional “counselling” and “psychotherapy.”³⁵ Some practitioners and private professional associations argue that psychotherapy is a broad term that includes counselling.³⁶ Some argue that psychotherapy and counselling are distinct practices, in that the former provides long-term care, whereas the latter addresses issues at the time of crisis³⁷ or is specialized to a specific area such as couples or addiction counselling. Some practitioners and associations argue that there is no distinction between psychotherapy and counselling and use the two terms interchangeably, and some argue that the distinction is ambiguous.³⁸ This debate is pertinent, for it has

33 American Counseling Association, “About ACA,” <https://www.counseling.org/about-us/about-aca>.

34 Canadian Counselling and Psychotherapy Association, Profession, *infra* note 46.

35 Counselling Directory, “Frequently Asked Questions,” <http://www.counselling-directory.org.uk/importantinfo.html> [*Counselling Directory, FAQ*].

36 *Ibid*; Royal College of Psychiatrists, “Frequently Asked Questions,” <http://www.rcpsych.ac.uk> [*Royal College of Psychiatrists, FAQs*].

37 Royal College of Psychiatrists, FAQs, *supra* note 37; Counselling Directory, FAQ, *supra* note 36.

38 The Federation of Associations for Counselling Therapists in British Columbia, “Frequently Asked Questions,” <http://www.factbc.org/faq>; Counselling Directory, “Understanding the Difference between a Psychiatrist, Psychologist, Psychotherapist, and Counsellor,” <http://www.counselling-directory.org.uk/psychiatrists-psychologists-psychotherapists-counsellors.html> [*Counselling Directory, Understanding Differences*];

a bearing on the statutory regulation of “professional counsellors” and “psychotherapists.” For example, statutory regulatory bodies in two³⁹ of the four provinces⁴⁰ in Canada that regulate counsellors have differentiated between “counselling” and “psychotherapy,” viewing the latter as a sub-specialty of counselling and requiring statutorily certified counsellors (in Ontario) and licensed counsellors (in Quebec) to complete additional educational and training requirements in order to be certified as a “psychotherapist.”⁴¹ In New Zealand, psychotherapists are statutorily regulated while counsellors are not.⁴² Private professional associations in New Zealand have described the distinction between psychotherapy and counselling as follows: “Psychotherapists tend to deal with longer term therapy for deep-rooted issues such as childhood trauma or relationship problems. Counsellors, on the other hand, specialise in helping to deal with specific issues in specific areas like couples counselling, addictions counselling or vocational counselling.”⁴³

Given the broad definition of counselling, a wide array of professionals claim to provide counselling services in the five countries in the sample. For example, in Canada, professional counselling is considered to encompass more than seventy professional titles, which include counselling therapist, psychotherapist, mental health therapist, and clinical counsellor.⁴⁴ The following section briefly explores the *ex ante* regulation of some of the counselling professions statutorily regulated in the five countries in the sample; it also examines the regulatory regimes for alcohol and drug abuse counsellor, marital and family therapist, pastoral counsellor, peer specialist, and life coach.

3.3.3.2 DIVERSITY IN EX ANTE REGULATION

The five countries in the sample have adopted diverse positions on the regulation of different types of professional counselling services (see Table 3.4). Moreover, the regulatory landscape governing professional counsellors is problematic because the regulations sometimes claim to

39 Quebec and Ontario.

40 The other two provinces are New Brunswick and Nova Scotia.

41 Counselling Directory, Understanding Differences, *supra* note 39.

42 New Zealand, Ministry of Business, Innovation, and Employment, “Counsellors and Psychologists,” <http://occupationoutlook.mbie.govt.nz/social-and-community/counsellors-and-psychologists>.

43 Robert Street Clinic, “Who Should I See? Psychologist, Psychotherapist, or Psychiatrist?,” <http://robertstclinic.co.nz/who-should-i-see>.

44 Canadian Counselling and Psychotherapy Association, “The Profession and Regulation,” <https://www.ccpa-accp.ca/profession> [Canadian Counselling and Psychotherapy Association, *Profession*].

Table 3.4. Professional counsellors

Jurisdiction	Regulatory approach
Canada	<ul style="list-style-type: none"> Professional counsellors statutorily regulated in four provinces.⁴⁵ Ontario, New Brunswick, and Nova Scotia: statutorily regulated through certification regimes as title protected but not practice, although New Brunswick and Nova Scotia refer to the regime as “licensing.” Québec: statutorily regulated through what is described as a licensure regime as it protects title and scope of practice Other provinces: No statutory regulation; voluntary, private certification.
US	<ul style="list-style-type: none"> Category of “Licensed Professional Counsellor” (LPC) is more strictly statutorily regulated than other categories of counsellors. LPCs: statutorily regulated in all states under either certification regime or what is described as a licensure regime. In some states, although legislation and titles are referred to as a “licensure” Act and “licensed” professional counsellor, LPCs are in fact regulated under a certification regime, as title is protected but not practice. LPCs are also referred to by other titles, such as: Clinical Mental Health Counselor, Licensed Mental Health Counselor, Licensed Clinical Professional Counselor, Licensed Professional Clinical Counselor of Mental Health, Licensed Clinical Mental Health Counselor, and Licensed Mental Health Practitioner.
UK	<ul style="list-style-type: none"> Three specific categories of counselling professions are statutorily regulated: Art Therapy,⁴⁶ Occupational Therapy,⁴⁷ and Speech and Language Therapists.⁴⁸ The statutory board regulates these therapies under what is described as a licensure regime, similar that for psychologists (see Table 3.2). Other counselling professions are not statutorily regulated; voluntary, private certification. However, the Professional Standards Authority, an independent statutory body accountable to Parliament, accredits professional organizations that certify health care practitioners that are not statutorily regulated, including psychotherapists and counsellors, and prescribes professional standards that its member organizations must comply with.

(Continued)

45 Quebec, Ontario, Nova Scotia, and New Brunswick; Canadian Counselling and Psychotherapy Association, Profession, *supra* note 46.

46 The Health and Care Professionals Council (HCPC) defines “art therapist” as “a psychological therapist who has arts-based experience plus training in psychological interventions using drama, music or art as their primary mode of communication”; Health and Care Professions Council, “Professions,” <http://www.hpc-uk.org/aboutregistration/professions/index.asp?id=14#profDetails> [HCPC Professions].

47 HCPC defines “occupational therapist” as a registered practitioner who “uses specific activities to limit the effects of disability and promote independence in all aspects of daily life”; HCPC Professions, *supra* note 46.

Table 3.4. Professional counsellors (*continued*)

Jurisdiction	Regulatory approach
New Zealand	<ul style="list-style-type: none"> • Psychotherapists are statutorily regulated under a certification regime. • Child and Adolescent Psychotherapy: the only sub-specialty recognized by the statutory board, and statutorily regulated under a certification regime. • Counsellors not statutorily regulated; voluntary, private certification.
Australia	<ul style="list-style-type: none"> • Occupational Therapy, and Aboriginal and Torres Strait Islander Health Practice, statutorily regulated through what is described as licensure regimes, since to practise the individual must be registered with the respective boards. • The wide definition of “practice” as applicable to psychology (see Table 3.2) applies to these practices as well. • Other counselling professions are not statutorily regulated; voluntary, private certification. Exceptions are three states in Australia – New South Wales, South Australia, and Victoria – which have issued general codes of conduct mandatorily requiring unregistered health practitioners, including counsellors, practising within their jurisdictions to adhere to them.

regulate professional counsellors by adopting a specific regime when in fact they are implementing a different regulatory regime (see [Table 3.4](#)). To elaborate, in Canada, although New Brunswick and Nova Scotia refer to these regimes as “licensing,” the regulation is through certification regimes, as title is protected but not practice. In Quebec, the regulation claims to have adopted a licensure regime as it protects title and scope of practice. In the UK and Australia, the regulatory regimes claim that the regulation of specific categories of professional counsellors is through licensure regimes. But this claim that regulation of professional counsellors in general (as in Quebec) or specific categories of professional counsellors (as in the UK, Australia, and some states in the US) is subject to a licensure regime or that its practice is protected is inaccurate for the reasons discussed earlier in the context of the regulation of psychologists. Since professional counselling is a form of talk therapy, if its practice were “protected,” it would prohibit non-qualified individuals from providing talk therapy. Yet a multitude of professionals, many statutorily regulated and others unregulated, provide mental health services through a range of talk therapies. Hence, in actuality, in these countries professional counsellors (or certain categories) are statutorily regulated through a certification regime administered by state-sanctioned self-regulatory bodies, with the title protected.

48 HCPC defines “speech and language therapist” as one who “assesses, treats, and helps to prevent speech, language, and swallowing difficulties”; HCPC Professions, *supra* note 46.

3.3.3.3 ALCOHOL AND DRUG ABUSE COUNSELLORS

Table 3.5. Alcohol and drug abuse counsellors

Jurisdiction	Regulatory approach
Canada, UK, New Zealand, Australia	<ul style="list-style-type: none"> No statutory regulation; voluntary, private certification.
US	<ul style="list-style-type: none"> Statutorily regulated in all 50 states; in some states under licensure regimes and in other states under certification regimes.

3.3.3.4 MARRIAGE AND FAMILY THERAPISTS (MFTs)

Table 3.6. MFTs

Jurisdiction	Regulatory approach
Canada	<ul style="list-style-type: none"> MFTs are commonly referred to as “couple and family therapists.” Statutorily regulated in one province: Quebec. MFTs are statutorily regulated and the practice of family therapy is restricted to MFTs. Individuals wishing to practise family therapy in Quebec must obtain a licence from the Ordre professionnel des travailleurs sociaux du Québec and a psychotherapy permit from the Ordre des Psychologues du Québec.⁴⁹ Other provinces: no statutory regulation – voluntary, private certification.
US	<ul style="list-style-type: none"> Statutorily regulated in all 50 states; in some states under licensure regimes and in some states under certification regimes. In some states, although the title is “<i>licensed</i> marital and family therapist,” the regulatory regime is in fact a certification regime.
UK, New Zealand, Australia	<ul style="list-style-type: none"> No statutory regulation; voluntary, private certification.

3.3.3.5 PASTORAL COUNSELLORS

Table 3.7. Pastoral counsellors

Jurisdiction	Regulatory approach
Canada, UK, New Zealand, Australia	<ul style="list-style-type: none"> No statutory regulation; voluntary, private certification.
US	<ul style="list-style-type: none"> Statutorily regulated in six states. Although these states refer to the qualification as a “license,” the regulatory regime is in fact a form of certification.

⁴⁹ Prior to being issued a psychotherapy permit, MFTs may perform conjugal and family interventions, as long as the intervention does not constitute psychotherapy.

3.3.3.6 PEER SPECIALISTS

In the five countries in the sample, peer specialists are broadly described as individuals who have lived experience with a mental issue or addiction, or have initiated their own recovery, and who help others suffering from such a mental issue or addiction.⁵⁰

Table 3.8. Peer specialists

Jurisdiction	Regulatory approach
Canada, UK, New Zealand, Australia	<ul style="list-style-type: none"> • No statutory regulation; voluntary, private certification.
US	<ul style="list-style-type: none"> • A relatively new behavioural health field; emerged in the early 2000s. • By 2014, 38 states had statutorily regulated this category under a certification regime; 8 states are in the process of developing or implementing regulation. • Other states: no statutory regulation – voluntary, private certification.

3.3.3.7 LIFE COACHES

The International Coach Federation defines coaching as “partnering with clients in a thought-provoking and creative process that inspires them to maximize their personal and professional potential.”⁵¹ This definition is widely relied upon by private professional associations when describing the practice of life coaches.

Table 3.9. Life coaches

Jurisdiction	Regulatory approach
All 5 countries	No statutory regulation; voluntary, private certification.

3.3.3.8 OTHER EX ANTE REGULATORY MEASURES

Regardless of whether these counselling professions are regulated statutorily or through private certification, certain *ex ante* regulatory measures have been adopted by the regulatory bodies (statutory or private) in all five jurisdictions

50 Te Pou o Te Whakaaro Nui, *Service User, Consumer, and Peer Workforce: A Guide for Planners and Funders*, <https://www.tepou.co.nz>; Amy Woodhouse & Ashley Vincent, *Mental Health Delivery Plan, Development of Peer Specialist Roles: A Literature Scoping Exercise* (Scottish Development Centre for Mental Health and Scottish Recovery Network, 2006), 5 [Woodhouse & Vincent]; Mental Health Foundation, “Peer Support,” <https://www.mentalhealth.org.uk> [Mental Health Foundation, *Peer Support*].

51 International Coach Federation, “About ICF,” <https://coachfederation.org/about>.

of our sample. For example, to qualify for a licence or certification, statutory or private (as the case may be), individuals are required to fulfil certain minimum educational and training requirements, although the exact requirements vary widely. Additionally, mental health care providers may sub-specialize within their respective fields. Some sub-specialty areas overlap across the countries, and some vary. Specialty certifications in certain sub-specialty areas may be granted by the statutory regulatory body, while in some countries specialty certifications are conferred only by private professional associations.

3.3.4 Ex Ante Regulation of Self-Help Groups

In the five countries in the sample, some individuals seeking help for mental health conditions join self-help groups, which may be face-to-face or involve other means such as online discussion boards.⁵² Zinman writes that “a self-help group can take many different forms; its parameters are limited only by the desires, energy and possibilities of its members.”⁵³ Most self-help groups are self-organizing and informal; individuals with shared interests and challenges come together to support one another. They are often free of charge.⁵⁴ These groups may be facilitated by a professional health care provider, such as a psychologist or a marriage and family therapist, or by ordinary individuals.⁵⁵ Some professional mental health practitioners express reservations about self-help groups; others, while expressing caution, may encourage individuals dealing with mental health issues to join these groups, contending that such groups can

52 Mental Health America, “Find Support Groups,” <http://www.mentalhealthamerica.net>; Canadian Collaborative Mental Health Initiative, *Working Together Towards Recovery: Consumers, Families, Caregivers and Providers* (Canadian Collaborative Mental Health Initiative, 2006); NHS Choices, “Depression Support Groups,” <https://www.nhs.uk/conditions>; Grow, Mental Wellness Program, “Home,” <https://www.grow.org.au>; *TeAra, the Encyclopaedia of New Zealand*, “Story: Health Advocacy and Self-Help,” <https://teara.govt.nz/en/health-advocacy-and-self-help/page-4>.

53 Zinman referred to in J. Campbell & J. Leaver, *Emerging New Practices in Organized Peer Support* (National Technical Assistance Center for State Mental Health Planning and National Association of State Mental Health Program Directors, 2003), 13.

54 Patience Seebohm et al., “The Contribution of Self-Help/Mutual Aid Groups to Mental Well-Being” (2013) 21:4 *Health and Social Care in Community* 391; BCSS Victoria, *Victoria Area Self-Help Groups for Mental Health and/or Substance Use* (2014), <http://bcssvictoria.ca>.

55 John C. Norcross, “Here Comes the Self-Help Revolution in Mental Health” (2000) 37:4 *Psychotherapy: Theory, Research, Practice, Training*, 370; Mental Health Commission of Canada, *Making the Case for Peer Support* (2nd ed., 2016), <https://www.mentalhealthcommission.ca> at 15; Mental Health America, *Support Group Facilitation Guide* (2016), <http://www.mentalhealthamerica.net>.

support patients in their recovery or help them manage their mental health condition.⁵⁶ In the five countries, a multitude of self-help groups endeavour to provide mental health-related support to individuals.⁵⁷

Given the breadth of possibilities regarding the structure and functioning of self-help groups, it is somewhat unsurprising to find that they are not statutorily regulated in any of the five countries we compare (see Table 3.10).

Table 3.10. Self-help groups

Jurisdiction	Regulatory approach
All 5 countries	<ul style="list-style-type: none"> • No statutory regulation; voluntary, private certification. • Professional practitioners facilitating groups must comply with the licensing or certification regimes for the relevant practice and jurisdiction. • Non-professional self-help group facilitators are restricted from providing services that fall under exclusive licensure regimes but are not regulated themselves. Private professional associations may provide guidance to aid facilitators in holding self-help meetings, such as by providing guidelines or prescribing best practices.

3.3.5 Ex Post Regulation

This section briefly explores the *ex post* regulation of the mental health practitioners discussed in Sections 3.2 and 3.3, and of the self-help groups discussed in Section 3.4, in the five countries in our sample.

3.3.5.1 PSYCHIATRISTS, PSYCHOLOGISTS, SOCIAL WORKERS, AND PROFESSIONAL COUNSELLORS

In the five countries there have been few empirical studies examining tortious and criminal proceedings taken against mental health care practitioners for malpractice.⁵⁸ According to the handful of studies available – mostly

56 Mark S. Salzer & Loran B. Kundra, “Liability Issues Associated with Referrals to Self-Help Groups” (2010) 61:1 L & Psychiatry 6; Mark S. Salzer et al., “Mental Health Professionals’ Support of Self-Help Groups” (2001) 11:1 *Community & Applied Social Psychol*, 1; Robert C. Hsiung, “The Best of Both Worlds: An Online Self-Help Group Hosted by a Mental Health Professional” (2004) 3:6 *CyberPsychology and Behaviour* 935.

57 K. Elsdon et al., “Sharing Experience, Living, and Learning: A Study of Self-Help Groups” (Community Matters, 2000); NHS, “Depression Support Groups,” <https://www.nhs.uk>; Ingrid D. Goldstrom et al., “National Estimates for Mental Health Mutual Support Groups, Self-Help Organizations, and Consumer-Operated Services” (2006) 33:1 *Admin & Policy in Mental Health and Mental Health Services Research* 92.

58 Mansfield Mela et al., “Forty-Five Years of Civil Litigation against Canadian Psychiatrists: An Empirical Pilot Study” (2016) 61:2 *Can J Psychiatry* 112; Laura W.

Table 3.11. Types of ex post regulation

Category	Jurisdiction	Regulatory approach
Continued Professional Development	All 5 countries	<ul style="list-style-type: none"> The statutory bodies and private professional associations regulate the mental health care providers falling under their jurisdiction on an ongoing basis. The regulated professionals are required to maintain their licence, certification, or membership (as the case may be) by fulfilling continuing professional training requirements and periodically renewing their licence, certification, or membership. The regulatory bodies (statutory and private) prescribe performance standards and codes of conduct.
Disciplinary action	All 5 countries	<ul style="list-style-type: none"> Statutory regulatory bodies and some of the private professional associations take disciplinary action against licensed or certified practitioners or their members (as the case may be). New Zealand has adopted an additional step focusing on consumers' health: a complaint filed against a psychiatrist, psychologist, social worker, or registered psychotherapist with the statutory regulatory body and impacting a consumer's health is forwarded to the Health and Disability Commissioner for assessment who then refers the complaint to the regulatory body for final determination.
Court sanctions	All 5 countries	<ul style="list-style-type: none"> All mental health care providers (regulated or unregulated) are subject to ex post regulation by courts. All mental health care providers (regulated or unregulated) are subject to criminal liability for gross negligence.
Tortious liability	Canada, US, UK, Australia	<ul style="list-style-type: none"> All mental health care providers (regulated or unregulated) are subject to tortious liability for personal injury claims resulting from professional malpractice.

(Continued)

Groshong, *Clinical Social Work Practice and Regulation: An Overview* (University Press of America, 2009), 28; Frederic G. Reamer, "Malpractice Claims against Social Workers: First Facts" (1995) 40:5 *Social Work* 595. Limited statistics are available at National Practitioner Data Bank, "All Locations – All Practitioners," <https://www.npdb.hrsa.gov/resources/npdbstats/npdbStatistics.jsp#contentTop>.

Table 3.11. Types of *ex post* regulation (*continued*)

Category	Jurisdiction	Regulatory approach
No-fault accident compensation	New Zealand	<ul style="list-style-type: none"> Enacted an accident compensation legislation based on “no fault” principle to provide compensation for certain types of personal injuries caused by medical malpractice; compensation is covered by a state-funded insurer, the Accident Compensation Corporation. Malpractice claims falling under the legislation cannot be brought civilly; other types of malpractice claims may be subject to common law damages.

focused on the US⁵⁹ – few civil malpractice claims against psychiatrists have been brought before the courts. A 2016 study examined civil cases filed against psychiatrists across Canada and reported that over the past 45 years, only 40 cases had been filed against psychiatrists.⁶⁰ It has proven a formidable challenge to uncover any systematic data on the disciplinary processes of professional associations of mental health care practitioners.

3.3.5.2 SELF-HELP GROUPS

The scholarly literature is largely silent on the extent to which self-help groups are subject to *ex post* regulation in the five countries in our sample. However, some private insurance companies offer medical malpractice insurance to self-help groups.⁶¹ Based on the analysis in Sections 3.1 and 3.2, it is likely that professional mental health providers who facilitate self-help groups would be subject to *ex post* regulation in the manner set out in Sections 3.1 to 3.2 (as applicable). It is unclear whether non-professional individuals facilitating self-help groups are likely to be subject to *ex post* regulation or liability on account of actions undertaken during or in relation to the self-help group. In the five countries there is a lack of empirical studies examining tortious and criminal proceedings taken against facilitators or members of self-help groups.

59 M.I. Taragin et al., “Physician Demographics and the Risk of Medical Malpractice” (1992) 93 Am J Med 537; James Reich and Alan Schatzberg, “Empirical Comparisons of Malpractice Claims of Different Medical Specialties” (2015) 2:2 J Pub Health Aspects 1, at 6; But see Christine E. Dehlendorf and Sidney M. Wolfe, “Physicians Disciplined for Sex-Related Offenses” (1998) 279 JAMA 1883; Paul Jung et al., “US Physicians Disciplined for Criminal Activity” (2006) 16 Health Matrix 335.

60 *Ibid.*

61 Blackfriars Group Insurance, “Self Help Groups Medical Malpractice Insurance,” <https://www.blackfriarsgroup.com/self-help-groups-medical-malpractice-insurance>.

3.3.5.3 PUBLIC HEALTH INSURANCE SCHEMES

Aside from regulatory controls, governments can influence consumer demand and practitioner supply through social policies. They may subsidize training in some disciplines more than in others, thus influencing the type and number of mental health professionals. They may also subsidize particular services through tax policies or public insurance schemes. In our sample countries, services provided by psychiatrists, psychologists, social workers, and professional counsellors are covered under public health insurance schemes to varying degrees.

Table 3.12. Coverage under public health insurance schemes

Practitioner	Jurisdiction	Regulatory approach
Psychiatrists	Canada, UK, New Zealand, Australia	Many services partly or fully covered, usually subject to referral from a general physician.
	US	Treatments covered by a majority of state Medicaid and Medicare programs; but coverage limited primarily to inpatient treatment. Home health and general outpatient psychiatric treatment partly covered in some states.
Psychologists	Canada	Services provided in hospitals and some community-based clinics are covered but may require referral from a general physician.
	UK	Many services covered, subject to referral from a general physician, or when provided by a practitioner directly employed by or associated with the National Health Service.
	US	Treatments covered for low-income individuals and seniors in some states by Medicaid and Medicare.
	New Zealand	Services by practitioners working within the public health system typically covered, subject to being referred by a general practitioner.
	Australia	Services generally covered by Medicare if referred by a general physician or provided by a clinical psychologist meeting certain eligibility criteria, including that he/she is registered with Medicare Australia and is (or is qualified to be) a member of the Australian Psychological Society's College of Clinical Psychologists.

(Continued)

Table 3.12. Coverage under public health insurance schemes (*continued*)

Practitioner	Jurisdiction	Regulatory approach
Social workers	Canada	Coverage varies across provinces. But typically services provided via public institutions, health authorities, and some publicly subsidized not-for-profit private firms are generally provided free of charge. ⁶²
	US	Covered under many state Medicaid and Medicare programs, but only if provided by a licensed clinical social worker and often subject to the practitioners holding malpractice insurance.
	UK	Many services covered, subject to referral from a general physician, or when provided by a practitioner directly employed by or associated with the National Health Service.
	New Zealand	Services by practitioners working within the public health system typically covered, subject to being referred by a general practitioner.
	Australia	Services fall under the category of “medicare-subsidised other allied mental health services” and are covered subject to the provider being registered with Medicare Australia and fulfilling certain qualification requirements, such as the social worker being an Accredited Mental Health Social Worker (accreditation by AASW) and being assessed by AASW as having specialist expertise in mental health.
Counsellors	Canada	Services provided via public institutions, health authorities, and some publicly subsidized not-for-profit private firms are generally provided free of charge.
	US	<ul style="list-style-type: none"> • <i>Licensed counselling</i>: Not covered under Medicare; in some states Medicaid covers certain services provided by licensed clinical professional counsellors. • <i>Other counsellors</i>: In many states certain services provided by licensed/certified alcohol and drug abuse counsellors, licensed marital and family therapists, and <i>certified</i> peer specialists are covered under Medicaid; certified pastoral counsellors are not covered under Medicaid and Medicare.
	UK	Many services covered, subject to referral from a general physician, or when provided by a practitioner directly employed by or associated with the National Health Service.

62 While not fully operationalized, Quebec is currently piloting a program that, once expanded, would provide universal access to various mental health care services, including social workers. For more information see the Quebec Program for Mental Disorders: from Self-Care to Psychotherapy (PQPTM).

Table 3.12. Coverage under public health insurance schemes (*continued*)

Practitioner	Jurisdiction	Regulatory approach
	New Zealand	Services by practitioners working within the public health system typically covered, subject to being referred by a general practitioner.
	Australia	<i>Occupational therapists and Aboriginal health workers</i> : Services fall under the category of “medicare-subsidised other allied mental health services” and are covered subject to the provider being registered with Medicare Australia and fulfilling certain qualification requirements.

3.4 Confronting the Central Regulatory Dilemmas

Ensuring an appropriate match of needs with providers in the mental health care context is a particularly acute challenge. In many professions, such as medicine and law, the unique nature of particular individuals’ needs precludes broad, across-the-board standard-setting of the kind one typically associates with building codes, product safety regulations, or statutory audit requirements.⁶³ The same can be said, at least as emphatically, of the mental health care field. After all, whether a physician has appropriately mended a broken arm or removed an infected appendix can be evaluated by other experts through physical scrutiny and reference to clinical guidelines. In the mental health field, by contrast, desired or desirable outcomes are much more subjective. Perhaps one could ask whether, as a result of a mental health care intervention, the individual to whom the intervention is directed has achieved a better state of mind, mental well-being, or an improved emotional state as a result of the intervention, but states of mind or heart are much more difficult to observe and evaluate than states of the body (as in biomedicine), and moreover may yield different assessments from short- and long-term perspectives. In other words, improvement to a broken heart or a troubled mind is far harder to verify objectively than repairs to a broken body. There are, however, clinical practice guidelines for diagnosis and treatment of particular kinds of mental health issues. Daniel Hogan’s four-volume *magnum opus*, *The Regulation of Psychotherapists*, was published in 1979 and thus is somewhat dated;⁶⁴ that said, the regulatory dilemma it presents is one that continues to be reflected in the

63 See Michael J. Trebilcock, “Regulating the Market for Legal Services” (2008) 45:5 *Alta L Rev* 215.

64 Daniel B. Hogan, *The Regulation of Psychotherapists* (Ballinger, 1979) [Hogan].

hodgepodge of contemporary regulations surveyed in the previous section of this chapter.⁶⁵

Significant disagreement is liable to result in choosing any set of outcomes as desirable, since the determination of mental health and illness is highly subjective and open to considerable variation. Without this delineation of potential outcomes, however, the possibility of informed choice for clients becomes meaningless. Without a clear picture of expected outcomes, a determination of what skills the practitioner needs to ensure them is also inherently impossible. Yet licensing laws, academic training programs, and professional associations have rarely, if ever, identified the outcomes they consider desirable.

With respect to output measures of quality, Hogan points out that extensive reviews of the empirical literature have found little evidence of systematic differences in effectiveness between most schools of psychotherapy.⁶⁶ With respect to input measures of quality, Hogan argues:⁶⁷

Most of the psychological theories relevant to therapeutic practice have not been shown to be of value ...

A considerable body of research demonstrates that paraprofessionals and lay-people are highly effective and that their levels of competence compare favorably with highly trained experts. In roughly half the studies, in fact, non-professionals achieve superior results on a variety of outcome measures, despite their lack of education and despite their lack of knowledge in the field of personality dynamics.

Further evidence ... indicates that possession of academic degrees is not especially helpful in improving therapeutic competence. The fact that others can be trained in a minimum of time to function effectively provides additional support for the notion that theoretical and technical knowledge is not a crucial variable in the psychotherapeutic or encounter group process.

The question posed by Hogan's comments, which remain largely salient today,⁶⁸ is whether it is possible to identify some basic elements or

65 *Ibid.*, at 101.

66 *Ibid.*, at 110.

67 *Ibid.*, at 112.

68 See Louis G. Castonguay and Clara E. Hill, eds, *How and Why Are Some Therapists Better than Others? Understanding Therapist Effects* (American Psychological Association, 2017); "Mental Health Care: Talk Is Cheap," *The Economist* (16 March 2019) 52 [*The Economist*, "Talk Is Cheap"]; "Shrinks, Expanded," *The Economist* (16 March 2019) 12 [*The Economist*, "Shrinks Expanded"].

contours of a general regulatory approach to the provision of mental health care services that offer some promise of improvements to the muddled and inconsistent regulatory status quo.

First, consistent with the conclusions in the previous case study relating to the regulation of alternative medicines and medical providers, mutually exclusive licensure regimes in the mental health care provision field appear to be a hopelessly misguided enterprise for the most part, with one qualified exception: the prescribing of drugs for mental health problems is restricted to physicians and psychiatrists.⁶⁹ Any attempt, beyond this exception, to segment or compartmentalize the field of mental health care provision into mutually exclusive domains, given the vast overlaps that already exist across many of these classes of service providers, seems both completely infeasible and highly undesirable. Moreover, psychiatry's pre-eminence in the mental health care domain is under question, given that laypeople with some very basic training are often able to offer effective counselling and therapeutic services, at least for a range of temporary or minor mental health problems.⁷⁰ Moreover, the scarcity of psychiatrists and psychologists⁷¹ has increased reliance on other kinds of mental health care providers.

Second, the preceding commentary directs our attention to the role of certification regimes in the mental health care field that reserve titles or designations to certain classes of providers but not to exclusive domains of practice. As the comparative review of contemporary regulatory policies reveals, at present there is a jumble of titles and designations – often coexisting – some of them officially conferred or sanctioned by

69 In the five countries in our sample certain other mental health care providers have also been permitted to prescribe medications to treat mental health issues to varying degrees, for example GPs and in some cases psychologists with specialized training. The extension of the right to prescribe medications to mental health care providers other than psychiatrists is often defended on several grounds, including shortage of psychiatrists resulting in long wait times for patients and shortage of affordable psychiatrists as in some jurisdictions – for example, in the US, some psychiatrists are not accepting payments through public health insurance schemes. While mindful of these issues, we argue that prescription of biomedicines must be limited to the scope of practice of psychiatrists as only psychiatrists are licensed physicians with specialization in mental illnesses.

70 Ari Zaretsky, "Psychiatrists Shouldn't Have a Monopoly over Psychotherapy," *Globe and Mail* (22 April 2019), <https://www.theglobeandmail.com/opinion/article-psychiatrists-shouldnt-have-a-monopoly-over-psychotherapy>; *The Economist*, "Talk Is Cheap," *supra* note 68; *The Economist*, "Shrinks, Expanded," *supra* note 68.

71 Rice-Oxley, "Mental Illness," *supra* note 1; Rice-Oxley, "Prevention," *supra* note 1; World Health Organization, *Global Health Observatory Data Repository: Human Resources Data by Country*, <http://apps.who.int/gho/data/node.main.MHHR?lang=en>.

the state, others by purely private organizations (akin to private trademarks). Because of this jumble of designations, and the differences in credibility attaching to each, potential clients of mental health care service providers find themselves confronted with extremely noisy and confusing quality signals.

An approach to certification along the following lines might go far to reduce this confusion: the state would establish certain input and output preconditions for the accreditation of a professional body with certification powers in the mental health care field. The preconditions would include appropriate initial and ongoing educational and training requirements; the establishment of an effective complaints and disciplinary regime; a broadly accessible (i.e., online) description of the professional body's philosophy or school of treatment; a list of certified members; a public record of disciplinary complaints and dispositions, as well as civil liability claims and dispositions; and, most importantly, an online facility for patients or clients to gain information about the quality of and types of services provided by individual certified practitioners and to provide feedback on or ratings thereof.

Practitioners could also be required periodically to publish online summaries of anonymized patient outcomes, regardless of improvement or regression in patients. Practitioners' impacts on outcomes would thus be more transparent. Also, consumers would be better able to assess and choose practitioners, and governing bodies would be able to scrutinize their members more closely.⁷² Feedback-informed therapy⁷³ typically requires the patient to periodically fill out a survey asking standardized questions about the patient's state of mental health, that is, whether it has improved.⁷⁴

72 Clark et al., *infra* note 86.

73 Also referred to as "routine measurement."

74 Erin Anderssen, "Rethinking Therapy: How 45 Questions Can Revolutionize Mental Health Care in Canada," *Globe and Mail* (7 April 2018), <https://www.theglobeandmail.com/canada/article-rethinking-therapy-how-45-questions-can-revolutionize-mental-health>. Patient feedback surveys are already commonly used in some mental health professions for particular conditions. For example, Spielberger State-Trait Anxiety Inventory, Structured Interview Guide for the Hamilton Anxiety Scale, and Short-Form-12 Health Survey. Such information may also be collected as a by-product of treatment: cognitive behavioural therapy involves "homework" that patients complete between sessions. For depression, materials and activities that therapists use to supplement CBT include symptom measures, written agendas, activity schedules, behavioural activation diaries, written resources to support behavioural experiments, mood diary, thought records, resources to support identification of unhelpful thinking, case formulation, relaxation materials, sleep diary, computerized CBT and online materials, and books/workbooks. See Debbie Tallon et al., "Materials Used to Support Cognitive Behavioural Therapy for Depression: A Survey of Therapists' Clinical Practice and Views" (2019) 48:6 *Cognitive Behaviour Therapy* 463.

Some empirical studies have concluded that such surveys are akin to clinical tests conducted in other branches of medicine, and that they aid in improving therapy by helping the practitioner identify trends and spot mental health concerns that might otherwise have been missed.⁷⁵ Some virtually delivered mental health services may integrate biometric and other data about patients via their cell phones such as their activity levels, sleep quality, and nutrition habits. An additional benefit of these surveys is that they assess progress and *outcomes*, that is, whether there has been improvement in the patients' mental health condition.

A compelling case can be made for a buffer or advisory body between individual professional associations with accredited status in this field and the elected government of the day. Such a body, comprised broadly of representatives of the various mental health care provider groups and demand-side or patient/client groups, would review proposed regulations originating with individual accredited professional bodies pertaining to entry standards, post-entry codes of conduct, and disciplinary procedures. It would then advise governments on whether to accept or reject the proposed requirements in the form of official government regulations (very much akin to what has been proposed in the previous case study on the regulation of alternative medicines).

As this approach becomes more fully elaborated, one could imagine that within particular classes of service providers (e.g., psychologists), sub-specialties might be certified by the accredited professional association of psychologists, or the sub-specialties could form independent accredited professional bodies of their own. To take a hypothetical, a child psychologist certified by his or her professional body might be designated as "Certified Child Psychologist by the Child Psychologists Association of Ontario (accredited under the *Ontario Mental Health Services Act*)."

To reduce the noise in the field, purely private professional associations would be prohibited from describing their members as "certified" or as possessing professional designations employed by accredited associations, such as "psychologist" or "social worker." As a further inducement to mental health service providers to pursue the government-sanctioned certification route, only such providers would be considered for coverage

75 *Ibid*; David M. Clark et al., "Transparency about the Outcomes of Mental Health Services (IAPT Approach): An Analysis of Public Data" (2018) 391:10121 *The Lancet* 679 [Clark et al.].

under state-provided or -supported health insurance schemes or for subsidized support for their education and training.

This general orientation, which would entail a shift by accredited professional bodies from a largely regulatory role to a matchmaking one, would not avoid all mismatches in the mental health field between providers and patients. That said, fewer, more credible, and more sharply differentiated quality and competence signals in this field would be a significant advance, given the seriously dysfunctional regulatory status quo.

4 Financial Advisers and Planners: Planning without a Regulatory Plan*

4.1 The Nature of the Regulatory Challenges

Financial advisory and planning services are a growth industry in most parts of the developed world, reflecting a proliferation of various categories of financial advisers and planners as well as available investment vehicles and financial products. The demand for financial planners and advisers reflects a combination of factors. People on average enjoy much longer life expectancies today than in the relatively recent past.¹ This requires them to provide for themselves for a longer period of post-retirement, including expenses relating to health care, in-home care, and nursing home care associated with a more protracted aging process. In addition, while a basic state-provided retirement pension is available in most developed countries, this benefit typically falls well short of individuals' pre-retirement incomes. With respect to private retirement plans, more and more employers are shifting from defined benefit to defined contribution plans, which impose more risk on individual employees, and some employers offer no private pension benefits at all, as part-time and precarious employment is on the rise. Finally, many individuals tend not to be financially literate;² low financial literacy is often compounded by psychological biases reflecting myopia or inertia in planning for long-term contingencies. This is borne out by behavioural

* With Anita Anand and Francesco Ducci.

1 See Evan Rosevear, Michael Trebilcock, & Mariana Mota Prado, "The New Progressivism and Its Implications for Institutional Theories of Development" (2021) 39:4 Development Policy Review 644.

2 See for instance OECD, International Survey of Adult Financial Literacy Competencies (2016), <http://www.oecd.org/finance/oecd-financial-literacy-study-finds-many-adults-struggle-with-money-matters.htm>.

economics research suggesting that people tend to save and invest far less than they have reason to.³

As a concrete example of the importance of investment advice, the following comparison is instructive. In the five years between the beginning of 2014 and the end of 2018, the Bank of Montreal's actively managed US Equity Fund Series A generated an annual return of 10.74 per cent, yielding total earnings on \$100,000 of \$66,579. In contrast, the Bank of Montreal's S&P500 Exchange Traded Fund over this same period generated an average return of 13.59 per cent, yielding total earnings over this period of \$89,097 (a difference of about \$23,000). On an investment of \$1 million (perhaps after investors have downsized their home pending retirement), the difference in total earnings would be \$230,000 (much of this due to management fees and commissions). Yet at the time of the hypothetical investment in 2014, the first fund was almost twice as large as the second (this disparity had largely flipped by the end of the period).⁴

In many developed countries, individuals seeking financial planning or advisory services with respect to long-term savings and investment strategies are likely to confront formidable information asymmetries when choosing an appropriate and competent financial adviser/planner who will act in their best interests. First, in many jurisdictions there is a jumble of confusing titles and designations; often, these are associated with private professional or industry associations that provide weak signals of relative competence. Second, many financial advisers and planners are subject to an inherent conflict of interest in that they are advising on investments and products in which they or their employers have a direct interest, and their compensation is often determined in part by their success at steering clients to in-house products, the result being advice that may not be in the client's best interests.⁵

3 See Richard Thaler & Cass Sunstein, *Nudge: Improving Decisions about Health, Wealth, and Happiness* (Penguin, 2009); Shlomo Benartzi and Richard Thaler, "Heuristics and Biases in Retirement Savings Behaviour" (2007) 21:3 *Journal of Economic Perspectives* 81–104; Morris Altman, "Implications of Behavioural Economics for Financial Literacy and Public Policy" (2012) 41:5 *Journal of Behavioral and Experimental Economics* 677. There is evidence to suggest that many of those who decline to invest in stocks make this choice at least in part because they do not wish to reflect on their finances, and because of concerns they have about finding a trustworthy financial adviser. On this point, see James J. Choi & Adriana Z. Robertson, "What Matters to Individual Investors? Evidence from the Horse's Mouth" (NBER Working Paper no. 25019, Sept 2018), <https://www.nber.org/papers/w25019.pdf>

4 I am indebted to my colleague, Adriana Robertson, for this example.

5 This concern is borne out by a study undertaken by Del Guercio and Reuter, in which they found that actively managed funds that were sold through brokerages often

Because the market for financial advice is characterized by endemic information asymmetry problems and a strong risk of conflicts of interest, the following regulatory interventions are required: (1) a government-accredited voluntary certification regime for financial advisers and planners who meet minimum *ex ante* and *ex post* standards of competence and integrity; such a regime would grant the title of Certified (government-accredited) Financial Advisor; (2) a mandatory distinction between independent and non-independent certified advisers, with independent advisers being subject to a duty to act in the best interests of their clients; (3) a public registry and database that would include prescribed information such as the individual adviser's formal educational credentials; job or employment experience; whether the individual is certified as a financial adviser by a government-accredited professional organization and, if so, whether as a certified independent or non-independent financial adviser; whether the individual holds a licence related to the sale of any financial products; and disciplinary complaints and civil liability claims and dispositions relating to that individual's financial advisory services.

This case study has two objectives. The first is to identify regulatory best principles for jurisdictions that currently lack or fall short of having a coherent regulatory framework relating to financial advisers and planners, on the basis of recent international regulatory experiences in selected jurisdictions (Australia, Canada, Europe, New Zealand, the UK, the US). The second is to provide a critique of exclusive licensing regimes in this context. The proposals in this chapter are often informed by positive lessons drawn from its comparative evaluation. Together, they provide a general critique of exclusive licensing regimes as the predominant approach followed by many jurisdictions that have implemented regulatory reforms for financial advice; they also call for a more flexible government-accredited certification regime coupled with a public registry as a way to address asymmetric information problems while avoiding the negative supply-side effects implicit in licensing schemes. Hence, these policy proposals are an attempt to rationalize the different approaches in the current regulation (or lack thereof) relating to financial planners/advisers across jurisdictions, as well as the discordances found within the regulatory landscape of specific jurisdictions.

underperformed index funds. Actively managed funds that were marketed directly to retail investors, by contrast, did not see their earnings outdone by index funds. For a more detailed discussion of this point, see Diane Del Guercio and Jonathan Reuter, "Mutual Fund Performance and the Incentive to Generate Alpha" (2013) 69:4 J Fin 1673.

Section II reviews the menu of available regulatory options. Section III provides a brief comparative review of regulatory experience in selected jurisdictions. Section IV provides a brief case study of Ontario's experience; in that province, the government is currently contemplating major regulatory initiatives. Section V presents some proposed regulatory approaches that would enhance regulatory coherence in a field in which it has hitherto been singularly lacking.

4.2 The Menu of Regulatory Options⁶

As set out in [chapter 1](#), it is useful to divide regulatory options into *ex ante* and *ex post*: *ex ante* forms of regulation are directed toward the entry qualifications of those seeking to provide a professional service (such as financial planning/advice), while *ex post* forms of regulation address post-entry forms of conduct. Most regulated professions have historically emphasized *ex ante* over *ex post* regulation, that is, input over output or outcomes.

With respect to *ex ante* regulation (here, of financial planners/advisers), three broad regulatory options are available: (a) *exclusive licensure* of a defined category of professional services; (b) *certification* of certain classes of service providers as meeting prescribed entry qualifications, but without precluding non-certified providers from the category of service in question (i.e., exclusive or reserved titles rather than exclusive or reserved fields of practice); or (c) *registration*, where all individuals providing services in a given field are required to register in a publicly accessible central registry, but without any entry qualification requirements, although registrants could be required to provide information on the registry of formal education and training, relevant job experience, organizational and professional affiliations (if any). [Chapter 1](#) briefly reviewed each of these regulatory options in terms of their strengths and weaknesses.

An obvious threshold issue – one that pertains to all of the major regulatory options identified above – is how to define the field of financial planning/advice to which the regulatory options would apply. In this respect, clearly function should prevail over form, so that whatever label or designation financial advisers/planners choose to apply to themselves should not unilaterally determine the application and extent of appropriate regulatory obligations.

6 This section draws, in part, on an earlier essay by Michael Trebilcock, "Regulating Service Quality in Professional Markets," in Donald Dewees, ed, *The Regulation of Quality: Products, Services, Workplaces, and the Environment* (Butterworths, 1983).

4.3 A Comparative Overview of Regulatory Regimes for Financial Advisers/Planners

This section examines how financial advisers/planners are regulated in the following five jurisdictions: Australia, Canada, Europe, New Zealand, the UK, and the US. As set out in this section and in Appendix 4.1, these five highlight the clear similarities, recurrent policy issues, and analogous consumer protection concerns that underpin regulatory approaches to financial planning/advice. At the same time, substantively critical differences emerge across these five countries, which are relevant to this chapter because they shed light on general regulatory best principles. The different approaches relate to the following three pillars of regulation: who is regulated and under what title; how entry or access is regulated, and what the associated pre-requisites are for entry or access; and how are conflicts of interest are addressed.

In some jurisdictions, the titles *financial adviser* and *financial planner* seem to be interchangeable; in others, *financial adviser* is a general category within which *financial planner* is a sub-category or specialization (respectively in Australia and New Zealand); in still other regimes, *investment adviser* and *financial planner* are distinct but often overlapping professional categories (US). Some jurisdictions lack a regulatory scheme for financial planners and advisers and largely base regulation on the sale of specific financial products as opposed to advice or planning (Canada, with the exception of Quebec); other jurisdictions regulate investment advice but not planning (US). Some countries regulate financial advisers and planners directly and distinctly from the sale of specific financial products, often distinguishing between “independent” and “non-independent” advisers and subjecting them to different rules (e.g., Australia and the EU). Countries that regulate financial advice and planning generally do so through licensing and specific access and standing requirements (including minimum education requirements, as well as continuing professional development requirements), although with some variations across regulatory regimes and in the terminology used (e.g., terms like “authorization” and “registration” are often used to describe an exclusive right equivalent to licensing).

All jurisdictions address conflicts of interest through a combination of specific standards of conduct and rules on remuneration. However, critical differences emerge regarding how conflicts are regulated. Strict regimes apply a “best interest of the client” standard in tandem with bans on both conflicted remuneration and commissions that apply to all advisers (Australia). Looser regimes either lack a best-interest standard (Canada, except for Quebec) or apply inconsistent regimes depending on the service and financial product (US). Other intermediate means

of regulating conflict of interest include qualified standards of conduct (UK), or partial as opposed to comprehensive bans on commissions that apply exclusively to independent advisors (various European countries).

4.3.1 Australia

In Australia, financial advice is regulated under the *Corporation Act 2001*.⁷ According to official reports, “financial planner” and “financial adviser” are interchangeable titles,⁸ and advice is classified as either *independent (non-aligned)* or *aligned*. A financial planner/adviser can use the term *independent* only when he or she operates without any conflict of interest arising from associations or relationships with a product issuer; an aligned adviser is usually employed by a financial institution such as a bank or a wealth management services provider, or tied to a product provider via vertical ownership structures, contractual relationships, and other forms of remuneration. The advice can also be distinguished between personal (when the adviser has considered one or more of the client’s objectives, financial situation, and needs)⁹ and general (any financial advice that is not personal).

The current regulatory regime, the result of reforms in force since January 2019, imposes restrictions on who can call themselves a “financial planner” or a “financial adviser.” In particular, a financial planner or adviser must (a) hold an Australian Financial Services (AFS) licence or operate under an exemption to that licensing requirement (e.g., by providing financial services as a representative of an AFS licensee) and (b) obtain and comply with the following specific requirements related to education, training, and ethical standards set by the Financial Advisers Standards and Ethics Authority (FASEA):¹⁰

- Have a relevant bachelor or higher degree, or equivalent qualification;
- Pass a professional exam;

⁷ *Corporation Act 2001* (Cth), 2001/50.

⁸ See The Royal Commission into Misconduct in the Banking, Superannuation, and Financial Services Industry, Background Paper 6, “Some Features of the Australian Financial Planning Industry” (2018), <https://financialservices.royalcommission.gov.au/publications/Documents/features-of-the-australian-financial-planning-industry-paper-6.pdf>; Australian Securities and Investment Commission (ASIC), “Professional Standards For Financial Advisers – Reforms,” <https://asic.gov.au/regulatory-resources/financial-services/professional-standards-for-financial-advisers-reforms>.

⁹ Personal advice can further be distinguished as *scaled* (limited in scope to a specific range of issues) or *comprehensive* (holist or full advice covering the client’s financial needs).

¹⁰ Background Paper no. 6, *supra* note 8.

- Meet continuing professional development (CPD) requirements each year;
- Complete a year of work and training (professional year);
- Comply with a code of ethics that includes a “best interest of the client” standard.

The current regulatory principles governing the provision of financial advice in Australia have also been shaped by a number of reforms enacted between 2007 and 2017.¹¹ In particular, the 2012 Future of Financial Advice Reforms (FOFA) bill introduced the following:

- a “best interests” obligation that requires all financial advisers to act in the best interests of their clients when giving personal advice;¹²
- a ban on conflicted remuneration (including commissions, volume payments, and non-monetary benefits) when financial product advice is provided to retail clients;¹³ and
- increased transparency through enhanced disclosure of fees and a requirement that providers of financial advice obtain client agreement to ongoing advice fees.

Other reforms, introduced in 2014, created a professional register established by the Australian Securities and Investment Commission (ASIC); further regulatory changes in 2018 targeted specific conflict of interest in life insurance remuneration schemes.¹⁴ The government has committed itself to further reforms; among other things, it is seeking to rename “general advice” currently not covered by the best interest of the client standard.¹⁵

11 See the Royal Commission into Misconduct in the Banking, Superannuation, and Financial Services Industry, “Key Reforms in the Regulation of Financial Advice,” <https://financialservices.royalcommission.gov.au/publications/Documents/key-reforms-in-the-regulation-of-financial-advice-background-paper-8.pdf>.

12 The best interests duty is based on the notion of “reasonableness.” One way in which an adviser can demonstrate he/she has complied with the best interests duty is to take the steps outlined in the legislation, which act as a “safe harbour” for complying with the best interests duty.

13 Financial advisers are also banned from charging asset-based fees (fees dependent on the amount of funds used or to be used to acquire financial products by or on behalf of the client).

14 Reforms attempted to reduce insurance advisers’ incentives to engage in unnecessary product replacement and introduced caps on up-front commissions and clawback requirements.

15 The government established an Enforcement Review Taskforce, which provided its report to the government in December 2017. The government is currently considering the task force’s final recommendations.

4.3.2 Canada

According to the Financial Consumer Agency of Canada, a financial adviser is a general term that can be applied to anybody who helps a client manage money; this could include an employee of a financial institution, a stockbroker, or an insurance agent. A financial planner is a type of adviser who helps clients develop a plan to reach long-term financial goals. This includes helping create a budget, identifying ways to save money on taxes, helping with retirement planning, or providing estate planning advice.¹⁶

There are different degrees of regulation pertaining to financial advisers/planners in Canada. In Ontario (see the next section for more detail), individuals using the title “financial planner” or “financial adviser” are not governed by a specific regulatory regime, and regulatory requirements for financial services remain tied to specific financial products or services, such as insurance, securities, or mortgage brokering.

Similar concerns over possible regulatory gaps have been raised in other provinces. For instance, while British Columbia has a higher regulatory standard than Ontario – a registration regime for professionals who trade in, underwrite, or advise on securities imposes a duty to act fairly, honestly, and in good faith¹⁷ as well as some restrictions on individuals holding themselves out as financial planners¹⁸ – the province still lacks a comprehensive regulatory regime for financial planners and advisers. In this regard, the Financial Advisors Association of Canada has recently noted that while a licence is required in BC to sell financial products, there is no minimum education requirement in that province even though almost half of British Columbians believe that someone with the title “financial adviser” is regulated much like a lawyer, doctor, or other professional.¹⁹

16 Financial Consumer Agency of Canada, “Choosing a Financial Advisor,” <https://www.canada.ca/en/financial-consumer-agency/services/savings-investments/choose-financial-advisor.html>.

17 British Columbia Securities Commission, BC Policy 31-601, “Registration Requirements,” https://www.bsc.bc.ca/Securities_Law/Policies/Policy3/PDF/31-601_BCP_January_11_2015.

18 BC Policy 31-601, “Registration Requirements,” notes that individuals holding themselves out as “financial planners” will not normally be registered unless the individual is licensed by the Financial Planners Standards Council of Canada to use the designation “Certified Financial Planner” or “CFP” or has similar qualifications and is subject to similar continuing education requirements.

19 Financial Advisors Association of Canada, “Majority of British Columbians Believe Financial Advisors Need Professional Regulation,” <https://myadvocis.ca/bc-title-protection-survey>.

A similar mismatch between lack of regulation and consumers' expectations is reported in Alberta and other provinces.²⁰

Quebec imposes a stricter regulatory regime. Only certain trained individuals are permitted to use the title “financial planner” or “planificateur financier” (Plan.Fin.). These titles can be used by individuals who hold a diploma issued by the Institut Québécois de Planification Financière (IQPF) and are authorized under a certificate issued by the Autorité des Marchés Financiers (AMF). This means that financial planners in Quebec must comply with the following requirements:

- specific academic training, usually a personal financial planning university program approved by the IQPF or equivalent programs;
- a mandatory IQPF Professional Training Course;
- IQPF exam leading to the issuance of an IQPF diploma;
- continuing professional development requirements;
- a Code of Ethics, which includes the duty for a financial planner to guide and enlighten the client with objective professional judgment, always keeping in mind the interest of the client and avoiding situations of conflict.²¹

4.3.3 *European Union*

Financial advice is regulated across Europe through a mix of regulations and directives at the European level, as well as through national legislation in individual member-states. General principles were laid out in the 2007 Markets in Financial Instruments Directive I (MiFID I) and in the 2018 Markets in Financial Instruments Directive II (MiFID II).

In 2007, MiFID I introduced various disclosure requirements as well as a statutory requirement to act honestly, fairly, and professionally in accordance with the best interests of clients. This standard, defined as a “best execution” obligation, requires that all appropriate steps be taken to obtain the best product for the client, considering all the costs

20 See IE Investment Executive, “Majority of Albertans Believe Financial Advisors Need Professional Regulation,” <https://www.investmentexecutive.com/news/industry-news/majority-of-albertans-believe-financial-advisors-need-professional-regulation>; “Financial Planner Regulations Needed, Say 2 Canadian Groups,” <https://www.cbc.ca/news/canada/nova-scotia/business-investments-advisers-1.3483531>.

21 See Institut Québécois de Planification Financière, “Becoming a Financial Planner,” <https://www.iqpf.org/en/becoming-a-financial-planner>; Autorité Des Marchés Financiers, “Financial Planning,” <https://lautorite.qc.ca/en/becoming-a-professional/financial-planning>.

entailed in the service and various options for remuneration. In 2018, MiFID II added further requirements for advisers, in particular a distinction between *independent* and *non-independent (or tied)* advisers, which requires advisers to disclose whether the advice is provided on an independent basis or on a more restricted analysis of the market.²² For advice to qualify as independent:

- the independent adviser must consider a sufficiently large number of financial instruments available in the market (by type, issuer, and product provider) and the advice should not be limited to financial products issued or provided by entities that are linked with the adviser; and
- the independent adviser must not accept or receive any commissions, or monetary or non-monetary benefits, from any third parties, such as product providers.

Other, more specific requirements are imposed by national legislation in individual European member-states with regard to access to the profession, types of advice available, credentials, and rules on remuneration.²³ For instance, some countries, including Germany and France, implemented the new MiFID II rules by adopting a partial ban on commissions only for independent investment advice. This is not the case in the Netherlands, which, like the UK, went further by adopting a full ban on commissions for all financial advisers. Access is generally based on a licensing regime (sometimes referred to as “registration” or “authorization” with a designated supervisory body), with licensees subject to specific requirements, which can include certain education prerequisites, professional exams, compliance with a Code of Ethics, and continuing professional development. In Italy, for instance, there is a professional register that is divided in specific sections for providers offering independent and non-independent advice. No specific degree is required except for a high school diploma, but access to the profession and registration is conditional on passing an exam set by the designated professional supervisory body. In France, a financial investment adviser must join a professional association authorized by the *Autorité*

22 New disclosure requirements also require advisers to notify <notify whom?> whether they will continue to assess the suitability of the recommendation on an ongoing basis.

23 Jeremy Burke and Angela Hung, “Financial Advice Markets: A Cross-Country Comparison” (2015), RAND Corporation, https://www.rand.org/pubs/research_reports/RR1269.html.

des Marchés Financiers. After fulfilling the associated professional prerequisites to join an association, each adviser must be listed in a public register.

4.3.4 New Zealand

Until very recent reforms (in April 2019), the regulation of financial planners in New Zealand was based on complex and detailed distinctions between different kinds of “financial advisers” depending on the service provided and the specifics of different financial products. In particular, while the Financial Market Authority defined “financial advisers” broadly as people who give advice about investing and other financial services and products – including financial planners, mortgage and insurance brokers, and banks that provide advice on products and investments – regulation prior to the reforms set different regulatory requirements for various sub-categories of advisers.²⁴

For example, a “Registered Financial Adviser” (RFA) could only give financial advice for specific, less complex products and was limited to non-personalized services to retail clients or services to wholesale clients. Regulatory requirements for RFAs simply included registration on the Financial Service Providers Register. By contrast, an “Authorized Financial Advisor” (AFA) could provide, in addition to services as an RFA, services for more complex financial products, as well as investment planning services. Regulation imposed an authorization regime for AFAs – a more demanding regime that required registration as well as the meeting of specific eligibility requirements, such as minimum competence prerequisites and compliance with a Code of Professional Conduct, including a duty to give priority to clients’ interests. Other sub-categories included “Qualifying Financial Entity Adviser” (an employee or a nominated representative of a qualifying financial entity) and brokers; each of these was subject to specific registration, conduct, and disclosure obligations.

The Financial Services Legislation Amendment Bill of 2019 introduced a new regulatory regime for financial advice covering a wide range of activities (including specific advice, holistic investment planning, and digital advice) and simplified these complex distinctions by requiring that *all* financial advisers comply with the requirements prescribed by the *Financial Advisers Act 2008*. The new regime requires a “Financial Advice

24 Financial Market Authority, “Types of Financial Advisers,” <http://www.fma.govt.nz/compliance/financial-advice/types-of-financial-advisers>.

Provider” to hold a licence granted by the Financial Markets Authority.²⁵ The new regime also establishes a level playing field by:

- simplifying the regime and the terminology by removing the categories of Authorized Financial Advisors (AFAs), Registered Financial Advisors (RFAs), and Qualifying Financial Entities (QFEs);
- introducing a Code of Conduct for Financial Advice, which include duties to give priority to a client’s interests and new disclosure requirements on remuneration (although no comprehensive bans on remuneration have been introduced);
- expanding the minimum standards of competence, knowledge, and skill to all categories of people giving financial advice to retail clients;
- removing the requirement that only a natural person can give financial advice, to allow for the provision of online advice (“robo-advice”); and
- amending the requirements to be registered on the New Zealand Financial Service Providers Register, in order to prevent its misuse.²⁶

4.3.5 United Kingdom

The 2006 Retail Distribution Review (RDR) regulating financial advice in the UK has imposed minimum qualifications and specific requirements regarding titles, disclosure, and remuneration. Regulation is based on the following principles:

- There is a mandatory disclosure requirement as to whether the advice is *independent* or *restricted*.²⁷
- All advisers have to be registered with and approved by the Financial Conduct Authority, subject to qualification requirements and compliance with prescribed standards of professionalism.
- Advisers are required to hold an approved qualification (similar to one year of a completed university degree) and need to have

25 Advisers can hold their own licence or can work on behalf of someone else who holds a licence. Licensed financial advice providers can give advice directly, through financial advisers or nominated representatives.

26 Financial Services Legislation Amendment Bill, https://www.parliament.nz/resource/en-NZ/SCR_78895/b77b3afb44ae46b9b1c62a64789ad4e5f7c215c1.

27 Independent advice should be free of any bias or restriction, based on an assessment of the entire market and products; restricted advice is restricted to certain products from a limited range of providers and requires disclosure of the nature of the restriction. See Financial Conduct Authority, “Types of Investment Adviser,” <https://www.fca.org.uk/consumers/types-investment-adviser>.

an annual Statement of Professional Standing (SPS) issued by an FCA-accredited body.

- Each type of adviser must comply with the Code of Ethics, which requires the adviser to “act honestly, fairly and professionally in accordance with the best interests of clients.”
- A ban has been placed on commissions for *all* advisers, with the minor exception of basic advice.²⁸

Some features of the UK regime are worth highlighting. First, there is no regulatory distinction between financial advisers and financial planners; however, many financial planners in the UK are Chartered Financial Planners (CFPs) – a title granted by a professional body and considered the “gold standard” qualification for planners. CFP status requires a diploma and at least five years of professional experience; it also imposes a Code of Conduct that includes a “best interests of the client” principle. Second, although advisers have been subject since 2007 to a requirement to “act honestly, fairly and professionally in accordance with the best interests of its clients,”²⁹ the UK Financial Services Authority appears to interpret this as a qualified standard³⁰ that applies flexibly to various business models and forms of investment advice.³¹ The comprehensive ban on commissions for all types of financial advisers appears to be the central tool against conflict of interest. Third, the terminology used to denote access to the profession is “authorization,” but the associated preconditions render the regime akin to licensing. Finally, a 2015 financial market review³² concluded that although RDR reforms have improved the integrity and competence of advisers, future reforms must mitigate an identified “advice gap” by improving affordability and accessibility of financial advice in the UK market.

28 Charlotte Baumanns, “The UK Ban on Commissions Relating to Retail Investment Advice – A Good Example for German Law?” (2017) Oxford Commercial Law Centre Blog, <https://www.law.ox.ac.uk/research-subject-groups/commercial-law-centre/blog/2017/05/uk-ban-commissions-relating-retail>.

29 Financial Services Authority, “Conduct of Business Sourcebook,” at: <http://fsahandbook.info/FSA/html/handbook/COBS> at s. 2.1.1.

30 See Ontario Securities Commission, Canadian Securities Administrators Consultation Paper no. 33-403 (2012), https://www.osc.gov.on.ca/en/SecuritiesLaw_csa_20121025_33-403_fiduciary-duty.htm#N_1_1_2_90a_.

31 Financial Conduct Authority, “Discussion Paper on a Duty of Care and Potential Alternative Approaches” (2018), <https://www.fca.org.uk/publication/discussion/dp-18-05.pdf>.

32 Financial Conduct Authority, “Financial Advice Market Review” (2015), <https://www.fca.org.uk/firms/financial-advice-market-review-famr>.

4.3.6 United States

The US financial services industry is characterized by specific regulatory regimes that apply to different types of advisers depending on the service and product provided. In particular, there are three types of professionals related to financial planning and advice, each governed by its own specific and distinct rules:

- A. *Investment advisers (IAs)*: IAs are generally individuals or firms that provide investment advice about securities for compensation. IAs are regulated both at the federal level and at the state level.³³ IAs are subject to a fiduciary standard, which requires them to act in the best interest of the client. Access to the profession requires a licence and a bachelor's degree;
- B. *Broker-dealers (BDs)*: BDs are providers offering recommendations for specific securities products and offering brokerage services such as buying or selling stocks, bonds, or mutual fund shares. BDs are subject to broker-dealer regulation at the federal and state levels³⁴ and are generally subject to a lower "suitability" standard, which simply requires providers to reasonably believe that the products are suitable for the customer. Access to the profession is based on a licensing regime and a set of rules set by the Financial Industry Regulatory Authority (FINRA), a non-governmental self-regulatory body;
- C. *Insurance agents*: Insurance agents are regulated at the state level and provide recommendations for insurance products and the sale of insurance products, including fixed and indexed annuities. For insurance agents, access requirements and standards of care vary by product and by state.

Financial planners are not directly regulated. Rather, they are governed by the specific rules of IAs, BDs, and insurance agents, depending on the service provided. Most frequently, financial planners are regulated as investment advisers; however, insofar as they provide specific recommendations and sell securities and products offered by broker-dealers, or insurance and other financial products provided by insurance agents, they can also fall within the regulatory schemes of IAs or BDs, or both.³⁵

33 These include the Investment Adviser Act of 1940, various rules imposed by the Securities and Exchange Commission, and various state investment adviser laws.

34 These include the Securities and Exchange Act of 1934, and various rules by the SEC and Financial Industry Regulatory Authority, as well as state broker/dealer laws.

35 For instance, financial planners who sell variable insurance products (variable life insurance or variable annuities) are subject to both state insurance regulation and

There has been extensive debate in the United States as to the desirability of creating a more comprehensive and integrated regime for financial planners and advisers. On the one hand, many believe that the current system is adequate and covers most activities in which financial planners engage.³⁶ On the other hand, there are concerns (raised among others by the Financial Planning Coalition)³⁷ that the current patchwork approach has created a regulatory gap so that integrated financial planning remains unregulated and consumers cannot rely on government authorities to verify providers' qualifications (despite the presence of voluntary professional designations such as the Certified Financial Planner certificate). Critics of the status quo in particular argue that:

- too many professional designations generate confusion among consumers;
- some components of financial planning are subject to no regulation at all when they do not fit under the existing regulatory schemes of specific professionals;
- regulated service providers may lack the skills and competence for integrated planning services; and
- planners are subject to different standards of care depending on their specific activities (fiduciary standard as investment advisers, suitability standard as broker-dealers, and various standards as insurance agents), which creates risks of regulatory arbitrage.

Following a 2012 study by the US Securities and Exchange Commission (SEC),³⁸ which recommended a uniform fiduciary standard for all types of financial professionals – including broker-dealers – while allowing retail investors to continue to have access to various fee structures, the SEC adopted in 2018 a package of proposals that created a new “Regulation Best Interest” standard for broker-dealers and imposed a

broker/dealer regulation (because these products are regulated as both securities and insurance products).

36 See Jason Broomberg and Alicia Cackely, “Regulating Financial Planners: Assessing the Current System and Some Alternatives,” in Olivia Mitchell and Kent Smetters, eds, *The Market for Retirement Financial Advice* (Oxford University Press, 2013).

37 Financial Planning Coalition, “Consumers Are Confused and Harmed: The Case for Regulating Financial Planners” (2014), <https://financialplanningcoalition.com/wp-content/uploads/2018/11/Financial-Planning-Coalition-Regulatory-Standards-White-Paper-Final.pdf>, 141–2.

38 SEC, Statement by SEC Commissioners, “Statement Regarding Study on Investment Advisers and Broker-Dealers” (2012), <http://www.sec.gov/news/speech/2011/spch012211klctap.htm>.

standardized, mandatory short disclosure form (explaining the type of services offered, applicable legal standards, and conflicts of interest). The new standard requires broker-dealers “to act in the best interest of a retail customer when making a recommendation of any securities transaction or investment strategy involving securities to a retail customer.”³⁹ The SEC proposals followed a prior attempt by the Department of Labor (DOL) in 2016 to adopt new rules for broker-dealers who provide services to retirement plans, which required them to be fiduciaries.⁴⁰ However, these rules were first postponed by the Trump administration and then vacated by the Fifth Circuit Court of Appeals in 2018.⁴¹

4.4 The Example of Ontario

Ontario, Canada, is one jurisdiction in which inconsistent and fragmented regulation is manifest. This section sets out the salient attributes of this regime as it relates to financial advisers and financial planners.

Canada has a federal constitutional system based on an explicit division of powers in the *Constitution Act, 1982*.⁴² Under the constitution, certain matters fall within the jurisdiction of the Government of Canada while others fall within the jurisdiction of the provinces and territories. For example, the regulation of banking is within the jurisdiction of the Government of Canada, while the day-to-day regulation of securities and mortgage brokering is a matter of provincial and territorial jurisdiction. Regulation of insurance companies is generally split between federal and provincial/territorial jurisdiction.⁴³

39 Supporters of the new rule argue that the open-ended meaning of the term will provide for greater regulatory flexibility, although critics suggest that the new terminology used for broker-dealers as opposed to investment advisers (subject to a fiduciary best interests rule) fails to provide a comprehensive and consistent approach.

40 A 2015 report by the White House Council of Economic Advisers found that biased advice drained \$17 billion a year from retirement accounts. See Council of Economic Advisors Report, “The Effects of Conflicted Investment Advice on Retirement Savings” (2015), https://obamawhitehouse.archives.gov/sites/default/files/docs/cea_coi_report_final.pdf.

41 The rules were vacated on the basis that DOL exceeded its statutory authority, although the DOL is working with the SEC to resurrect the fiduciary rule.

42 See *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

43 In recent decades, as financial markets have become more complex and international in scope, efforts to form national regulatory organizations to administer and enforce laws and regulations across Canada have developed. There have been a number of attempts to bring securities regulation under federal constitutional jurisdiction. In 2011, the Supreme Court of Canada held that the federal government did not have constitutional jurisdiction to enact a securities act that it had proposed, and the SCC

In addition, the sale of financial products by individuals employed by or associated with securities dealers, insurance agencies, mortgage brokerage firms, and mutual fund firms is generally a matter of provincial and territorial jurisdiction. Some banking activities, such as deposit-taking services and the provision of banking services such as credit and lending, remain a matter of federal jurisdiction, although the federal government has proven loath to pre-empt provincial regulation in this area for non-bank institutions.

Thus, in Canada, much of financial product sales and services and associated financial planning or financial advice is a matter of provincial and territorial jurisdiction. As a result, provincial and territorial agencies and regulatory bodies have been constituted to regulate these financial firms and their activities. In Ontario, these agencies are the Ontario Securities Commission (OSC) and the Financial Services Commission of Ontario (FSCO). Ontario also recently established the Financial Services Regulatory Authority (FSRA), which has consolidated FSCO and the Deposit Insurance Corporation of Ontario (DICO).⁴⁴ FSRA was established in June 2017 and has subsumed the responsibilities of FSCO and DICO.⁴⁵

Additionally, various self-regulatory organizations (SROs), such as the Investment Industry Regulatory Organization of Canada (IIROC) and the Mutual Fund Dealers Association of Canada (MFDA) on the securities side and the Registered Insurance Brokers of Ontario (RIBO) on the insurance side, have specialized expertise and knowledge. These bodies are delegated by government to regulate the activities of their members.

The current fragmented regulatory environment stems from the fact that financial service firms originally functioned in silos based on activities

has recently affirmed this holding. See *Reference re Securities Act*, 2011 SCC 66; *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48. The federal government and several of the provinces and territories then proposed the formation of a Cooperative Capital Markets Regulator (CCMR) to replace the securities regulatory bodies in participating provinces and territories with one regulatory body. For details of the proposal, see Cooperative Capital Market Regulatory System, “Memorandum of Agreement Regarding the Cooperative Capital Markets Regulatory System” (2016). In April 2019, Nova Scotia joined the CCMR. See Council of Ministers of the Cooperative Capital Markets Regulatory System, Press Release, “Nova Scotia Agrees to Join the Cooperative Capital Markets Regulatory System” (10 April 2019), <http://ccmr-ocmc.ca/wp-content/uploads/news-release-nova-scotia-joins-ccmr-20190410-en.pdf>.

44 Financial Services Regulatory Authority of Ontario, *The Way Forward: Building a Modernized and Adaptive Regulator – Board of Directors Progress Report* (April 2018) at 1, [*FSRA Progress Report*]; see also Joanne De Laurentis, “Ripe for Reform: Modernizing the Regulation of Financial Advice,” C.D. Howe Institute, Commentary no. 556, 2019.

45 *Ibid.*

and products sold.⁴⁶ Historically, these firms were not today's conglomerates, each with diverse business lines and products. Rather, banks, insurance companies, securities dealers, and mortgage brokers were separate companies operating in different sectors, and regulators were established for each of those sectors.⁴⁷ To this day, despite efforts toward regulatory consolidation, this "siloed" framework still stands.⁴⁸ Regulators focused on regulating the transaction itself; they did not regulate the relationship between the salesperson and the consumer, because the relationship was only a function of the specific transaction.⁴⁹ One consequence of this splintered regulatory sphere is the absence of an integrated scheme concerning the titles held by service providers and the qualifications they possess. A 2015 exercise conducted by the OSC, IIROC, and Mutual Fund Dealers Association of Canada (MFDA) observed 48 different business titles in use in Ontario, a panoply that highlights the difficulties consumers face when confronted with fragmented regulation.⁵⁰

In recent decades, the financial services landscape has changed in several ways. First, firms have expanded horizontally across the previously siloed industry sectors. Banks, insurance firms, securities dealers, and mortgage brokers can now exist within a single corporate structure.⁵¹ Second, the financial products themselves have also often converged across sectors (e.g., financial derivatives).⁵² Third, the relationship between salespersons and customers has shifted from an emphasis on transactions toward a holistic advisory relationship. There are no longer "salespersons" and "customers," but rather "advisers" and "clients."⁵³

46 Robert Kerton & Idris Ademuyiwa, "Financial Consumer Protection in Canada: Triumphs and Tribulations" in Tsai-Jyh Chen, ed, *An International Comparison of Financial Consumer Protection* (Springer Nature Singapore, 2018), 86 [Kerton]; Expert Committee to Consider Financial Advisory and Financial Planning Policy Alternatives as appointed by Ontario Ministry of Finance, *Financial Advisory and Financial Planning Regulatory Policy Alternatives* (1 November 2016), 17 [Expert Committee].

47 Kerton, *supra* note 46 at 86; Expert Committee, *supra* note 46 at 17.

48 Expert Committee, *supra* note 46 at 17.

49 *Ibid* at 17.

50 "Mystery Shopping and Investment Advice: Insights into Advisory Practices and the Investor Experience in Ontario" (2015), see <http://www.osc.gov.on.ca/documents/en/Securities-Category3/20150917-mysteryshopping-for-investment-advice.pdf>.

51 Kerton, *supra* note 46 at 86, 91; Expert Committee, *supra* note 46 at 17–18.

52 For example, "derivative products were ... developed ... that in many cases did not necessarily correlate with the type of financial institution producing them or the product salesperson marketing and selling them." See Expert Committee, *supra* note 46 at 18.

53 Advocis, *Consultation on the Option of Discontinuing Embedded Commission*, Comment Re: Canadian Securities Administrators Consultation Paper 81-408 (2017) at 13, 15, 39, 41–2 [Advocis Comment]; Expert Committee, *supra* note 46 at 18–19.

Fourth, the relationship between salespersons and their employers has taken a more independent, contractual-type shape.⁵⁴ Lastly, technological shifts in the industry have led to increased online financial advising, further de-emphasizing the transactional nature of the “advice.”⁵⁵ This technological change will likely continue, requiring an adaptable and innovative regulatory framework.⁵⁶

The 2018 FSRA Progress Report stated: “Regulating and establishing consistent standards for ‘horizontal’ activities and characteristics common across all industry sectors will be critical.”⁵⁷ Financial planning is an important example of this. Financial planners, and individuals who hold themselves out as such, exist across the financial services industry as a whole.⁵⁸ But there are no horizontal regulations that ensure consistency across those who hold themselves out to be financial planners or advisers.⁵⁹

In 2015, the Ontario Minister of Finance struck an Expert Panel to propose reforms to create a strengthened and harmonized regulatory framework. The Expert Committee proposed a comprehensive regulatory scheme that would expand the mandates of the current financial service regulators; place restrictions on the use of the “Financial Planner” and “Financial Advisor” titles; and establish a universal statutory best interest duty.⁶⁰

In its 2019 *Budget Measures Act* (Bill 100), the Ontario government included the *Financial Professionals Title Protection Act*, which would implement several of the Expert Committee’s recommendations.⁶¹ Now

54 While these relationships are formally employee–employer relationships, they often contain several additional elements of employee independence. Consequently, the relationship can be seen as a hybrid between the traditional employee–employee relationship and that of an independent contractor working for a financial institution. See Expert Committee, *supra* note 46 at 18–19.

55 *Ibid* at 19.

56 FSRA Progress Report, *supra* note 44 at 4.

57 FSRA Progress Report, *supra* note 44 at 4.

58 Advocis Comment, *supra* note 53 at 45.

59 *Ibid* at 41–2.

60 See Expert Committee, *supra* note 46.

61 Bill 100, Protecting What Matters Most Act (Budget Measures), 1st Sess., 42nd Leg., Ontario, 2019 (second reading 2 May 2019), Schedule 25. The Act restricts the use of the title “Financial Planner” and “Financial Adviser” to those who have obtained an approved financial planning credential from an approved credentialing body. It also empowers the Chief Executive Officer to make inquiries into businesses in this industry and the activities of individuals in their employ, and creates a public register detailing the names of individuals who hold certificates in the acts designated “restricted practices” by the Act.

enacted, the legislation restricts the use of the titles “Financial Planner” and “Financial Advisor” to those with the appropriate credentials. That credential must be obtained from an approved credentialing body as determined by the Chief Executive Officer of the FSRA.

4.5 General Regulatory Principles

The regulatory principles proposed below are addressed to jurisdictions (like Ontario) that are characterized by a diffused and discordant pattern of regulation and that are contemplating major regulatory reform initiatives related to financial advisers and planners. These should usefully be informed by reform experience in other jurisdictions. At the same time, these policy principles attempt to provide a critique of regulatory approaches predominantly based on various forms of exclusive licensing, which for reasons identified in this section are excessively restrictive and likely to reduce access and raise costs.

4.5.1 Defining the Field That Should Be the Focus of Regulatory Attention

In defining the scope of regulatory initiatives addressed to financial advisers and planners, two preliminary points seem compelling: (a) the regulatory framework should not be defined by product categories – insurance, mutual funds, and so on – or by personnel associated with the selling or promoting of such products, given the dramatic blurring of product and organizational boundaries in the financial sector in recent years; and (b) the regulatory framework should not be centrally dependent on the particular designation or title that an individual chooses to assume in providing financial planning or advisory services, given that this will obviously encourage regulatory arbitrage through the adoption of different titles or designations to circumvent the regulatory framework. Thus, a functional rather than formal definition of the financial planning/advisory field is required for regulatory purposes. Such a definition would apply to any individual offering, or holding themselves out as providing, planning or advisory services to individuals on an individualized basis with respect to existing or potential investments in any form of financial security or instrument, when the provider of such services is remunerated, directly or indirectly, for providing such services to individual consumers.

Several points need to be noted about this definition: (a) it applies only to advice to individuals, and not to organizations such as businesses or institutional investors; (b) it excludes various forms of advice such as

informal non-remunerated communications between individuals; (c) it excludes books, newspaper columns, blogs, and the like offering financial advice on a non-individualized basis; (d) it excludes credit counseling, debt consolidation, and bankruptcy services, which do not address actual or potential investments and financial securities or instruments; and (e), while attempts are sometimes made in the financial services industry to distinguish financial planning from financial advising, this distinction is not robust even within the industry and certainly not among the general public – hence, a preference for the more capacious term “financial adviser” as the focus of regulatory attention.

4.5.2 *The Case for a Public Registry of Financial Advisers*

Reversing the hierarchy of *ex ante* forms of regulatory intervention reviewed in section II of this chapter and [chapter 1](#) of this book, and applying a “least restrictive means” test in seeking to vindicate the normative rationales for regulation, the case for a public registry of all financial advisers, however designated, that fall within the foregoing definition seems comfortably to have been met.

Such a public registry would make information about individual financial advisers readily accessible to the public. It should include prescribed information, in particular:

- the individual adviser’s formal educational credentials;
- job or employment experience;
- organizational affiliations;
- professional affiliations;
- whether the individual is certified as a financial adviser by a government-accredited professional organization;
- if so, whether the adviser is certified as an independent or non-independent adviser;
- whether the adviser is subject to any licensing regimes related to the sale of financial products; and
- disciplinary or civil liability claims relating to that individual’s financial advisory services and their disposition.

Such data on the public registry should be available online at no cost to consumers, and registration should be made mandatory for all individuals offering financial advisory services, including professional services related to the sale of financial products. Thus, the registry would include professionals who are already covered by specific licensing schemes (such as broker-dealers or insurance agents). There

is also the important question of whether consumers of financial advisory services should be able to provide online ratings of the service providers they have utilized.⁶² In principle, there is much to be said for this option as long as rating mechanisms are designed to minimize “gaming.”

The purpose of a public registry is to mitigate information asymmetries on the demand-side. It should be user-friendly so that investors can use the information it provides to make informed decisions. In particular, a public online interface should attempt to minimize investors’ information overload and confusion by providing clear and concise explanations of relevant regulatory distinctions – for example, between certified and non-certified advisers, as well as independent and non-independent certified advisers. This emphasis on a public registry and accessible information is consistent with the essence and purpose of securities regulation and its disclosure-centred focus.

Various countries have established public registries and datasets as part of their respective reforms, including the UK, New Zealand, and Australia. Recently, the Ontario Expert Committee on Financial Advisory and Financial Planning Policy has proposed much the same system.

4.5.3 *The Case for a Certification Regime*

Given that an alphabet soup of titles and designations prevails today in many jurisdictions, simply creating a public registry of all financial advisers, alongside this jumble of designations (some regulated, many not), is likely to have only a modest impact on reducing consumers’ confusion as they seek competent financial advisory services. One way to ameliorate this would be to superimpose on a public registry system a broadly cast government-accredited certification regime whereby individual financial advisers would have to meet duly specified entry credentials if they wished to hold themselves out as, for example, a government-accredited certified financial adviser (as in “certification issued by X professional association, a government-accredited certification organization”).

This approach would require oversight by a government financial regulatory agency. That agency would accredit professional self-regulatory bodies as certification agencies, subject to specific minimum *ex ante* and *ex post* membership requirements. *Ex ante* membership requirements would relate to minimum required forms of formal education, training, and

62 See US Federal Trade Commission Report, “The Sharing Economy: Issues Facing Platforms, Participants, and Regulators” (2016), ch. 2.

professional examinations; *ex post* requirements, including continuing education, as well as adherence to codes of conduct and disciplinary procedures in the event of non-compliance with *ex ante* and *ex post* requirements.

Private forms of certification already exist in various countries, and some of these private regimes are viewed as the gold standard for financial planners and advisers. Hence, there are virtues in enhancing these market-created solutions to information asymmetries by requiring government accreditation of certification regimes with minimum *ex ante* and *ex post* standards. Such a regime would reduce the heterogeneity of the information base available to consumers of financial planning/advisory services available to them in the public registry, while still contemplating some diversity of *ex ante* and *ex post* certification requirements.

4.5.4 *The Case for Caution in Adopting a Universal Licensure Regime*

In considering elevating the regulatory options to the most restrictive one in the hierarchy reviewed in Section II of the chapter and [chapter 1](#) of this book – occupational licensure – caution is warranted as to both the desirability and the feasibility of implementing a universal licensure regime, with presumably a common set of *ex ante* and *ex post* licensing requirements, across the entire landscape of financial advisory activities. Exclusive licensing schemes have a number of shortcomings relative to voluntary government-accredited certification regimes.

First, proposals to introduce exclusive licensing are likely to provoke sharp and protracted debates among different groups of financial advisers with very different formal education, training, and job experience profiles. Second, in many jurisdictions, sub-classes of financial advisers are already subject to licensure regimes (e.g., mortgage brokers, insurance brokers, mutual fund dealers). Universal licensure would impose more homogeneous standards across these different regulated sub-categories but would also increase the regulatory burden and possibly add further complexity as a result of overlapping licensing schemes. Third, exclusive licensing is likely to create supply-side effects that may be detrimental in terms of affordability and accessibility of financial advice. For example, the UK Financial Advice Market Review, published in 2016, found that reforms had positive effects on the quality of advice available to those with larger amounts to invest, but also that the changes may have contributed to a widening of the “advice gap” – that is, consumers with lower incomes or investible amounts found it more of a burden to pay for advice. The same reasons that were identified in the Introduction as main drivers of increasing demands for financial advisory services

also highlight the importance of promoting affordable access to services of growing relevance to many consumers and investors.

On balance, a public registry system along with a government-accredited certification regime is likely to significantly ameliorate information asymmetries between providers and consumers and promote a race to the top in the market for financial advisory services, while avoiding the inflexibilities and ensuing inter-professional conflicts that a universal licensure regime is likely to engender.

4.5.5 Addressing Conflict of Interest

As noted earlier in this chapter, many financial advisers are directly or indirectly affiliated with particular classes of financial securities or investments that it is in their interest to promote, be it as employees, agents, or recipients of commissions or referral fees. While imposing on all financial advisers a duty to act in the best interests of their clients has compelling virtues, in many contexts it may be difficult to specify what such a duty would entail. For example, a financial adviser employed by a bank that sells mutual funds may be partly compensated on the basis of the sale of such in-house products to consumers of financial advisory services; it seems unrealistic to expect such a planner or adviser to recommend that a consumer or client purchase a competing bank's mutual funds.

Hence, by way of a refinement to the certification regime proposed earlier, financial advisers certified by a government-accredited professional self-regulatory organization should be identified in their certification as either *independent* or *non-independent* (or unaffiliated or affiliated). Independent advisers should be subject to a duty to act in the best interests of their client as well as related specific restrictions – they should have no employment or other affiliation or commission or referral arrangements that may compromise the objectivity of their advice and the best interests of their clients. For financial advisers who meet this test of independence and simply charge clients a fee for their advice, the certification regime would identify them as certified *independent* financial advisers (“certified by X professional self-regulatory organization, government-accredited”). For non-independent certified financial advisers, there would seem to be merit in the requirement that their certification characterize them as *non-independent* (“certified by X professional self-regulatory organization, government accredited”), although such advisers would still be under a regulatory obligation to disclose to clients the nature of their employment, affiliation, and commission or referral arrangements that may influence their advice.

In many respects, this proposed distinction follows recent developments in the regulation of financial advisers in the EU, Australia, and the UK, reviewed in Section III of this chapter. There are various possible ways to implement this critical distinction. One option is to prescribe this choice *ab initio* (an individual adviser is certified as either independent or a non-independent). Another option is to rely on disclosure requirements (a certified individual can offer independent advice to some clients and non-independent advice to other clients, but the individual must disclose whether a particular advice is provided on an independent or non-independent basis subject to specific restrictions once the advice is disclosed as independent). On balance, the potential risks of conflict of interest at play in this market would seem better addressed by requiring initial certification as either independent or non-independent.

4.5.6 *Transitional Arrangements*

Each government-accredited certification self-regulatory organization for financial advisers should be required, as a condition of certification status, to adopt transitional arrangements whereby non-compliant members are provided with opportunities to upgrade their credentials through top-up or bridging requirements in order to qualify for certification (as with foreign-trained members). These transition arrangements would be modest under our proposed certification regime, as financial advisers may always choose to opt out and settle for the Public Registry listing.

After a government-accredited certification regime is implemented for financial advisers, non-government-accredited private professional bodies or trade associations should have no authority to confer certification status on their members for any functions falling within the defined field of financial advising to which the public registry and government-accredited certification regime applies. That is, members of such bodies would still be required to list themselves on the public registry but would be identified and held out only as members of a private association that lacks governmental accreditation (and not as certified, registered, or accredited). The government financial regulator in charge of the public registry and government accreditation regime should be equipped with statutory enforcement powers to address non-compliance with regulatory requirements, including failure to register on the public registry and the provision of misleading or false information on the registry. Effective enforcement of these requirements is of central importance in the proposed regime.

Appendix 4.1 Regulatory Approaches across Jurisdictions

JURISDICTION	WHO IS REGULATED AND UNDER WHAT TITLES	ACCESS TO THE PROFESSION	MAIN REGULATORY PRINCIPLES	REFORMS AND PROPOSALS
AUSTRALIA	Financial advisers and financial planners (interchangeable titles). Titles restricted to those who hold an AFC license (or representatives of an AFS licensee), and have the necessary pre-requirements	Australian Financial Services (AFS) licence. Requirements: <ol style="list-style-type: none"> having a degree passing an exam 1 professional year CPD compliance with a code of ethics 	<ul style="list-style-type: none"> Restricted use of titles “Best interest” principle Comprehensive ban on conflicted remuneration Transparency and disclosure requirements 	FOFA (2012); Register Reforms (2014); Insurance Reforms (2017); Corporation Act Reforms (2017).
CANADA	<p><i>Quebec</i> Regulation of planificateur financier.</p> <p><i>Other provinces</i> Financial advisers and financial planners are not directly regulated (regulation based on sale of specific financial products).</p>	<p><i>Quebec</i> IQPF Diploma and AMF Certificate. Requirements:</p> <ol style="list-style-type: none"> completion of designated academic training programs professional training course IQPF exam CPD compliance with a code of ethics 	<p><i>Quebec</i></p> <ul style="list-style-type: none"> Restricted use of titles Standard of conduct imposing objective professional judgment and avoidance of conflict of interest Disclosure requirements 	Quebec regulations; Ontario Regulation of Financial Planners Consultation Paper (2018).
NEW ZEALAND	Financial advisers (used as a broad category that includes financial planners). Title of financial adviser is restricted to advisers with a licence (or working with a licensed firm) and the necessary pre-requirements.	Financial Markets Authority licence. Requirements: <ol style="list-style-type: none"> minimum standards of competence CPD compliance with a Code of Professional Conduct 	<ul style="list-style-type: none"> Restricted use of titles Client interests first principle Disclosure requirements No bans on commissions Same principles apply to personal and online-advice 	Financial Services Legislation Amendment Bill (2017).

EUROPEAN UNION	<p>Financial advisers and equivalent terms in the official language of individual member states (terms that generally include financial planning). Independent and tied advisers follow different regulatory schemes.</p>	<p>Rules imposed by national legislation of individual member states (usually licensing regimes).</p>	<p><i>European level</i></p> <ul style="list-style-type: none"> • Distinction between independent and non-independent adviser • Best execution principle • Ban on commissions for independent advisers <p><i>National level</i> Various rules on access, remuneration, and education</p>	<p>MiFID I (2007) and MiFID II (2018); National legislation and reforms in each European country.</p>
UNITED KINGDOM	<p>Financial advisers (used as a broad category that includes financial planners). Regulation imposes mandatory distinction between Independent Financial Advisor (IFA) and Restricted Financial Advisor</p>	<p>Registration with FCA. Requirements:</p> <ol style="list-style-type: none"> a) minimum qualification b) compliance with code of ethics c) CPD d) Statement of Professional Standing 	<ul style="list-style-type: none"> • distinction between independent and restricted advisors • comprehensive ban on commissions • qualified best interest duty 	<p>RDR (2013); Future Reforms Financial Market Review (2015).</p>
UNITED STATES	<p>Financial planners are not directly regulated, but are instead covered, depending on their activity, under different the regulatory schemes of investment advisers, broker-dealers, or insurance agents.</p>	<p>Investment advisers, broker-dealers, and insurance agents have their specific licensing requirements, as well as rules and code of conduct.</p>	<ul style="list-style-type: none"> • different (lower) “suitability” standard of conduct for broker-dealers • no bans on remuneration 	<p>Regulation Best-Interest for broker-dealers (2018).</p>

5 Regulating Immigration Consultants: Precarity and Exploitation*

5.1 Introduction

This case study focuses on the regulation of immigration consultants. Various jurisdictions have wrestled with persistent, frequent, and serious delinquencies on the part of these service providers. These are often to the prejudice of prospective or recent immigrants who are struggling to orient themselves in new countries with limited language proficiency and knowledge of local institutions, laws, and regulations, sometimes in complicity with dishonest consultants who are seeking to game the immigration system. As with several of the other occupations and professions examined in this book, the regulation of immigration consultants has been seriously under-studied by scholars of professional regulation. This case study focuses on three key questions: (a) what are the most persistent problems, in terms of frequency or seriousness, that the jurisdictions surveyed in this case study have encountered?, (b) what efforts (legal, regulatory, or otherwise) have these jurisdictions made to address these problems?, and (c) how effective have these efforts been?

Section II reviews Canada's protracted efforts to address problems in this sector, in part because in recent decades Canada has experienced some of the highest per capita immigration rates in the world, with immigrants arriving from ever more diverse countries.¹ Section III reviews attempts to address problems in this sector in Australia, New Zealand, the UK, and the US. Section IV draws lessons from these bodies of experience and suggests appropriate legal and regulatory policies for this sector.

* With Isaac Gazendam.

1 See Michael Trebilcock, "The Puzzle of Canadian Exceptionalism in Contemporary Immigration Policy" (2019) 20 *J Intl Migration & Integration* 823.

5.2 Ineffective Regulation of Immigration Consultants in Canada

5.2.1 Introduction

Immigration consultants have frequently defrauded, mistreated, and exploited prospective immigrants to Canada. While registered consultants have engaged in fraud and given incompetent advice, the overarching issue plaguing Canadian immigration is unregistered “ghost” consultants, so called because they do not attend hearings or place their names on documents. While some ghost consultants are competent practitioners, many engage in unscrupulous behaviour, whether by colluding with clients to defraud the system or by duping vulnerable prospective immigrants. Offshore consultants also pose a serious problem.

Regulatory concerns initially developed because of a loophole in the *Immigration Act, 1976*² that was meant to allow church or community leaders to aid immigrants and refugees in their claims. The Act gave immigrants the right to be represented by *any* counsel, that is, not only legal counsel.³ Reports of dishonest behaviour date to before 1980 and cover a range of misconduct: incompetent and faulty advice; charging large sums for applications with no prospect of success; writing fictitious business proposals to give clients landed immigrant status; instructing clients to lie about their refugee status; telling clients how to answer questions from immigration officials; offering false social insurance cards or work permits; and using one address for hundreds of claimants.⁴

Two populations of prospective Canadians are particularly vulnerable to unethical immigration consultants: temporary foreign workers and international students. Consultants persuade members of these groups to pay thousands of dollars after falsely promising decent jobs or places in a career college, along with long-term work permits leading to permanent Canadian residency. In reality, the prospective immigrants end up underpaid and overworked in short-term jobs, unemployed, or with

2 SC 25–26, c 52.

3 “Consultants Taking Advantage of Immigrants, Lawyers Claim,” *Calgary Herald* (8 November 1995) A10.

4 Finbarr O’Reilly, “Unethical Consultants ‘Prey on’ Immigrants, Lobby Group Says,” *National Post* (4 May 2001) A4; Victor Malarek, “Desperate Immigrants Given Empty Hopes,” *Globe and Mail* (23 April 1985) P1; “Provinces Should License Refugee Advisers” [Editorial], *The Gazette* (21 December 1988) B2; Jessica Leeder, “How a PEI Motel Became the Centre of a Fraud Crackdown,” *Globe and Mail* (20 February 2019) A8, <https://www.theglobeandmail.com/canada/article-peis-immigration-record-in-spotlight-after-family-caught-in-crackdown>; “Ghost Consultants Haunt the System” [Editorial], *Globe and Mail* (5 February 2010) A14.

useless career college degrees, all while facing or fearing deportation.⁵ Importantly, a long-term work permit never materializes. Instead, these immigrants are asked to make payments, each time with the promise of a permit, but receive only temporary work visas after each remittance.

It is illegal to pay for a job in Canada, yet some service-sector businesses receive large payoffs from immigration consultants for employing immigrants or international students. The would-be immigrant ends up working at a menial job for little pay, with the employer often taking a large portion of the worker's paycheque for "expenses".⁶ The immigrant has few options, because the employer continues to promise to help the prospective Canadian get a foothold on permanent residency status; in addition, until very recently, visas only allowed migrants to work for one designated employer.⁷

Private colleges engage in similar activities, receiving money from consultants who persuade students that paying high tuition is an easy way to enter Canada and eventually become a permanent resident. The reality is that international students' work hours are capped and these programs provide limited opportunities to stay in Canada after graduation unless students meet certain requirements (e.g., language proficiency) and find employers willing to sponsor them.⁸

Twice the federal government has attempted regulation; both times it has failed. The newest iteration, announced in 2019, proposes significant changes but does not seem radically different from previous efforts. While ghost and offshore consultants reduce the effectiveness of regulation, jurisdiction is also a problem.⁹ Immigration falls under federal

5 Kathy Tomlinson & Michelle Zilio, "Immigration Minister Vows to Crack Down on Consultants and Protect 'Vulnerable' Newcomers," *Globe and Mail* (8 April 2019) A1, <https://www.theglobeandmail.com/canada/article-ahmed-hussen-vows-to-crack-down-on-immigration-consultants-and-protect>.

6 Kathy Tomlinson, "False Promises: Foreign Workers Are Falling Prey to a Sprawling Web of Labour Trafficking in Canada," *Globe and Mail* (5 April 2019) A15, <https://www.theglobeandmail.com/canada/article-false-promises-how-foreign-workers-fall-prey-to-bait-and-switch>.

7 Kathy Tomlinson, "Employers Taking Cash from Foreign Workers Seeking Permanent Resident Status in Canada," *Globe and Mail* (31 May 2019) A12, <https://www.theglobeandmail.com/canada/article-employers-taking-cash-from-foreign-workers-seeking-permanent-resident>.

8 Kathy Tomlinson, "The Foreign Students Who Say They Were Lured to Canada by a Lie," *Globe and Mail* (27 June 2019) A10, <https://www.theglobeandmail.com/canada/article-international-students-coming-to-private-colleges-say-they-were-duped>.

9 Dianne Rinehart, "Consultants Face Suit from Lawyers: The Chair of the Canadian Bar Association Immigration Law Division Says the Public Has No Protection from Inept Consultants," *Vancouver Sun* (27 August 1997); Nicholas Keung & Jim Rankin,

jurisdiction whereas the regulation of most service-sector professionals falls within provincial jurisdiction. This inter-jurisdictional tension has tended to create a regulatory vacuum, which is filled by ghost consultants.

5.2.2 Pre-2002: Rumbblings and Beginnings

In 1981, following a legislative review instigated by complaints of immigration consultants “ripp[ing] off” immigrants, then-Immigration Minister Lloyd Axworthy announced initiatives to protect immigrants from unscrupulous consultants, and stated that he was open to legislative reform, including licensure.¹⁰ However, Axworthy never implemented these actions, nor did he take up the recommendations from a subsequent parliamentary report.¹¹

The next two decades saw a string of investigations into the rampant exploitation of immigrants, followed by parliamentary reports and government inaction.¹² This was interspersed with private-actor attempts at consolidation and regulation. These efforts failed due to lack of uptake and follow-through, and their non-mandatory nature.¹³

In 1995, the Canadian Bar Association (CBA) made the first of four submissions, calling for only lawyers to handle or supervise immigration claims, or, alternatively, for consultant licensure and regulation with a stipulation that officials would refuse to deal with unlicensed consultants.¹⁴ Subsequent submissions in 1999 and 2010 followed much the same theme, with the 2017 submission adopting more stringent proposals.¹⁵

“Watchdog Needs Teeth,” *Toronto Star* (18 June 2007) A7, https://www.thestar.com/news/2007/06/18/watchdog_needs_teeth.html.

10 John Crump, “Axworthy to Review Law on Consultants after Newcomers’ Complaints,” *Globe and Mail* (20 August 1980) P5.

11 “Immigration Adviser Crackdown Planned,” *Globe and Mail* (15 May 1981) P9; Malarek, *supra* note 4.

12 “Consultants Taking Advantage of Immigrants, Lawyers Claim,” *supra* note 3; “Report Urges Regulation of Immigration Consultants,” *Globe and Mail* (28 November 1995) A9; David Hogben, “License Immigration Consultants, Report Says,” *Vancouver Sun* (8 December 1995) B4; Paula Simons, “Regulation Urged for Immigration Advisers,” *Edmonton Journal* (3 July 1996) F6.

13 Richard Lord, Letter to the Editor, *The Gazette* (3 January 1989) B2; Estanislao Oziewicz, “Immigration Consultants Form Professional Body,” *Globe and Mail* (2 December 1991) A7; Paul Watson, “Immigration Advisers Join to Set Standards,” *Toronto Star* (30 November 1991) A20.

14 Jim Morris, “Regulate Immigration Help, Bar Association Says,” *Globe and Mail* (27 August 1997) A5.

15 “Immigration Consultants” (March 2017) at 2–4, <http://www.cba.org/CMSPages/GetFile.aspx?guid=d2ddcb44-166c-41c9-b0b7-02ffa3d4125c>.

Finally, in 2001, *Law Society of British Columbia v Mangat*¹⁶ spurred political action. The Supreme Court of Canada ruled that a non-lawyer may receive the authority to practise law under a federal statute even if contrary to provincial legal profession legislation.¹⁷

5.2.3 2002 to 2010: Canadian Society of Immigration Consultants

In 2003, following the report of an advisory committee, then-Immigration Minister Denis Coderre created an “independent, federally incorporated not-for-profit body,” the Canadian Society of Immigration Consultants (CSIC).¹⁸ The CSIC established a Code of Conduct and membership guidelines, including requirements for citizenship, study, language, professional development, insurance, good character, and contribution to a compensation fund for victims of dishonest consultants.¹⁹ In 2004, Coderre amended the *Immigration and Refugee Protection Act*²⁰ regulations so that only authorized representatives – lawyers, Quebec notaries, and CSIC members – could, for a fee, represent or advise immigration applicants or be involved in official proceedings.²¹

These measures were inadequate. The federal government could not punish or curtail ghost or incompetent consultants who refused to join the CSIC but practised nonetheless, sometimes claiming to be licensed.²² The only sanction for unlicensed consultants was refusal to hear a case before the federal government.²³ Furthermore, the CSIC did not have the mandate to investigate complaints, seek judicial enforcement of its internal disciplinary

16 2001 SCC 67.

17 “Immigration: Not Just for Lawyers,” *Globe and Mail* (21 August 1997) A18.

18 Sandra Elgersma and Anna Gay, “Legislative Summary of Bill C-35: An Act to amend the Immigration and Refugee Protection Act” (19 January 2011), https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/LegislativeSummaries/403C35E.

19 *Ibid*; Martin Regg Cohn, “Canada Vows to Get Tough with Immigration ‘Vultures,’” *Toronto Star* (7 September 2002) A22; Beppi Crosariol, “Immigration Consultants’ Group Sparks Anger,” *Globe and Mail* (27 September 2004) B14, <https://www.theglobeandmail.com/life/immigration-consultants-group-sparks-anger/article746110>.

20 SC 2001, c 27 [*IRPA*].

21 “New Rules on Immigration Consulting Aim to Protect Vulnerable Applicants,” *The Gazette* (9 April 2004) A8.

22 Crosariol, *supra* note 19; Keung & Rankin, *supra* note 9.

23 According to Keung and Rankin, *supra* note 9, “the RCMP do not bust consultants simply for operating outside regulations. Investigations of unregistered advisers are rare and difficult, and must involve fraud, such as misrepresenting the facts on an immigration application, or counselling someone to enter a ‘marriage of convenience.’ Usually, it takes a lot of money or multiple victims to be worth the effort.”

measures, carry out checks, summon witnesses, or seize documents.²⁴ Despite having the appearance of licensure, this attempt operated more like a certification regime; non-members were not prevented from practising.

The Federal Court of Appeal's 2008 decision in *Law Society of Upper Canada v Canada*²⁵ underscored immigration consultants' ability to practise. The court upheld the *IRPA*'s validity in designating CSIC members as "authorized representatives."²⁶

5.2.4 2010 to 2014: Immigration Consultants of Canada Regulatory Council

In 2011, then-Immigration Minister Jason Kenney replaced the CSIC with the Immigration Consultants of Canada Regulatory Council (ICCRC).²⁷ The two bodies were similar in their licensing requirements and codes of conduct, but new legislation criminalized the provision of immigration advice for a fee by unauthorized individuals.²⁸ The government could also share information with regulatory bodies for disciplinary proceedings related to professional conduct violations.²⁹ As such, the new regime was true licensure. Kenney also announced an information campaign to educate immigrants about the immigration process and warn them about fraud.³⁰

Notwithstanding these new efforts, problems persisted. The ICCRC received many complaints but had no authority to prosecute non-members. Rather, the Canada Border Services Agency (CBSA) was required to investigate and bring charges, which the ICCRC complained did not happen with sufficient frequency to reduce the prevalence of ghost consultants.³¹

24 Elgersma & Gay, *supra* note 18.

25 2008 FCA 243.

26 "CSIC Welcomes Federal Court Decision," *Canada NewsWire* (27 December 2006); "CSIC Vindicated by Supreme Court Decision," *Canada NewsWire* (11 December 2008).

27 "Ghost Consultants Haunt the System," *supra* note 4; Barbara Kay, "Cleaning the Sleaze out of Immigration Consulting," *National Post* (26 May 2010) A12, <https://nationalpost.com/full-comment/cleaning-the-sleaze-out-of-immigration-consulting>.

28 Douglas Quan, "'Ghost Consultants': How Fraudsters Con Canada's Immigration System – and Their Clients," *National Post* (16 January 2016), <https://nationalpost.com/news/canada/ghost-consultants-how-fraudsters-defraud-canadas-immigration-system-and-their-clients>. Authorized representatives were lawyers, Quebec notaries, paralegals and law students acting under supervision of a lawyer or notary, and licensed immigration consultants.

29 An Act to amend the Immigration and Refugee Protection Act, SC 2011, c 8, s 4.

30 Colin Perkel, "Ottawa Sets Up Agency Aimed at Regulating Immigration Consultants," *Canadian Press* (18 March 2011).

31 Nicholas Keung, "Despite Growing Complaints, Few 'Ghost' Immigration Consultants Are Prosecuted," *Toronto Star* (11 October 2014) IN1, <https://www.thestar.com>

5.2.5 2015 to 2020: A New Government and a Familiar Promise

Further investigations and data revealed continuing rampant cases of unlicensed consultants as well as extremely low rates of complaint investigation and prosecution by the CBSA.³² As well, infighting and allegations of fraud, bullying, and human rights violations plagued the ICCRC. In the end, the CBA withdrew its support for immigration consultants, declaring that only lawyers should represent immigrants.³³

In 2017, a report to then-Immigration Minister Ahmed Hussen recommended abandoning self-regulation for stronger federal oversight.³⁴ Hussen did not adopt this suggestion, but rather announced the *College of Immigration and Citizenship Consultants Act*³⁵ in 2019, which proposed replacing the ICCRC³⁶ with the College of Immigration and Citizen Consultants (CICC, or College) and creating a new licensing regime. The CICC will regulate and accredit immigration consultants, ensure compliance with its Code of Conduct, and raise public awareness.³⁷

[/news/immigration/2014/10/11/despite_growing_complaints_few_ghost_immigration_consultants_are_prosecuted.html](https://www.cbc.ca/news/immigration/2014/10/11/despite_growing_complaints_few_ghost_immigration_consultants_are_prosecuted.html).

- 32 Kathleen Harris, “Liberals Face Pressure to Crack Down on Crooked Immigration Consultants,” *CBC News* (4 June 2017), <https://www.cbc.ca/news/politics/immigration-ghost-consultants-study-1.4141280> [Harris, “Liberals face pressure”]; “Immigration Consultants,” *supra* note 15 at 4; Ravi Jain & Aris Daghighian, “Why Lawyers Must Supervise the Work of Immigration Consultants,” *National* (26 February 2019), <https://nationalmagazine.ca/en-ca/articles/law/opinion/2019/why-lawyers-must-supervise-the-work-of-immigration>.
- 33 Laura Lynch, “Agency That Oversees Immigration Consultants Appears to Be in Turmoil,” *CBC News* (20 May 2017), <https://www.cbc.ca/news/politics/immigration-consultants-regulator-crisis-1.4124560> [Lynch, “Turmoil”]; Laura Lynch, “Council That Regulates Immigration Consultants Accused of Fraud, Forgery, and Human Rights Violations,” *CBC News* (3 July 2018), <https://www.cbc.ca/news/politics/immigration-consultants-council-court-filing-1.4729412>.
- 34 Lynch, “Turmoil,” *supra* note 33; Kathleen Harris, “MPs Recommend New Immigration Watchdog to Crack Down on Crooked and ‘Ghost’ Consultants,” *CBC News* (16 June 2017), <https://www.cbc.ca/news/politics/immigration-commitee-ghost-consultants-1.4165216>.
- 35 SC 2019, c 29, s 292 [*CICC Act*].
- 36 Section 84 of the CICC Act that will enable the ICCRC to apply to transition into a new role as the CICC. In September 2019, the ICCRC membership endorsed the ICCRC applying to become the new CICC.
- 37 CICC Act, *supra* note 35, s 4. Hussen detailed one such public awareness activity in his announcement of the new regime: an outreach program to counter false information provided by corrupt consultants abroad via dedicated outreach officers in overseas offices. See Peter Zimonjic, “Immigration Minister Details Plans to Go After Unethical Immigration Consultants,” *CBC News* (6 May 2019), <https://www.cbc.ca/news/politics/ahmed-hussen-college-immigration-consultants-1.5124601>.

Like previous regimes, the College will have a Code of Conduct (now established by the Immigration Minister), set out licensing requirements, and establish a compensation fund for victims of exploitative licensed immigration consultants.³⁸ New features include a tiered licensing system, a public registry of licensed individuals, and the prohibition of unlicensed individuals using certain titles – “immigration consultant,” “citizenship consultant,” or “international student immigration advisor,” or variations thereof. Also, the CICC will be able to exercise its powers outside of Canada (to the extent that the laws in the other jurisdiction allow it), and a Board of Directors will be appointed by the Immigration Minister to oversee the new body during a transitional period.³⁹

Importantly, the Act gives the College more disciplinary powers. The CICC will have both a complaints committee and a discipline committee.⁴⁰ The complaints committee will have the power to investigate complaints about the professional misconduct or incompetence of former and current licensed immigration consultants.⁴¹ Investigators will be able to request documents and information and search business premises.⁴² The discipline committee will have the ability to accept evidence; administer oaths; and summon and enforce the appearance of persons, compel them to testify, and compel them to produce evidence and documents.⁴³ Upon reaching a decision, the discipline committee will have the power to restrict, suspend, or revoke licences; impose penalties; and take any other action as set out in regulations.⁴⁴ Subjects of discipline committee actions can apply for judicial review.⁴⁵

Contraventions of certain provisions – obstructing, hindering, or making a false statement to an investigator; and non-compliance with a decision of the discipline committee or an order from that committee to appear or produce evidence – will result in fines, imprisonment, or

38 CICC Act, *supra* note 35, ss 4, 13, 33, 43.

39 *Ibid*, ss 6, 16–28, 31, 33, 77, 84–7. If the ICCRC successfully applies to become the CICC, the board will consist of nine members, five of which are to be appointed by the minister; the remaining four are to be the former chair and vice-chair of the ICCRC and two others selected by the former ICCRC chair from among the ICCRC’s existing board of directors. If the ICCRC is unsuccessful in its application, the board will consist of five individuals appointed by the minister.

40 CICC Act, *supra* note 35, s 29.

41 *Ibid*, ss 45, 48–9.

42 *Ibid*, s 51.

43 *Ibid*, s 66.

44 *Ibid*, s 69.

45 *Ibid*, ss 71–3.

both.⁴⁶ The CICC will also be able to apply to a court for an injunction in the event of a contravention of title provisions.⁴⁷

While this does not create full federal oversight, the *CICC Act* provides for some ministerial ability to step in and alter the regime.⁴⁸ The CICC is thus similar to the ICCRC, albeit with a wider mandate to pursue practising non-members (in effect, it is a licensure regime).

The *CICC Act* was accompanied by amendments in the *IRPA* and the *Citizenship Act*,⁴⁹ which will double the current maximum fines for offences under both laws, allow authorities to establish administrative penalties and consequences for rules violations, and investigate and compel document production.⁵⁰

5.2.6 Prospects

While originally optimistic about self-regulation, many lawyers have since changed their stance due to ongoing incompetence, fraud, failure to effectively self-regulate, and lack of effective federal oversight. Consultants have blamed the lack of success on the regulatory body's inability to investigate and discipline non-member ghost consultants and on the CBSA's ineffectiveness in investigating and prosecuting criminal conduct. While self-regulation is still the predominant regime, the new College will have stronger powers to investigate complaints and there will be more direct federal oversight. That said, it is unclear whether these changes will suppress misconduct effectively.

While the CICC supposedly addresses some of these concerns, a core argument remains: only lawyers, or paralegals under their supervision, should handle immigration matters. One study found that immigrants fared substantially better in their claims when represented by a lawyer rather than an immigration consultant, although those represented by a consultant had higher success rates than unrepresented immigrants.⁵¹ While this study does not provide conclusive evidence on outcomes for immigrants represented by family, friends, or community or church groups, immigrants represented by "other" counsel – including paralegals, community legal workers, family and friends, and unclassified

46 *Ibid*, s 79.

47 *Ibid*, s 78.

48 *Ibid*, s 81.

49 RSC, 1985, c C-29.

50 *Ibid*, ss 27(1), 29.1(a, b); IRPA, *supra* note 20, ss 91(9), 91.1(1).

51 Sean Rehaag, "The Role of Counsel in Canada's Refugee Determinations System: An Empirical Assessment" (2011) 49:1 Osgoode Hall L.J. 71 at 86–93.

persons – fared almost as well as those who had legal counsel.⁵² Ultimately, these findings preclude strong conclusions.

Access-to-justice concerns would arise if only lawyers or supervised paralegals were permitted to represent potential immigrants. Increased legal aid would help, but such aid has recently been weakened by, for example, Ontario's decision to slash legal aid spending, especially on immigration matters. Some believe that simplifying the immigration system is the best way forward as this would eliminate the need for many applicants to turn to third parties for assistance.⁵³

Others cite a more basic problem: the new plan still lacks provisions to protect victims, who risk being deported if they come forward with a complaint.⁵⁴ Thus far, the government has taken two actions. First, temporary foreign workers in abusive job situations will be able to apply for open work permits, allowing them to find other jobs. While this still leaves workers vulnerable to abuse, it is a reversal of a previous commitment to retain the one-employer policy.⁵⁵ Second, migrant workers will be able to work for any eligible business within a specific sector instead of being tied to just one employer. However, backlogs in the system for assessing potential employers willing to take on foreign workers have led to long delays, leaving vulnerable low-wage workers out of work.⁵⁶ Meanwhile, the government has begun an information campaign in India to warn prospective immigrants about unscrupulous consultants.

5.2.7 Conclusion

Several discrete issues have emerged during this long-running saga. The problems that need addressing must be identified before an effective regulatory or legal framework to resolve them can be specified.

Complaints against the immigration consultant industry fall broadly into five categories. First, unscrupulous consultants defraud their clients

52 *Ibid* at 91.

53 Harris, "Liberals Face Pressure," *supra* note 32.

54 Jolson Lim, "Immigration Consultant Regulator to Turn into New Body under Budget Bill," *iPolitics* (26 April 2019), <https://ipolitics.ca/2019/04/26/immigration-consulting-regulator-set-to-turn-into-new-body-proposed-in-budget-bill>.

55 Kathy Tomlinson, "Liberal Government Expanding Program to Protect Foreign Workers in Canada from Exploitation," *Globe and Mail* (31 May 2019) A4, <https://www.theglobeandmail.com/canada/article-liberal-government-expanding-program-to-protect-foreign-workers-in>; Tomlinson & Zilio, *supra* note 5.

56 Kathy Tomlinson, "Ottawa Moves to End Employers' Monopoly on Migrant Workers," *Globe and Mail* (24 June 2019) A1, <https://www.theglobeandmail.com/politics/article-ottawa-moves-to-end-employers-monopoly-on-foreign-workers>.

by, for example, charging exorbitant fees for empty promises. While regulated consultants may commit this crime, it is typically perpetrated by non-members or ghost consultants. Second, some clients and consultants collude to abuse the immigration system by, for example, lying on forms or undergoing marriages of convenience. Again, the consultant may be legitimate but typically is not. Third, some consultants are incompetent; most often these are ghost consultants, but some are regulated. Fourth, some consultants are ghosts, that is, unauthorized but practising. This issue is often related to one or more of the above problems, but is arguably the most serious, overarching problem that regulation has sought to address. Fifth, offshore consultants often engage in fraudulent or incompetent behaviour, and Canada lacks the jurisdiction to sanction them.

The first two issues – fraud by either the consultant alone or by the client and consultant together – should be dealt with through the criminal justice system. In the past, the CBSA has struggled to address this issue effectively, and it seems that criminal activities by regulated and ghost consultants alike will still fall under the CBSA’s jurisdiction, as opposed to that of the CICC. The government has committed more resources to the CBSA for this function.

The third and fourth issues – incompetence and ghost consultants – point to the main reservations with past regulatory regimes. These underscore why the CBA has withdrawn its support for the immigration consultant industry. The CBA argues that consultants have shown they are incapable of effective self-regulation. Lawyers, for their part, claim that previous regulatory efforts suffered from governance problems and mismanagement, failure to enforce ethical and professional standards, and attempts to silence members who criticized management. They argue that another government overhaul will cost taxpayers money and that more robust legal aid is the solution.⁵⁷ Immigration consultants respond that the strictures of legal aid and obtaining a lawyer would render immigration services inaccessible to many who need such services, and that leaving regulation up to the provinces would result in a piecemeal system that is difficult to navigate. They believe that with effective regulation, consultants can be a useful part of the system.

57 Jain & Daghighian, *supra* note 32; Renaud Dery, “A Lack of Compliance among Canadian Immigration Consultants” (15 November 2017), <https://www.canadim.com/blog/lack-compliance-canadian-immigration-consultants-attorney-dery-blog>; Ravi Jain, “Immigration Consultants Should Not Be Propped Up by Ottawa,” *Globe and Mail* (17 April 2019), A11, <https://www.theglobeandmail.com/opinion/article-ottawa-should-stop-propping-up-immigration-consultants>; “Immigration Consultants,” *supra* note 15.

Incompetent regulated consultants are not a pervasive issue, and any incompetence would ideally be addressed by CICC licensing prerequisites. Although the education and training requirements seem only marginally different from those prescribed by the ICCRC, the Queen's University Faculty of Law and the Université de Montréal have recently announced accredited graduate diploma programs for prospective immigration consultants.

Addressing the ghost consultant problem has proven more challenging. The new College's enhanced abilities to investigate and take action by seeking injunctions against practising non-members are designed to address this issue. However, many of the CICC's enhanced powers – such as compelling testimony, requesting documents, conducting searches, and imposing penalties – apply only with respect to misconduct or incompetence by former and current licensed immigration consultants. The prosecution of ghost consultants for criminal misconduct will still involve the CBSA.

The new legislation also lacks provisions for protecting victims of immigration consultant fraud who wish to come forward with complaints. There are few positive incentives to report unscrupulous immigration consultants, and furthermore, those consultants wield a great deal of power over would-be Canadians, for they are privy to details about their precarious status and overseas relatives. By coming forward, a claimant would expose these details and may risk deportation.

The problem of offshore consultants has no easy solution. The CICC will still have to work within the confines of domestic laws in foreign jurisdictions. Given the logistical and cost hurdles, it remains unclear how it can address this problem effectively.

5.3 A Comparative Overview of Regulatory Regimes for Immigration Consultants

5.3.1 Overview

Concerns about the immigration advice or consulting industry are common in Australia, New Zealand, the UK, and the US. While the regulatory approaches in these jurisdictions are in some respects similar, the differences help in identifying best practices. It is useful to examine regimes from three perspectives: what behaviour is restricted under what, if any, regulatory regime; prerequisites for access to the profession; and disciplinary and penal processes.

These jurisdictions face similar issues with respect to immigration advice. In each, restrictions exist on who, if anyone, can provide such advice

for a fee. In some jurisdictions (Australia, New Zealand, the UK), regulatory bodies oversee immigration professionals through direct government regulation, with some variation. These three countries allow registered (in effect, licensed) professionals to practice; by contrast, the US restricts the provision of immigration advice to lawyers and certain individuals under lawyers' supervision, with a narrow exemption for not-for-profit organizations. Arguably, the primary problem in all four countries is that unregulated individuals present themselves as registered (licensed) professionals and then defraud their clients. Yet even in regulated jurisdictions, licensed individuals may defraud clients, cheat the system, or provide incompetent advice, albeit typically much less often. All of these jurisdictions have had to contend with unregulated offshore consultants as well as with immigrants and unlicensed individuals colluding to defraud the immigration system. Lastly, many jurisdictions face difficulties investigating and sanctioning unregistered immigration consultants.

5.3.2 Australia

In Australia, unregulated "migration agents" frequently present themselves as registered. While sometimes providing competent advice, they often defraud clients or collude with prospective immigrants to game the system.⁵⁸ Defrauding clients follows the pattern seen in other jurisdictions – for example, employers taking migrants' money, giving them jobs, and then paying them a "salary" from money the migrants have already remitted; contractors sponsoring workers in skilled roles but actually employing them as labourers and machine operators; agents lying on visa applications, resulting in the applicant being accused of fraud or refused a visa; and unregistered agents using the registration of registered agents, or registered agents sharing their registration with unregistered individuals.⁵⁹ Australia has had difficulty disciplining both

58 Shamsher Kainth, "Visa Seekers Paid \$100,000 for Sponsorship from Fake Businesses," *Special Broadcasting Service* (30 May 2019), <https://www.sbs.com.au/yourlanguage/punjabi/en/article/2019/05/30/visa-seekers-paid-100000-sponsorship-fake-businesses>; Kylar Loussikian, "Corrupt Migration Agents Swindling 'Desperate' Customers Face Crackdown," *Sydney Morning Herald* (13 January 2019), <https://www.smh.com.au/politics/federal/corrupt-migration-agents-swindling-desperate-customers-face-crackdown-20190110-p50qj3.html>.

59 Dan Oakes, "'False' Documents Submitted for 457 Visas as Part of Alleged Multi-Million-Dollar Tax Fraud Scheme," *ABC* (27 November 2018), <https://www.abc.net.au/news/2018-11-28/457-visa-documents-fudged-in-alleged-tax-fraud-rort/10559908>; Nick McKenzie & Richard Baker, "Visa Fraud Suspects Fled after Wiring \$1m Overseas," *Sydney Morning Herald* (8 August 2014), <https://www.smh.com.au/politics/federal/visa-fraud-suspects-fled-after-wiring-1m-overseas-20140807-3dbmu>

registered and unregistered migration agents, and complaints take months or years to process.⁶⁰

Registered migration agents are regulated under the *Migration Act 1958*⁶¹ and the Office of the Migration Agents Registration Authority (OMARA), a discrete office in the federal Department of Home Affairs (DHA). Australia created the OMARA in 2009 after a parliamentary review concluded that change was necessary to address pervasive problems. The *Migration Act 1958* states that a person who is not a registered migration agent must not give immigration assistance for payment. The penalty for doing so is up to ten years' imprisonment.⁶² This does not preclude, with caveats, parliamentarians, lawyers, officials, close family members, visa sponsors and nominators, members of a diplomatic mission or consular post, members of an office of an international organization, or specific non-remunerated individuals from giving immigration advice or immigration legal advice.⁶³ Furthermore, no person can advertise him/herself or another person as a registered migration agent if that person is not.⁶⁴

"Immigration assistance" entails a person claiming to use knowledge or experience to: prepare or help prepare a visa application, cancellation, or sponsorship, or other immigration document; advise about a visa application or matter; and represent an applicant in proceedings before a court or review authority in relation to a visa application or matter. Immigration assistance does not include: performing clerical work to prepare or help prepare an application or other document; providing translation or interpretation services to help prepare an application or other document;

[.html](https://www.sbs.com.au/yourlanguage/punjabi/en/article/2019/06/06/victim-agents-fraud-indian-migrants-7-year-long-battle-visa); Shamsher Kainth, "Victim of Agent's Fraud: Indian Migrant's 7-Year Long Battle for Visa," *Special Broadcasting Service* (6 June 2019), <https://www.sbs.com.au/yourlanguage/punjabi/en/article/2019/06/06/victim-agents-fraud-indian-migrants-7-year-long-battle-visa>; Shamsher Kainth, "Migration Agent's 'Widespread Fraud' Has Indian Woman's Visa in Limbo for 8 Years," *Special Broadcasting Service* (15 May 2019), <https://www.sbs.com.au/yourlanguage/punjabi/en/article/2019/05/15/migration-agents-widespread-fraud-has-indian-womans-visa-limbo-8-years>; Australia, Commonwealth, Joint Standing Committee on Migration, *Report of the Inquiry into Efficacy of Current Regulation of Australian Migration and Education Agents* by Chair Jason Wood (Canberra, 2019) at 38–9.

60 Kathryn Diss, "Migration Agent Rebecca Mason's Trail of Deception Revealed in Tales of Debt and Deportation," *ABC* (27 April 2019), <https://www.abc.net.au/news/2019-04-28/migration-agent-rebecca-mason-trail-of-deception-revealed/11044452>.

61 (Austl), 1958/62.

62 *Ibid*, ss 281–2.

63 *Ibid*, s 280.

64 *Ibid*, ss 283–5.

advising someone that he or she must apply for a visa; or referring a person to a third party or information produced by a third party.⁶⁵

An individual must register with the OMARA to provide immigration advice or assistance. To register, a person must: be a practising lawyer or hold a graduate diploma in Australian migration law and practice and pass a national assessment; demonstrate English proficiency; be a person of integrity and be “fit and proper” (verified by a police check); hold professional indemnity insurance; have access to a suitable professional library; be an Australian citizen or permanent resident or a New Zealand citizen holding a special category visa; and not have had their registration application refused in the past year or cancelled in the past five years.⁶⁶ Once registered, agents must complete continuing professional development prior to annual re-registration.⁶⁷ The OMARA also sets out a Code of Conduct that agents must follow or face disciplinary action.⁶⁸

Complaints about registered migration agents are directed to the OMARA, which can then investigate and sanction agents with cautions and registration suspensions or cancellations.⁶⁹ The OMARA, however, has no jurisdiction over unregistered migration agents. The DHA has said that a lack of information and evidence-sharing combined with a lack of appropriate search and seizure warrant executing powers has resulted in delays and insufficient investigations, contributing to the proliferation of unscrupulous migration agents.⁷⁰

5.3.3 New Zealand

“Immigration advisers” have long been a source of coercion in New Zealand’s immigration system. People posing as immigration advisers have charged immigrants large sums for jobs that never materialize and have given erroneous, harmful advice.⁷¹ In 2018, an investigation revealed

65 *Ibid*, s 276.

66 Wood, *supra* note 59 at 3–4; *ibid*, s 290.

67 *Migration Act 1958*, *supra* note 61, s 290A.

68 *Ibid*, ss 303, 314.

69 *Ibid*, ss 303, 316. The OMARA also investigates complaints about lawyers providing immigration assistance, but then refers cases to professional associations for potential disciplinary action.

70 Wood, *supra* note 59 at 44.

71 “Fake Immigration Adviser Sentenced” (8 February 2013) *New Zealand Herald*, https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10864254; Anuja Nadkarni, “Unlicensed Immigration Adviser Prosecuted for Multiple Offences” *Stuff* (27 March 2018), <https://www.stuff.co.nz/business/102641241/unlicensed-immigration-adviser-prosecuted-for-multiple-offences>; Kendall Hutt, “Auckland Man Pleads Guilty to Being an Unlicensed Immigration Adviser,” *Stuff* (28 May 2019), <https://>

rampant fraud, fake advisers, and exploitation. These scams have included: licensed advisers stealing money from clients; an immigrant purchasing a job followed by an adviser (usually unlicensed) falsifying paperwork for a fake job and the immigrant finding an under-the-table job elsewhere; an immigrant purchasing a job, and the adviser and employer then taking back much of the salary; service sector businesses profiting from these arrangements by paying the adviser a percentage of the original fee levied on the immigrant; creating fake job advertisements to satisfy immigration requirements; and offering New Zealanders money to marry immigrants.⁷²

The *Immigration Advisers Licensing Act 2007*⁷³ sets out the legislative framework for regulating immigration advisers. The *IALA* delineates who may give immigration advice (no one other than a licensed adviser or exempt person); provides for the licensing of immigration advisers, with exemptions from licensing requirements for certain groups; has created the Immigration Advisers Authority (IAA), a government agency that acts as a regulatory body; has created the Immigration Advisers Complaints and Disciplinary Tribunal (IACDT); mandates a register of all licensed advisers; and prohibits Immigration New Zealand (INZ), a government agency distinct from the IAA, from accepting applications in which the *IALA* has been contravened.⁷⁴

www.stuff.co.nz/business/113066310/auckland-man-pleads-guilty-to-be-being-an-unlicensed-immigration-adviser; “Auckland Woman in Court after Allegedly Giving Immigration Advice Illegally,” *Stuff* (8 February 2018), <https://www.stuff.co.nz/national/101273825/auckland-woman-in-court-after-allegedly-giving-immigration-advice-illegally>.

- 72 Dileepa Fonseka & Steve Kilgallon, “The Big Scam: How Our Immigration System is Being Rorted,” *Stuff* (21 September 2018), <https://www.stuff.co.nz/national/crime/107212250/the-big-scam-how-our-immigration-system-is-being-rorted>; Dileepa Fonseka & Steve Kilgallon, “The Big Scam: Bad Eggs ‘Rife’ in Hospitality Industry,” *Stuff* (21 September 2018), <https://www.stuff.co.nz/national/crime/107073415/the-big-scam-bad-eggs-rife-in-hospitality-industry>; Dileepa Fonseka & Steve Kilgallon, “The Big Scam: ‘I’m Always Scared’” *Stuff* (21 September 2018), <https://www.stuff.co.nz/national/crime/107073322/the-big-scam-im-always-scared>; Dileepa Fonseka & Steve Kilgallon, “The Big Scam: The Tip of an Immigration Scam Iceberg,” *Stuff* (21 September 2018), <https://www.stuff.co.nz/national/crime/107073384/the-big-scam-the-tip-of-an-immigration-scam-iceberg> [Fonseka and Kilgallon, “Iceberg”]; Dileepa Fonseka & Steve Kilgallon, “The Big Scam: ‘Marriages for Sale’ in Alleged Visa Rort,” *Stuff* (26 October 2018), <https://www.stuff.co.nz/national/crime/108067804/the-big-scam-marriages-for-sale-in-alleged-visa-rort>; Dileepa Fonseka & Steve Kilgallon, “The Big Scam: 17 Granted Residency through Alleged ‘Paper’ Company,” *Stuff* (2 October 2018), <https://www.stuff.co.nz/auckland/107454068/the-big-scam-17-granted-residency-through-alleged-paper-company>.

73 (NZ), 2007/15 [*IALA*].

74 *Ibid.*, ss 6–17, 34–43, 77.

Under the *IALA*, immigration advice “means using, or purporting to use, knowledge of or experience in immigration to advise, direct, assist, or represent another person in regard to an immigration matter ... whether directly or indirectly and whether or not for gain or reward.” It does not, however, include providing publicly available information; directing a person to the government or an adviser for advice; or carrying out clerical work, translation or interpreting services, or settlement services.⁷⁵

Prospective immigration advisers must meet the IAA’s competency standards. These include completion of a diploma in New Zealand Immigration Advice; knowledge of the licensing scheme; knowledge of New Zealand immigration law and instructions; the ability to prepare, lodge, and administer immigration applications; English proficiency; and the ability to conduct business professionally, ethically, and responsibly.⁷⁶ Once licensed, an adviser must fulfil continuing professional development requirements. Subject to caveats, certain persons are exempt from licensing, including those who non-systematically provide immigration advice in an informal or family context; foreign diplomats and consular staff; Members of Parliament and their staff; certain public servants, lawyers, and community law centre volunteers; citizens’ advice bureau volunteers; and (in special cases, subject to conditions) competent individuals or organizations.⁷⁷ Advice pertaining to temporary student visas is also exempt.⁷⁸

The New Zealand system is tiered, with three levels of licensure: full, limited, and provisional. Each relates to a different type and complexity of work.⁷⁹ At any time, an adviser may apply to upgrade his or her license. All new immigration advisers must hold a provisional licence for two years and work under the direct supervision of a person holding a full licence.⁸⁰

The IAA has the jurisdiction to investigate offences and enforce the *IALA*.⁸¹ Once the IAA has investigated a complaint and recommended that it proceed, the case is referred to the IACDT, which may then dismiss the complaint or sanction the adviser.⁸² Unlicensed provision of immigration advice – whether in New Zealand or offshore, and whether or not for a fee – can result in a fine and/or up to seven years’

⁷⁵ *Ibid*, s 7.

⁷⁶ Immigration Advisers Authority, “Competency standards,” <https://www.iaa.govt.nz/for-advisers/competency-standards>.

⁷⁷ *IALA*, *supra* note 73, ss 11–12.

⁷⁸ *Ibid*, s 11.

⁷⁹ *Ibid*, s 19.

⁸⁰ Immigration Advisers Authority, “Licensing,” <https://www.iaa.govt.nz/become-a-licensed-adviser/licensing>.

⁸¹ *IALA*, *supra* note 73, s 35.

⁸² *Ibid*, ss 40–3, 51.

imprisonment.⁸³ Claiming that an unlicensed individual is licensed or that they may legally provide advice may result in a fine and/or two years' imprisonment.⁸⁴

The previously detailed unscrupulous behaviour that is rampant in New Zealand suggests that previous regulatory attempts have not been effective. One solution would be to revamp the prosecution process, which currently suffers from large backlogs and long delays. Others have suggested removing the requirement that a visa be linked with an individual employer; this could help extricate immigrants from oppressive schemes.⁸⁵ Government officials assert that whistle-blowers will not be "unduly penalized" for coming forward⁸⁶ unless they are found to be complicit, but mistrust of that caveat discourages immigrants from reporting fraud.⁸⁷ The government has announced an extensive review of migrant exploitation; however, a similar review of the regulatory regime was completed in 2014 and did not result in significant improvements.⁸⁸

Both Australia and New Zealand recognize a somewhat similar professional category: education agents. These individuals arrange study visas and college courses for migrants. Albeit to a lesser degree, the profession in both countries has been dogged by claims of fraud, misinformation, and exploitation similar to those confronting migration agents.⁸⁹

In New Zealand, education agents are not licensed and thus are not required to meet competence standards. However, the government has developed free training for agents. Contractual arrangements must exist

83 *Ibid*, ss 8, 63, 67. There are actually two offences with two different penalties. The first involves an unlicensed person who gives advice after having been told, at some point in the preceding twelve months, that he or she must be licensed to provide advice. This case results in seven years' imprisonment and/or a fine. If an unlicensed person simply provides advice, he or she will receive a fine. Under this second charge, a person can defend by proving that he or she did not know he or she was providing immigration advice or did not know he or she was not licensed to provide immigration advice. In both cases, the person must have exercised all reasonable care and due diligence to avoid breaking the law.

84 *Ibid*, ss 64–5.

85 Fonseca & Kilgallon, "Iceberg," *supra* note 72.

86 Presumably, they are referring to the separation of IAA and INZ, which provides some reassurance to victims that they can report incompetent or unethical adviser behaviour to the IAA without consequences when dealing with INZ.

87 Fonseca & Kilgallon, "Iceberg," *supra* note 72.

88 *Ibid*.

89 See, for example, Gill Bonnett, "Government's Immigration Approach Called 'Harsh and Draconian,'" *Radio New Zealand* (2 August 2019), <https://www.rnz.co.nz/news/national/395812/government-s-immigration-approach-called-harsh-and-draconian>; Wood, *supra* note 59; Australia, Commonwealth, Australian Skills Quality Authority, *Protecting the Quality of International VET and English Language Education* by Chief Commissioner Mark Paterson (Canberra, 2019).

between the education agent and education providers, and while there is no formal complaint process, the onus is on education providers to ensure that these agents adhere to laws and regulations. Furthermore, the Education New Zealand (ENZ) Recognised Agency program “recognizes” education agents and agencies when they meet a minimum number of points based on how successful they are at placing prospective students,⁹⁰ how well they comply with standards of conduct, and whether they undertake training. ENZ provides certain benefits to recognized agents and agencies, which include listing them on a database; providing them with access to ENZ staff, training programs, materials, and marketing materials; allowing them to use ENZ’s official logo; and inviting them to events. Recognized agents and agencies may be offshore or in New Zealand, but the latter must employ a licensed immigration adviser. Education agents and agencies can be removed from the registry if they do not operate appropriately.⁹¹

The Australian government does not directly regulate education agents. Rather, education providers regulate education agents under the *Education Services for Overseas Students Act 2000*⁹² and the related *National Code of Practice for Providers of Education and Training to Overseas Students 2018*. The Department of Education and Training administers the *ESOSA*, which “establishes legislative requirements and standards” for the quality of education offered to international students. This includes regulation of education providers that engage education agents. Education providers must have written agreements with their education agents; enter agents’ details in an online database; ensure that agents have sufficient knowledge of the Australian International Education and Training Agent Code of Ethics,⁹³ and ensure that agents act honestly and in good faith, terminating the relationship with an agent who does not comply with the National Code. Also, the provider must not accept students from an agent if it suspects the agent is acting unethically.⁹⁴

90 For each student an agency places, it earns points based on the level of study and location of that student. Agencies must also meet a minimum visa approval rate based on the student’s country of origin. See “ENZRA FAQs,” <https://web.archive.org/web/20200116083218/https://enz.govt.nz/support/agent-engagement/enzra-faqs>.

91 NZ, Ministry of Business, Innovation, and Employment, *Review of the Regulation of Immigration Advice* by Michael Mills and Hayden Johnston (2014) at 52.

92 (Austl) 2000/164 [ESOSA].

93 “Australian International Education and Training Agent Code of Ethics” (21 October 2016), <https://internationaleducation.gov.au/News/Latest-News/Documents/Australian%20International%20Education%20and%20Training%20-%20Agent%20Code%20of%20Ethics.pdf>.

94 “National Code of Practice for Providers of Education and Training to Overseas Students 2018,” <https://internationaleducation.gov.au/Regulatory-Information/Pages/National-Code-2018-Factsheets.aspx>.

These strictures imply that education agents are subject to disciplinary procedures and must not provide immigration advice.⁹⁵ In a 2019 report on migration and education agent regulation, the Joint Standing Committee on Migration recommended that Australia create a database of education agent performance; require agents to meet standards, including meeting English language proficiency, completing certified training, obtaining police checks, and not having had a written agreement cancelled in the past five years; require education providers to review written agreements annually and ensure agents undertake professional development; and institute a demerit point system to downgrade education agencies that breach the *ESOSA*. Nothing yet has come of the recommendations.

While both the UK and Canada encounter some similar fraudulent conduct from education agents (or, in the case of Canada, typically immigration consultants advising on education matters), neither country has moved toward regulation.⁹⁶

5.3.4 *The United Kingdom*

The UK faces many of the same problems as the other jurisdictions, and accounts of fraudulent and unregistered “immigration advisers” are common. Many of these individuals falsely claim to be registered advisers, charging high fees for visas or other immigration documents that never appear.⁹⁷ Some work with clients to falsify documents so as to appear that the applicant has been living and working in Britain for some time; or they help their clients cheat on English-language tests, set up sham marriages, and take advantage of rules that allow British nationals to bring non-European Economic Area spouses into the country.⁹⁸ Still others charge exorbitant

95 Wood, *supra* note 59 at 63–4, 67–8.

96 See, for example, Bala Yogesh and Stuart Neatby, “B.C. Students Allege Overcharging, Fraud by International Recruiters,” *Vancouver Sun* (12 October 2017), <https://vancouver.sun.com/feature/how-international-students-are-filling-funding-shortfalls/chapter-3>; “Student Loans Fraud Exposed by Panorama,” *BBC* (13 November 2017), <https://www.bbc.com/news/uk-41966571>; Chris Parr, “Student Recruitment Agents Sometimes Engage in ‘Outright Fraud,’” *Times Higher Education* (3 September 2014), <https://www.timeshighereducation.com/news/student-recruitment-agents-sometimes-engage-in-outright-fraud/2015573.article#survey-answer>.

97 Jane Bradley, “Families ‘Ripped Off’ by Birmingham Immigration Firm,” *BBC* (22 October 2012), <https://www.bbc.com/news/uk-england-birmingham-20004900>.

98 Ishani Duttagupta, “Indian Couple in UK Sentenced for Immigration Scam,” *Economic Times* (18 May 2012), <https://economictimes.indiatimes.com/nri/visa-and-immigration/indian-couple-in-uk-sentenced-for-immigration-scam/articleshow/13255554.cms>; “Immigration Adviser Admits Organising Sham Marriages,” *BBC* (14 January 2013),

fees while manufacturing documents; or they simply fail to submit an application, leaving prospective immigrants in limbo and facing the threat of being charged with fraud themselves.⁹⁹ Fraudulent advisers have also targeted students, demanding large sums for an extension of their stay in the UK.¹⁰⁰

The *Immigration and Asylum Act 1999*¹⁰¹ created the Office of the Immigration Services Commissioner (OISC), an independent public regulatory body that sets out the conditions for giving advice on immigration. It is a criminal offence, punishable by a fine and/or up to two years' imprisonment, for anyone not registered with the OISC to provide immigration advice "in the course of a business," paid or unpaid, unless exempt from regulation.¹⁰² This covers both for-profit and not-for-profit entities. To provide immigration assistance, the former must register with the OISC and pay an annual fee, while the latter must apply to the OISC for a certificate of exemption. Family and friends acting in a personal capacity are also exempt.¹⁰³ Aside from registered advisers, those who can give immigration advice include persons who are part of a designated professional body;¹⁰⁴ are exempted from the

<https://www.bbc.com/news/uk-england-london-21017755>; Paul Grant, "Thousands Use 'Fake Life' Scam to Get into the UK," *BBC* (17 January 2017), <https://www.bbc.com/news/uk-38597384>; David Barrett, "'Entrepreneur' Visa Scheme Tightened after New Scam Uncovered," *The Telegraph* (10 July 2014), <https://www.telegraph.co.uk/news/uknews/immigration/10960403/Entrepreneur-visa-scheme-tightened-after-new-scam-uncovered.html>; "Student visa tests suspended over fraud claims," *The Guardian* (9 February 2014), <https://www.theguardian.com/uk-news/2014/feb/10/student-visa-tests-suspended-fraud>.

99 "Fraudulent UK Immigration Advisor Jailed," *UK Visa Bureau* (5 September 2012), <http://www.visabureau.com/uk/news/05-09-2012/fraudulent-uk-immigration-adviser-jailed.aspx>; Emily Dugan, "She Thought She Was Getting a Dream Job and a Future in Britain. In Fact She Was a Victim Of an Elaborate Visa Scam," *BuzzFeed News* (13 December 2018), <https://www.buzzfeed.com/emilydugan/home-office-visa-scam-victims>; Office of the Immigration Services Commissioner, news release, "Bogus Croydon Immigration Advisers Convicted of Fraud" (20 July 2018), <https://www.gov.uk/government/news/bogus-croydon-immigration-advisers-convicted-of-fraud>.

100 Ruhi Khan, "Int'l Students in UK Caught Up in Tier 2 Visa Scam," *Pie News* (8 February 2016), <https://thepienews.com/news/international-students-in-uk-caught-up-in-tier-2-visa-scam>.

101 (UK) [IAA].

102 *Ibid.*, ss 82, 84, 91.

103 Immigration Law Practitioners' Association, "The Regulation of Immigration Advice and Immigration Services" (27 June 2019), <https://www.ilpa.org.uk/resources.php/33352/information-sheet-the-regulation-of-immigration-advice-and-immigration-services>.

104 That is, the General Council of the Bar (England and Wales), the Faculty of Advocates (Scotland), the General Council of the Bar of Northern Ireland (Northern Ireland),

regulations;¹⁰⁵ satisfy the equivalent requirements in an EEA state; and are under the supervision of any of the above.¹⁰⁶ The OISC must publish a register of all immigration advisers.¹⁰⁷

Under the *IAA*, “immigration advice” relates to advising a particular individual about: claims for asylum; applications for or variations of entry clearance or leave to enter or remain in the UK; UK nationality and citizenship or EU citizenship; admission to or residence in EU member-states; removal or deportation from the UK; applications for bail under immigration law; or appeals or applications for judicial review in relation to any of the above. “Immigration services” cover the same activities, but deal with representation before a court, tribunal, or adjudicator; or corresponding with a government minister or department.¹⁰⁸ Advice not given directly to clients – for example, from one advice service to another – and “signposting” advice, such as directing a person to an adviser or translating a form, do not require registration or exemption.¹⁰⁹

The UK employs a tiered registration scheme (in effect a licensure regime) with three levels of practice. Each corresponds to different work that an adviser may undertake, ranging from straightforward applications of law to appearing before courts and the immigration tribunal.¹¹⁰ A person can apply for registration or exemption at each level.

To become registered, an immigration adviser must be “fit and competent.” Fitness means a person must be likely to comply with the OISC’s regulatory scheme and have a history of honesty, legal compliance, and financial probity.¹¹¹ As for competence, there are

the Law Society of England and Wales, the Law Society of Scotland, the Law Society of Northern Ireland, and the Chartered Institute of Legal Executives.

105 Health sector bodies and employers and educational institutions licensed to sponsor migrants to work for, or to study with, them are exempt for free advice given to the people they sponsor for certain visas and for certain queries. These organizations must, however, comply with OISC’s Code of Standards.

106 *Immigration and Asylum Act 1999*, *supra* note 101, ss 84–6; *Immigration and Asylum Act 1999 (Part V Exemption: Educational Institutions and Health Sector Bodies) Order 2001* (UK), SI 2001/1403, ss 3, 4.

107 *Immigration and Asylum Act 1999*, *supra* note 101, Schedule 6, s 6.

108 *Ibid*, s 82.

109 Office of the Immigration Services Commissioner, “Immigration Assistance” (16 October 2018) at 7, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/749370/Immigration_Assistance_-_PRACTICE_NOTE_-_161018_v3.pdf.

110 *Immigration and Asylum Act 1999*, *supra* note 101, s 19.

111 Office of the Immigration Services Commissioner, “Guidance on Fitness (Advisers),” (1 April 2016), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/510309/fitness_2016.pdf.

no formal qualifications, but a person must pass a competence assessment and demonstrate necessary knowledge and skills via experience.¹¹² Prospective advisers must undergo a criminal record check, be proficient in English, and agree to comply with the OISC Code of Standards and Rules (such as carrying insurance and establishing their own complaints scheme).¹¹³ Once registered, advisers must fulfil continuing professional development requirements.¹¹⁴ Because this scheme requires a base level of competency but does not require specific qualifications, the IAA allows people to gain experience without being regulated. A prospective adviser can work under or be supervised by an OISC-authorized adviser or member of a professional body denoted above.¹¹⁵

The OISC handles complaints about immigration advisers and commences criminal proceedings against advisers who are acting illegally. It can receive complaints about any immigration adviser, including members of the designated professional bodies and unregistered individuals. OISC investigators can charge unregistered advisers with a criminal offence.¹¹⁶ However, it also attempts to persuade illegal operators to join the body. Those who refuse are prosecuted.¹¹⁷ To prosecute unregistered immigration advisers, the OISC has been turning increasingly to the false representation provisions under anti-fraud laws, which provide for longer sentences.¹¹⁸

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- 112 Office of the Immigration Services Commissioner, “Guidance on Competence” (30 March 2017) at 3–4, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/604521/OISC_GoC_2017.pdf. There is an exemption to this: those who wish to practise only in the area of asylum and protection (as opposed to immigration as well as asylum and protection) and who have successfully completed the Law Society Immigration and Asylum Accreditation Scheme examinations.
- 113 Office of the Immigration Services Commissioner, “How to Become a Regulated Immigration Adviser” (8 March 2019), <https://www.gov.uk/government/publications/how-to-become-a-regulated-immigration-adviser/how-to-become-a-regulated-immigration-adviser>; Office of the Immigration Services Commissioner, “The Code of Standards” (1 April 2016) at 7, 9, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/458689/Code_of_Standards_2016.pdf.
- 114 “How to Become a Regulated Immigration Adviser,” *supra* note 113.
- 115 *Ibid.*
- 116 *Immigration and Asylum Act 1999*, *supra* note 101, Schedule 5, ss 5–9.
- 117 Keung & Rankin, *supra* note 9.
- 118 C.J. McKinney, “Sentences for Unqualified Immigration Advice Increase as Regulator Turns to Anti-Fraud Laws,” *Free Movement* (15 July 2019), <https://www.freemovement.org.uk/sentences-for-unqualified-immigration-advice-increase-as-regulator-turns-to-anti-fraud-laws>.

5.3.5 The United States

The US faces a unique set of problems in regulating the provision of immigration advice. Fraud is being widely perpetrated by people who falsely claim to be legal immigration advisers when, in fact, no such profession exists: the US does not have a recognized immigration assistance profession. Fake advisers often refer to themselves as “notarios” because in Spanish – the language of a large number of immigrants – *notario publico* refers to a professional who is much more qualified than a notary public.¹¹⁹ “Notario fraud” – the common term for this crime, whether or not it involves Hispanic immigrants – often involves charging exorbitant fees for services the notario does not perform and is not legally entitled to perform, as well as charging fees for false promises, such as protecting migrants from deportation, getting family members out of custody, expediting document processing, and working special government connections.¹²⁰ The consequences of this crime

119 See, e.g., Anne E. Langford, “What’s in a Name? Notarios in the United States and the Exploitation of a Vulnerable Latino Immigrant Population” (2004) 7 *Harvard Latino L Rev* 115 at 119–23.

120 Jessica Weisberg and Bridget O’Shea, “Fake Lawyers and Notaries Prey on Immigrants,” *New York Times* (21 October 2011), <https://www.nytimes.com/2011/10/23/us/fake-lawyers-and-notaries-prey-on-immigrants.html>; Steph Solis, “NJ Businesses Push Back Against Immigration Services Fraud Charges,” *North Jersey Record* (4 February 2019), <https://www.northjersey.com/story/news/new-jersey/2019/02/04/new-jersey-fraudulent-immigration-services/2678768002>; Steph Solis, “State-wide Sweep Nets 28 New Jersey Businesses Accused of Defrauding Immigrants” *North Jersey Record* (9 November 2018), <https://www.northjersey.com/story/news/new-jersey/2018/11/09/nj-notario-fraud-ag-cites-28-businesses/1941891002>; Yesenia Amaro, “They Take ‘Their Last Dollar’: Immigrants at the Mercy of Fraudsters,” *Fresno Bee* (15 September 2018), <https://www.fresnobee.com/news/local/article217226465.html>; “District Attorney Jackie Lacey Lauds New Unit for Immigration Fraud Convictions,” *Pasadena Now* (12 February 2019), <http://www.pasadenanow.com/main/district-attorney-jackie-lacey-lauds-new-unit-for-immigration-fraud-convictions>; Javier Panzar, “7 Chinese Nationals Bilked of \$1.5 Million in Visa Scheme, D.A.’s Office Says,” *Los Angeles Times* (6 May 2019), <https://www.latimes.com/local/lanow/la-me-ln-immigration-scheme-20190506-story.html>; Janene Scully, “L.A. Man Accused of Posing as Immigration Lawyer, Defrauding Santa Maria Farmworkers,” *The Tribune* (1 December 2018), <https://www.sanluisobispo.com/news/local/crime/article222504005.html>; Heather Navarro, “Mother and Daughter Accused of Scamming Immigrants Say They’re Innocent Even Though Clients Got Deported,” *NBC* (23 May 2019), <https://www.nbclosangeles.com/news/local/Los-Angeles-Immigration-Scam-Documents-Seized-Notarios-Targeted-Immigrants-510342911.html>; Jason Green, “San Jose: Woman Arrested for Alleged Immigration Fraud,” *Mercury News* (13 February 2018), <https://www.mercurynews.com/2018/02/13/san-jose-woman-arrested-for-alleged-immigration-fraud>; Bobby Allyn, “‘Notarios’ Often Defraud Hispanics, Officials Say,” *USA Today* (24 November 2012), <https://www.usatoday>

can be dire: immigrants can lose large sums of money, see charges brought against them, and undermine their legitimate prospects for immigration.

The federal and state governments have enacted laws to combat such fraud. Federal legislation outlines basic regulations for immigration assistance and provides remedies for victims of fraud. Many states have passed more detailed legislation aimed at regulating the industry, with varying degrees of success.

The Code of Federal Regulations, Title 8, Section 292, is the primary federal regime.¹²¹ It prescribes who can practise immigration law and represent immigrants: lawyers, law students or graduates, reputable individuals not receiving remuneration with a pre-existing connection to the claimant, and representatives and officials accredited by the Board of Immigration Appeals (BIA).¹²² The regulations define representation as appearing in a case; filing briefs, papers, applications, petitions, or other documents on behalf of another person; studying and advising on laws and cases; and the incidental preparation of papers. However, representation does not include helping filling in the blanks on a form for nominal remuneration. Anyone performing this function cannot, however, “hold himself or herself out as qualified in legal matters or in immigration and naturalization procedure.”¹²³

The exception for BIA-accredited representatives is narrow. It applies only to not-for-profit religious, charitable, social service, or similar organizations. First, an organization must gain official recognition from the BIA. To do so, it must have adequate knowledge, information, and experience and promise to charge only nominal fees. Once recognized, an organization may designate representatives to become accredited; individuals cannot themselves apply for accreditation. Proposed representatives must have sufficient experience with immigration law and be of good moral character. The BIA maintains a roster of recognized organizations and their accredited representatives. If representatives engage in criminal, unethical, or unprofessional conduct, or in frivolous behaviour, it falls to the BIA to sanction them.¹²⁴

States have attempted to stamp out notario fraud by passing laws in three broad categories: unauthorized practice of law (UPL) statutes,

[.com/story/news/2012/11/24/notarios-often-defraud-hispanics/1724523](https://www.rrstar.com/news/2017/11/24/notarios-often-defraud-hispanics/1724523); Susan Vela, “Notarios Publicos vs Notaries: Immigrants Are Getting Caught in the Middle,” *Rockford Register Star* (14 October 2017), <https://www.rrstar.com/news/2017/10/14/notarios-publicos-vs-notaries-immigrants-are-getting-caught-in-middle>.

121 *Immigration Regulations*, 8 CFR, s 292 (2012).

122 *Ibid*, s 292.1.

123 *Definitions*, 8 CFR, s 1.2 (2011).

124 *Immigration Regulations*, *supra* note 121, s 292.2.

immigration consultant regulations, and notary regulations.¹²⁵ Some states, like Alabama and Florida, rely solely on general UPL statutes.¹²⁶ Others, like Arizona, have UPL laws specific to immigration law.¹²⁷ Depending on the jurisdiction, the consequences for violating these laws range from civil penalties to criminal prosecution to private law remedies.¹²⁸

Some states, like California and New York, supplement the federal statute by, for example, setting specific parameters for assistance and delineating unlawful acts. Such laws allow for the provision of narrowly defined immigration assistance.¹²⁹ In Minnesota, these laws require those providing immigration assistance to post notices stating they are not authorized to give legal advice or represent clients before the BIA; prohibit the use of titles like “notary public” and “immigration consultant”; and mandate written contracts.¹³⁰ California has similar provisions and also requires fingerprinting and background checks.¹³¹ Many states, like Washington and Tennessee, specifically prohibit the use of the term “notario publico” (and related or translated derivatives).¹³²

Notary statutes – in Nebraska and Oregon, for example – apply to notaries public and require and/or prohibit certain practices.¹³³ Some state laws, such as those in Georgia, prohibit notaries from giving legal advice or holding themselves out as legal or immigration consultants.¹³⁴ Other states, such as Arkansas, require notaries public who fashion themselves as notarios to post notices clarifying they cannot provide legal or immigration advice and do not represent the government.¹³⁵ Still other states,

125 Emily A Unger, “Solving Immigration Consultant Fraud through Expanded Federal Accreditation” (2011) 29 *Law & Ineq* 425 at 438–9.

126 *Ibid* at 438; National Notary Association, “State Rules on Immigration Consulting and Assistance Services,” <https://www.nationalnotary.org/immigration/knowledge-center/state-immigration-consulting-rules>; Catholic Legal Immigration Network, Inc., “Unauthorized Practice of Immigration Law (UPL): A State-by-State Overview of Legal Mechanisms” (21 December 2018), <https://cliniclegal.org/upil>.

127 *Ariz Rev Stat Ann* tit 41, s 41-329.

128 Langford, *supra* note 119 at 128–31.

129 *Cal Bus & Prof Code* 8, ss 22440–49; *NY Gen Bus Law* art 28-C, ss 460-a to -k.

130 *Minn Stat Ann*, c 325E, s 325E.031.

131 *Cal Bus & Prof Code* 8, ss 22441.1, 22442.4; Unger, *supra* note 125 at 438–9.

132 *Tenn Code Ann*, s 8-16-402; *Rev Code Wash* tit 19, s 19.154.060; Langford, *supra* note 119 at 128–31; Careen Shannon, “To License or Not to License? A Look at Differing Approaches to Policing the Activities of Nonlawyer Immigration Service Providers” (2011) 33:2 *Cardozo L Rev* 437 at 471–9.

133 *Neb Rev Stat*, c 64, s 64-105.03; *Or Rev Stat Ann*, c 194, s 194.350; Unger, *supra* note 125 at 438–9.

134 *Ga Code Ann* tit 45, s 45-17-8.2.

135 *Ark Code Ann* tit 4, s 4-109-103; Unger, *supra* note 125 at 438–9; “State Rules on Immigration Consulting and Assistance Services,” *supra* note 126.

such as Nebraska, simply prohibit notaries from using the term “notario publico” or any equivalent non-English term.¹³⁶

5.4 Conclusion: The Contours of an Optimal Regulatory Regime for Immigration Consultants

Discerning the contours of an optimal regulatory regime for immigration consultants by comparing the selected jurisdictions is not straightforward: none of the regimes discussed in this chapter have succeeded especially well at minimizing abuses in this sector – abuses that range from outright fraud to rank incompetence. Admittedly, some of the regimes are sufficiently recent that firm judgments are not warranted.

As with the other case studies in this book, a threshold question must be addressed: what is the appropriate instrument for regulating the activities of immigration consultants? The basic choices are registration, certification, or licensure. In the case at hand, a certification regime of the sort that has many virtues in other contexts and that avoids the rigidities of an exclusive licensure regime would not be sufficient. It seems that immigration consultants’ abuses and delinquencies are sufficiently serious and rampant, and their clients are sufficiently vulnerable, that an exclusive licensure regime is warranted.

Once this policy option has been adopted, several second-order issues must be resolved. First, any regulatory regime will have to define the scope of the field of immigration consulting. In this respect, recent efforts in Australia, New Zealand, and the UK to provide such a definition are instructive. In particular, the Australian definition seems broadly apposite for most jurisdictions; that includes the exemptions and exclusions that regime provides for lawyers, government officials, parliamentarians, close family members, diplomats, and community volunteer organizations. One can debate whether a tiered form of licensure (as in New Zealand and the UK) is appropriate, given the additional regulatory complexities it would introduce. However, provisional licences of limited duration might be granted to individuals who are bridging or upgrading their credentials under the supervision of a licensed consultant (as in New Zealand).

Once an exclusive licensure regime has been adopted, and the scope of the licensed domain and exclusions or exemptions therefrom have been resolved, a key further question must be resolved: who should administer the regime? In other professional contexts, caution is warranted in adopting an untempered self-regulatory regime, given the inherent

136 Neb Rev Stat, c 64, s 64-105.03(6).

conflicts that such regimes pose between consumer protection and producer protectionism. These concerns are exacerbated in the case of immigration consultants, who are often drawn from countries almost as diverse as the countries of origin of immigrants, with equally diverse training, social norms, and conceptions of the role and responsibilities of professionals. Thus, it seems implausible that sufficient common ground exists to sustain an effective self-regulatory regime, as the unedifying Canadian experience rather dramatically exemplifies. Instead, as recent experience in Australia, New Zealand, and the UK suggests, direct government regulation of the immigration consulting profession through a specialized agency of government may be the optimal choice. The responsibilities of such an agency in developing appropriate entry and post-entry standards of competence and integrity and in enforcing such standards may well be enhanced by the creation of a multi-stakeholder advisory council drawn from representatives of groups such as immigration lawyers, immigration settlement and advocacy groups, immigration legal aid centres, relevant educational institutions, and well-established and well-respected immigration consultants. However, this council's role, as its name suggests, would be advisory only to the government agency responsible for administering the licensure regime; it would not be vested with any decision-making authority in its own right.

Once this decision has been taken, the question then arises as to what powers should be vested in this government agency, beyond developing appropriate entry and post-entry standards of competence and integrity. First, it seems appropriate that such an agency be vested with the power and responsibility to bring criminal prosecutions against both licensed members and unlicensed members for criminal misconduct, or in some cases vested with full investigative powers but with the option of referring prosecution to criminal law enforcement authorities. Second, such an agency should have the power and authority to prosecute unlicensed immigration consultants for unauthorized practice; those so charged would be subject to criminal fines and penalties. Alternatively, such cases could be referred to criminal law enforcement agencies. Third, such an agency would be responsible for administering a disciplinary regime for licensed members: criminal misconduct as well as breaches of internal codes of conduct regulating competence and integrity might result in sanctions, including cancellation or suspension of the licence to practise immigration consulting. Finally, it may well be useful for such a regulatory authority to maintain a current and publicly accessible registry of all licensed immigration consultants (as in the UK); on that registry, immigration consultants would be required to disclose their relevant training and job experience, as well as any criminal, civil, and disciplinary complaints and dispositions.

These would seem to be the basic elements of an optimal regulatory regime for immigration consultants. However, comparative experience to date suggests that well-conceived schemes on paper are likely to fall well short of achieving their public policy objectives when they lack the resources, expertise, and proactive commitment to strictly and consistently enforce the entry and post-entry rules of the game. That is to say, laws on the books are likely to be of little effect unless there is a strong commitment to following through on the ground. In the immigration consulting context, this poses particular challenges, given the presence of ghost and offshore consultants who systematically push the limits of any effective regulatory regime. In this regard, a few high-profile criminal prosecutions of serious misconduct by licensed or unlicensed practitioners, rigorous enforcement of disciplinary codes with respect to licensed members, and some high-profile prosecutions of unlicensed practitioners would likely boost the salience, visibility, and efficacy of a well-conceived regulatory regime.

Appendix 5.1. The Roles of the Regulatory Body across Selected Jurisdictions

Australia

In Australia, section 316 of the *Migration Act 1958* outlines the regulatory functions of the OMARA. With some minor revisions for clarity, the law reads as follows:

- A. The functions of the Migration Agents Registration Authority are:
- (a) to deal with registration applications in accordance with this Part; and
 - (b) to monitor the conduct of registered migration agents in their provision of immigration assistance and of lawyers in their provision of immigration legal assistance; and
 - (c) to investigate complaints in relation to the provision of immigration assistance by registered migration agents; and
 - (d) to take appropriate disciplinary action against registered migration agents or former registered migration agents; and
 - (e) to investigate complaints about lawyers in relation to their provision of immigration legal assistance, for the purpose of referring appropriate cases to professional associations for possible disciplinary action; and
 - (f) to inform the appropriate prosecuting authorities about apparent offences against this Part or Part 4; and

- (g) to monitor the adequacy of any Code of Conduct; and
- (h) such other functions as are conferred on the Authority by this Part.

New Zealand

In New Zealand, section 35 of the *Immigration Advisers Licensing Act 2007* outlines the regulatory functions of the IAA. With some minor revisions for clarity, the law reads as such:

- A. The functions of the Authority are –
 - (a) to establish and maintain a register of licensed immigration advisers:
 - (b) to administer the licensing regime for immigration advisers:
 - (c) to develop and maintain competency standards and a code of conduct for immigration advisers:
 - (d) to facilitate the education and professional development of immigration advisers:
 - (e) to facilitate public awareness of matters relating to the provision of immigration advice:
 - (f) to investigate and take enforcement action in relation to offences under this Act:
 - (g) to provide procedures for the lodging of complaints, including requiring immigration advisers to set up their own complaints processes:
 - (h) to carry out such other functions as may be conferred on the Authority by this Act or any other enactment:
 - (i) to carry out any functions that are incidental and related to, or consequential on, the functions referred to in paragraphs (a) to (h).
- B. The Registrar is responsible to the chief executive for carrying out the functions of the Authority.

The United Kingdom

In the UK, Schedule 5, Part I, of the *Immigration and Asylum Act 1999* outlines the regulatory functions of the OISC. Because these laws are rather extensive, below is a summarized overview of the OISC's functions.

- A. Make rules regulating any aspect of the professional practice, conduct, or discipline of registered persons, and those acting on behalf of registered persons, in connection with the provision of immigration advice or immigration services.

- B. Prepare and issue a code setting standards of conduct which those to whom the code applies are expected to meet. (This code applies only to registered advisers, that is, not those who are exempt or part of other bodies.)
- C. Carry out inspections of the activities and businesses of registered persons.
- D. Establish a scheme for the investigation by the Commissioner of relevant complaints made to the Commissioner. Investigate any matter which the Commissioner would have power to investigate on a complaint made under the complaints scheme. This includes complaints involving both registered and unregistered persons.
- E. If the Commissioner refers a complaint to a designated professional body, give directions setting a timetable to be followed by the designated professional body. On an application made by the Commissioner, a justice of the peace may issue a warrant authorizing the Commissioner (or an authorized person) to enter premises.

6 Regulating the Market for Legal Services: Paradoxes of Over- and Under-Regulation within a Single Profession

6.1 Introduction

In including a case study on the regulation of the market for legal services in this book, I am concerned with pre-empting the criticism that it is easy to be critical and prescriptive of other professions and to grant one's own profession a free pass. In fact, in previous writing I have been critical of various aspects of the regulation of the legal profession from which this case study is derived.¹ In my view, in most jurisdictions the dominant regulatory regime of the market for legal services exhibits characteristics of the paradox of both over- and under-regulation described in [chapter 1](#). In particular, the legal profession in most Western jurisdictions has historically relied on a self-governing exclusive licensure regime with an extremely broad scope of protected practice, while at the same time adopting a relatively narrow focus on post-entry competence through passive, complaint-driven disciplinary processes that have for the most part focused on egregious forms of misconduct (fraud, embezzlement, sexual abuse of clients) rather than more proactive policies that address issues of post-entry competence.

While the case for regulating the market for legal services, as in the previous case studies, rests on the serious risk incurred by uninformed or ill-informed consumers (and sometimes third parties) when legal services are incompetently provided, among the professions the legal profession claims a particular normative lodestar as its custodian: the Rule of Law and its correlatives Equality before the Law and ensuring access to justice –

¹ See Michael Trebilcock, "Prices, Costs, and Access to Justice," in Trevor Farrow and Les Jacobs, eds, *The Justice Crisis: The Cost and Value of Accessing Law* (UBC Press, 2020); and Trebilcock, "Regulating the Market for Legal Services" (2008) 45 *Alta L. Rev.* 215.

central values in all liberal democracies. While the Rule of Law is subject to many understandings and ambiguities – thick and thin versions, instrumental and non-instrumental versions² – all such understandings must confront an obvious albeit painful reality: no society assigns infinite public resources to the administration of justice or access to justice, and they all must compete with demands by citizens for public expenditures on other functions of importance to them, including health care, education, infrastructure, and social safety nets, etc. Given the finite resources devoted to the administration of justice, including legal aid (which has sustained serious budget cuts rather than increases in many jurisdictions in recent years), this implies that scarce resources – including access to legal services – will need to be rationed and allocated in some way.

6.2 The Price of Justice

Beyond government decisions on the allocation of public expenditures, there are other important institutional actors whose policies and conduct significantly affect the price of justice. If access to civil justice is interpreted to mean primarily access to civil courts, then judges individually and collectively in the procedures they adopt and apply to civil litigation will significantly affect the price of justice. The more prolix and protracted civil proceedings are, the higher the monetary, temporal, and psychological costs experienced by many litigants, creating pressures on them to settle cases or to move disputes to less costly and more expeditious venues, such as private mediation or arbitration, or simply to “lump” their grievances, leading to the much-studied phenomenon of the “vanishing trial” in the US (and in Canada, although there is less systematic Canadian evidence on this issue).³ In the words of the antiwar poster from the 1960s: “Suppose they gave a war and nobody came.” Under classical conceptions of the adversarial system, judges were largely passive umpires between legally well-armed adversaries, who were accorded substantial latitude as to how they presented their cases to courts, in terms of number of witnesses, time for examination and cross-examination, scope of discovery,

2 See Brian Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press, 2006); Michael Trebilcock and Ronald Daniels, *Rule of Law Reform and Development: Charting the Fragile Path of Progress* (Edward Elgar, 2008); Michael Trebilcock, “Between Universalism and Relativism: Reflections on the Evolution of Law and Development Studies” (2016) 66 *University of Toronto Law Journal* 330; Christopher May and Adam Winchester, eds, *Handbook on the Rule of Law* (Edward Elgar, 2018).

3 See Marc Galanter, “The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts” (2004) 1 *J of Empirical Legal Studies* 459; Gillian Hadfield, “Where Have All the Trials Gone?” (2004) 1 *J of Empirical Legal Studies* 713.

scheduling of hearings, adjournments, and so on – the “Full Court Press,” as I have called it.⁴ In recent years, there has been significant movement away from the classical adversarial model of judges as relatively neutral umpires of proceedings largely controlled by the legal representatives of litigants, toward more active forms of judicial case management, in partial recognition of the fact that perfect justice for the few is a denial of justice for the many; controversy persists as to what form case management should take, whether it should be mandatory or voluntary, and at what stage of proceedings it is most appropriate.⁵

Courts, of course, are not the only institutions that perform adjudicative functions in our society. A plethora of administrative tribunals, bodies, and program administrators within government perform adjudicative or quasi-adjudicative roles in resolving claims or disputes, and many of the same questions one might pose of courts can, with appropriate adaptations, be applied to these quasi-adjudicative bodies.

Setting aside courts and quasi-adjudicative bodies, the price of justice is obviously influenced by the policies adopted by university-based law schools: the number of students they admit; the length and nature of course requirements; and tuition fees (which in recent years have been increasing substantially, reflecting in part reductions in real levels of government support for professional education and increasingly intense international competition for academic talent, both faculty and students).

Law societies as self-regulators of the legal profession also significantly influence the price of justice in terms of the wide range of policies they adopt with respect to entry requirements, the post-entry regulation of lawyers’ conduct, and the permissible scope of activities of paralegals, cognate professionals, and non-lawyer relationships with lawyers in the provision of legal services.

For many good reasons, courts, university law schools, and law societies are all fiercely protective of their institutional autonomy. These contending autonomies, however, along with the political decisions (both federal and provincial in Canada) that bear on the administration of justice, carry the offsetting risk of disarticulating any coherent approach to enhancing access to justice (including the development of any systematic database on the administration of justice).⁶

4 Michael Trebilcock and Lisa Austin, “The Limits of the Full Court Press: Of Blood and Mergers” (1998) 48 *University of Toronto Law Journal* 1.

5 See Judge David Price, “A New Model for Civil Case Management: Efficacy Through Intrinsic Engagement” (2015) 50 *Court Review* 174.

6 See Action Committee on Access to Justice in Civil and Family Matters, *Access to Civil and Family Justice: A Roadmap for Change* (Canadian Forum on Civil Justice, Ottawa, 2013).

Moving from the systemic or institutional perspective to the actual administration of justice, it is useful to undertake a reality check on the incentives facing lawyers in private practice and private citizens with respect to the latter's needs or concerns that could potentially benefit from legal assistance or representation. First, from the perspective of lawyers in private practice, despite periodic proposals to mandate some level of pro bono services, it seems unrealistic to expect them to devote large amounts of their time to pro bono services or to dramatically reduce their fees for impecunious clients below those they would normally charge. Lawyers in private practice, particularly those in smaller practices, are presumably constrained by the need to maintain a business model that ensures the long-term viability of their practices. Second, from a citizen's or client's perspective, whatever their personal resources, it makes no economic sense to pursue a grievance where the costs of legal representation exceed the expected returns from pursuing it – better “lump” it than litigate it. Even when the expected returns from pursuing a matter exceed the legal costs of representation, impecunious clients will find it neither rational nor in many cases even possible to pay for retainers or ongoing time-based legal fees before the matter is resolved, given the many other pressing and competing claims on their limited resources.⁷ Contingency fees and class action procedures can alleviate some of these constraints, but only in a limited range of cases. In Ontario, for the past decade or so, paralegals who meet prescribed training requirements have been licensed by the Law Society of Ontario (on which paralegals are represented) to provide direct representation for clients before lower courts and various tribunals (with ongoing debates as to whether their scope of notice should be extended to the increasing number of unrepresented litigants in family law proceedings). This regime has had significant take-up, with 9,000 licensees (and has functioned more effectively than the federal regulation of immigration consultants described in the previous chapter).

Thus, it turns out that at a systemic level, at the individual practitioner level, and at the individual citizen or client level, justice does indeed have a price, however disagreeable this reality may be. This reality then leads to a critical cluster of issues – the relationship between prices and costs – that requires confronting the reality that the only way to substantially reduce the price of justice is to reduce its costs (recognizing that prevailing prices are largely a function of prevailing, underlying cost structures).

7 Noel Semple, “The Cost of Seeking Civil Justice in Canada” (2015) 93 Canadian Bar Review 1; for a recent survey of the costs of civil justice in Canada, see Trevor Farrow et al., *Everyday Legal Problems and the Cost of Justice in Canada: An Overview Report* (Canadian Forum on Civil Justice, 2016); more generally, Farrow and Jacobs, *supra* note 337.

6.3 Prices and Costs

Economists tend to assume that the prices confronting consumers of goods and services bear some relationship – typically a close one – to the costs of providing those goods or services. That includes legal services. So if we are concerned (as we should be) about the price of justice, and how the prevailing price of justice precludes many citizens from obtaining access to justice (civil justice in particular), we cannot avoid focusing sharply on the costs (fixed and variable) of providing legal and related services (including adjudicative services).

In this respect, a number of contemporary scholars argue that there is strong potential for reducing the cost and hence the price of justice through two emerging and overlapping trends: liberalization of the rules governing the business structures through which legal services may be provided; and the role of information technology (IT) and artificial intelligence (AI) in reducing the costs of assembling, disseminating, and applying legally relevant information to individual citizens' or firms' needs.

A prominent proponent of this view is Richard Susskind, who has argued in a number of publications that legal institutions and the legal profession are at a crossroads and are poised to change more radically over the next two decades than they have over the past two centuries. He argues that the bespoke specialist who handcrafts solutions for clients will be challenged by new working methods, characterized by lower labour costs, mass customization, recyclable legal knowledge, pervasive use of IT, and more. In *Tomorrow's Lawyers: An Introduction to Your Future*,⁸ Susskind argues that there will be three main drivers of change: the more-for-less challenge, liberalization, and IT. The more-for-less challenge reflects the concerns of many users or potential users of legal services about costs, particularly in a contemporary low-growth economic environment. These concerns apply across the spectrum, from large corporate clients and their in-house counsel to small businesses and individual citizens. The liberalization challenge addresses prevailing concerns about the absence of choice in modes of legal service delivery. In this respect, the UK has led the way with the *Legal Services Act 2007*, following a review of the regulatory framework for legal services by Sir David Clementi in 2004. This Act, *inter alia*, permits the setting up of new types of legal businesses called “alternative business structures” (ABSs) so that non-lawyers can own and run legal businesses; permits external

⁸ Richard Susskind, *Tomorrow's Lawyers: An Introduction to Your Future* (Oxford University Press, 2013).

investment, such as private equity or venture capital, to be injected into legal businesses by outside investors; and allows non-lawyers to become partners or principals in law firms.⁹ Since the enactment of the *Legal Services Act*, new modalities for the delivery of legal services have emerged in the UK, and also in some states of Australia, where similar reforms have been adopted. Several law firms have issued public offerings to finance a large network of branch offices, while a major UK building society has announced plans to provide legal services from its 330 UK bank branches, and a private equity-backed group of law firms – in effect a franchise network – has obtained concessions in many of the stores of a major retail chain. In the case of IT, many new and emerging applications of IT and AI do not simply computerize and streamline pre-existing and inefficient manual processes. Rather than automate, many systems innovate, which means they allow tasks to be performed that were previously not possible or even imaginable, including the use of big data collections of court or regulatory decisions or rulings and their application to the facts of particular clients' circumstances.

While Susskind may be a “techno-optimist,” it is difficult to reject his central claim that lawyers are in the information business, given that their job is to assemble, disseminate, and apply information. In that regard, IT and AI innovations are as likely to disrupt traditional business models in law as they already have in the print and broadcast media, online shopping, taxi and ride-sharing services, hospitality services, and other economic sectors. It is equally difficult to reject the proposition that disruptive innovations often originate with upstarts outside an established industry, rather than with incumbents, who are more focused on sustaining innovations to existing business models.¹⁰

The legal profession is often decried as monopolizing the provision of legal services, but this is equally true of many other professions and skilled trades that impose entry requirements. Yet this does not preclude

9 For a more detailed exploration of alternative business structures for the practice of law, drawing on economic theories of the firm and optimal capital structure, see Edward Jacobucci and Michael Trebilcock, “An Economic Analysis of Alternative Business Structures for the Practice of Law” (2013) 92 *Canadian Bar Review* 57; for proposals for multiple licensing tracks for legal service providers with limited but specialized training and limited sphere of practice, see Alice Woolley and Trevor Farrow, “Addressing Access to Justice Through New Legal Service Providers: Opportunities and Challenges” (2016) 13 *Texas A & M L Rev* 549.

10 See Clayton Christensen, *The Innovators Dilemma: When New Technologies Cause Great Firms to Fail* (Harvard Business School Press, 1997); Roy Worthy Campbell, “Rethinking Regulation and Innovation in the US Legal Services Market” (2012) 9 *NYU Journal of Law and Business* 1.

competition within their licensed domain. In Ontario, there are 55,000 licensed lawyers and most legal services markets in Ontario, by specialty and region, are structurally competitive.¹¹ Thus, the term “monopoly” is, economically speaking, misleading. But just as bricks-and-mortar retail stores vigorously competed against one another prior to online shopping, the advent of this new business model with a lower cost structure has profoundly affected the competitive dynamics in many retail markets.

Susskind argues that the more-for-less challenge, liberalization, and IT will drive immense and irreversible change in the way lawyers work. He describes this as a perfect storm in the making.¹² Frank Stephen similarly argues that more liberal rules on alternative business structures and a more expansive role for IT and AI together have the potential to generate a technological revolution in lawyering by facilitating access to more sources of capital and managerial, marketing, and IT expertise; this will allow greater economies of scale, scope, and specialization and more efficiently transform a wider range of inputs into more highly valued outputs.¹³ The US has seen the emergence of legal service providers such as Legal Zoom and Rocket Law, which combine online interactive legal advice and assistance, supported by a referral network of fixed-fee lawyers (often resisted by state bar associations). In short, the future of the legal profession is likely to become much more entrepreneurial and more IT and AI intensive. While this may threaten existing business models in the profession, it does not necessarily imply less employment for lawyers. Lawyers will practise in increasingly varied business structures with different roles and responsibilities that better respond to the demand for legal services by citizens who presently lack effective access to them. There may not be a fortune to be made at the bottom of the pyramid, but professional incomes will almost certainly be adequate.¹⁴

11 See Edward Iacobucci and Michael Trebilcock, “Self-Regulation and Competition in Ontario’s Legal Services Sector: An Evaluation of the Competition Bureau’s Report on Competition and Self-Regulation in Canadian Professions” (Report to the Federation of Law Societies of Canada, November 2008).

12 For similar prognoses, see Frank Stephen, *Lawyers, Markets, and Regulation* (Edward Elgar, 2013); Noel Semple, *Legal Services Regulation at the Crossroads: Justitia’s Legions* (Edward Elgar, 2015); Deborah L Rhode, *The Trouble with Lawyers* (Oxford University Press, 2015); Benjamin H. Barton, *Glass Half Full: The Decline and Rebirth of the Legal Profession* (Oxford University Press, 2015); Benjamin H. Barton and Stephanos Bibas, *Rebooting Justice: More Technology, Fewer Lawyers, and the Future of Law* (Encounter Books, 2017).

13 Frank Stephen, *Lawyers, Markets, and Regulation* (Edward Elgar, 2013), ch. 8.

14 See C.K. Prahabad, *The Fortune at the Bottom of the Pyramid: Eradicating Poverty through Profits* (Prentice Hall, 2010).

Susskind also argues that the courts will not be immune from these trends and predicts a dramatic expansion of online dispute resolution and virtual trials,¹⁵ as well as a dramatic expansion of non-court-based online dispute resolution, citing by way of example the fact that eBay has resolved some 60 million complaints through informal online dispute resolution (e-adjudication). Private arbitration – generally of commercial, family, consumer, and employment disputes – is already expanding dramatically (although often raising legitimate concerns in the latter two cases of coerced consent through fine-print, take-it-or-leave-it clauses in standard form contracts).¹⁶ Courts are thus not the only game in town for resolving civil disputes (and progressively less so). However, if they price themselves out of the market for resolving civil disputes, this will come at a significant social cost in terms of forgoing the incremental development of the law through the accumulation of a body of authoritative judicial precedents and the public articulation of important social norms.¹⁷ In the near future, legal education may in turn be exposed to various disruptive technologies that engage a much more diverse range of educational providers (including online providers offering low-cost or specialized course modules).¹⁸

In terms of enhancing access to justice and realizing more fully our ideal of equality before the law, we really only have two basic choices: either devote substantially more public resources to the administration of justice within the existing modalities and institutions, or devise much more innovative, lower-cost, lower-priced modalities that ensure that many more legal services are within the reach of our fellow citizens.

6.4 Post-Entry Regulation of Competence

This second option necessarily implies a much more flexible set of entry regulations than have typically obtained in the legal profession in most Western jurisdictions. Given the mixed balance sheet of exclusive licensure regimes described in [chapter 1](#), the legal profession in many jurisdictions has relied excessively on highly restrictive entry controls to

15 See Richard Susskind, *Online Courts and the Future of Justice* (2020).

16 See Margaret Jane Radin, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* (Princeton University Press, 2012).

17 See Trevor Farrow, *Civil Justice, Privatization, and Democracy* (University of Toronto Press, 2014), ch. 6.

18 See, e.g., Michele Pistone and Michael Horn, “Disrupting Law School: How Disruptive Innovation Will Revolutionize the Legal World” (Clayton Christenson Institute for Disruptive Innovation, 2016).

ensure competent provision of legal services to clients afflicted with serious information asymmetries in choosing legal service providers and in evaluating the cost and quality of services provided thereafter, and conversely placed too little emphasis on post-entry regulation of competence.¹⁹ In short, regulatory resources should be shifted from the front end to the back end of the regulatory continuum.

6.4.1 *Mandatory Continuing Professional Development*

In recent years, the legal profession (along with many other professions) in many jurisdictions has moved to impose generalized mandatory continuing professional development requirements on all licensed lawyers, irrespective of their specialties, the sophistication of their client base, and the law firm structure in which they practise. Such requirements are, in effect, another form of overinclusive input regulation, layered on top of initial entry requirements, and do not key on what is ultimately of importance to clients: the quality of legal outputs or outcomes, not inputs. This is not to say that re-examination or mandatory continuing education does not have a place in the regulation of professional competence. As will be argued below, that place is among a range of sanctions available to the disciplinary agency of the profession in responding to particular instances of incompetence.

The efficacy of continuing professional education has been studied more extensively in the medical profession than in the legal profession. Evidence of its utility in the medical profession in promoting competence is decidedly mixed. Studies have concluded that formal continuing medical education (CME) courses do produce knowledge transfer, but without reinforcement, feedback, or other behaviour modification techniques,²⁰ CME courses often do not produce positive outcomes in terms of improved physician performance or competence. In particular, studies suggest that mandatory programs that allow physicians to choose their own fields of study are onerous and wasteful.²¹ However,

19 See Michael Trebilcock, "Regulating the Market for Legal Services" (2008) 45 *Alta L. Rev.* 215.

20 Robert H. Brook, Rudolf L. Brutoco, and Kathleen N. Williams, "The Relationship between Medical Malpractice and Quality of Care" (1975) 6 *Duke L.J.* 1197 at 1226; Gary L. Gaumer, "Regulating Health Professionals: A Review of the Empirical Literature" (1984) 62 *Millbank Memorial Fund Quarterly* 380 at 399–400; D.A. Davis et al., "Attempting to Ensure Physician Competence" (1990) 263 *Journal of the American Medical Association* 2041 at 2041.

21 John C. Sibley et al., "A Randomized Trial of Continuing Medical Education" (1982) 306 *New England Journal of Medicine* 511.

there is some evidence that CME succeeds where education is targeted to specifically identified problems. For example, one study demonstrated significant improvement in physician performance where persistent use of X-ray pelvimetry – a procedure that may cause harm to a fetus and for which there is little evidence of efficacy – was specifically targeted to reduce use. After an education program that discussed acceptable indications for the use of X-ray pelvimetry, physicians with delivery privileges at the hospitals that participated in the program performed pelvimetry less than one-third as often as the physicians at hospitals that had not participated in the program.²² A survey of 50 CME trials concluded that programs that use practice-enabling or reinforcing strategies do consistently improve physician performance.²³ These findings support the conclusion that effective practice modification requires that educational programs focus on specific problem areas and that the only demonstrably reliable way to remedy deficiencies is through output monitoring followed up by corresponding deficiency-oriented training.

6.4.2 *Specialty Certification*

In the legal profession (as in other professions), a very wide range of highly specialized professional functions are performed. Thus, a single-track or generic licensing regime is likely to produce a set of skills unevenly matched to the specialized functions many professionals will be called upon to perform over the course of their careers. It follows that licensing requirements are weak guarantors of specialized professional competence. This is why a case is often made for some form of specialty certification (i.e., for more input regulation) as a means to reduce the information asymmetries between providers and purchasers of professional services. At least in regard to law, one can be sceptical as to the wisdom of devoting scarce regulatory resources (both public and private) to ambitious specialty certification programs, for the following reasons. First, there will be pressure for the proliferation of specialty classes as members of the profession strive to differentiate their services from others in an attempt to reap whatever competitive advantage is associated with real or imagined service differentiation. Second, there will be disputes within the profession over the appropriate specifications and

22 Mark R. Chassin and Sally M. McCue, "A Randomized Trial of Medical Quality Assurance" (1986) 256 *Journal of the American Medical Association* 1111.

23 D.A. Davis et al., "Evidence for the Effectiveness of CME: A Review of 50 Randomized Controlled Trials" (1992) 268 *Journal of the American Medical Association* 1111.

boundaries of each specialty, over the appropriate criteria by which one is judged to be a specialist, and over the even-handedness and competence with which the plans are being administered, particularly if their administration resides primarily in the hands of those already certified as specialists. Third, a substantial amount of the scarce regulatory resources of the profession is likely to be invested in supporting the plans under the weight of these pressures. Fourth, plans that start off only as specialty certification programs are likely over time to become, at least in part, *de facto* specialty licensing programs, as those who succeed in having themselves certified as specialists then succeed in establishing exclusive claims to specialized competence (e.g., by persuading large institutional employers or various demand-side regulatory agencies, legal aid administrators, and the like, to stipulate specialty certification as a necessary qualification for undertaking particular professional functions or categories of work). These developments are likely to lead to a very extreme form of segmentation of professional service markets, with a concomitant loss of mobility of human resources within those markets, as well as to a major new demand on the scarce regulatory resources of the profession's governing bodies. Instead of establishing a formal specialty certification program, it would be preferable to permit law firms and individual lawyers to advertise freely relevant and accurate professional information about themselves, including, for example, the areas of practice on which they principally concentrate (without implying specialty recognition or accreditation), membership in the American College of Trial Lawyers, completion of full-time or part-time specialized LL.M. programs, and so on.

6.4.3 *Civil Liability*

In contrast to mandatory general continuing education programs or specialty certification regimes, the civil liability regime has some strengths as a response to quality control problems in that it focuses on outcomes. If a service fails to achieve the purpose for which it was reasonably intended and this is a result of negligence in its provision, liability arises. Liability serves both compensatory and deterrent functions. However, in many contexts the civil liability system will not well serve its compensatory or deterrent objectives, particularly in the segments of the legal services market where information asymmetries are likely to be most acute. Because the system is victim-initiated, it makes tenuous assumptions about a victim's ability to obtain and analyse the kinds of information she needs in order to know that victimization has taken place. The client will be able to resolve this information problem only by (1) mustering sufficient

personal expertise to make a judgment on the matter (in which case she should consider switching sides in the marketplace), or (2) purchasing the advice of a second expert to pass judgment on the quality of performance of the first expert with a view to persuading a third expert (a judge) that the second expert is right. For these reasons, I assign very limited weight to civil liability as a form of output regulation of post-entry competence. This in turn suggests a central role for the post-entry disciplinary processes of the legal profession.

6.4.4 Professional Disciplinary Processes

The orientation of professional disciplinary processes generally can be characterized as falling predominantly into one of three categories: “misconduct,” “passive competence,” or “active competence.” It is a fair generalization that disciplinary processes in the legal profession (and indeed in many other professions) overwhelmingly fall into the misconduct category, only marginally engage passive competence, and have almost entirely rejected active competence. Statistics for reported discipline decisions in Alberta, British Columbia, and Ontario reveal that of 264 reported cases in 2015, only about 3 per cent dealt with stand-alone allegations of incompetence.²⁴ This passivity is not defensible, particularly in segments of the legal services market that are most severely afflicted by information asymmetries.

A more active, post-entry competence-oriented strategy should embrace the following elements. First, at a minimum, law societies should expand the range of sources they draw upon for problem identification to include: written or oral complaints about competence received by law societies; claims or complaints received by professional errors and omissions insurance plans; complaints received from courts, taxing officers, or administrative agencies; and, ideally, reporting obligations placed upon lawyers with respect to serious lapses of competence they have encountered with other lawyers.

It is particularly important that more effort be made to harness institutional intelligence and expertise about both individual and systemic practice deficiencies in legal practice (in much the same way that institutional quality assurance programs have developed in the hospital sector – tissue audits, incident reports, check list protocols – in the case of the medical profession). Such an approach would still primarily engage the passive competence orientation in that it would be complaint-driven,

24 See Amy Salyzyn, “From Colleague to Cop to Coach: Contemporary Regulation of Lawyer Competence” (2017) 95 Canadian Bar Review 489 at 504–7.

albeit by a wider array complaints. However, upon receipt of such complaints – especially anything that resembles a pattern of complaints with respect to a particular practitioner – law societies should respond in much the same way as they do now to the possibility of a pattern of financial irregularities (the “tip of the iceberg” phenomenon) and initiate some form of peer review or practice audit not only of the specific complaints received, but also of the practice of the lawyer in question more generally (as important 1999 amendments to the Ontario *Law Society Act*²⁵ now contemplate). Courts, administrative agencies, and professional errors and omissions insurance plans, beyond reporting patterns of complaints against particular practitioners, should also be encouraged or induced to identify more systemic patterns of professional deficiencies in particular areas of practice.

In the event this information suggests that combinations of particular kinds of clients, particular kinds of legal practitioners, and particular kinds of legal services are high-risk in terms of competence, the law societies should undertake random practice audits of law firms or lawyers that fall within this high-risk profile. Consequential legislative modification to solicitor–client confidentiality rules should permit peer reviews of this kind (as of course is already possible with respect to financial audits). This strategy would begin to engage seriously the active competence perspective referred to earlier. In addition to random practice audits of professionals practising in high-risk practice areas, it may also be desirable to have the legal ability to insist that practitioners in these high-risk areas participate in mandatory continuing legal education programs that are addressed specifically to identified systemic practice deficiencies in these areas. The inducement to participate may take the form of substantial insurance risk premiums for practitioners in these areas who do not choose to participate in such programs.

As 1999 amendments to the Ontario *Law Society Act* now commendably recognize, in order to effectuate this more proactive competence orientation of the disciplinary processes of law societies, it is important to broaden the array of sanctions available to law societies. Given the expanded focus on competence advocated in this case study, the essentially punitive nature of traditional sanctions (i.e., disbarment or suspension) is far too narrow, blunt, cumbersome, and penal to respond well to many competence problems for which a more remedial or corrective approach

25 R.S.O. 1990, c. L.8, as am. by *Law Society Amendment Act*, S.O. 1998, c.21; see Gavin MacKenzie, “Regulating Lawyer Competence and Quality of Service” (2008) 45:5 *Alta L Rev* 143.

is appropriate. Remedial orders for practitioners who are found to be deficient in some set of practice skills might take the form of any of the following:

- 1 mandatory legal education requirements that focus specifically on these areas of practice deficiency;
- 2 mandatory requalification;
- 3 confining a lawyer's practice to established areas of expertise, thus restricting her ability to practise outside these areas of expertise if competence problems have been revealed in other areas;
- 4 requiring a practitioner to practise in an employment or partnership relationship with another lawyer so that joint and several liability creates incentives for the latter to monitor the quality of service of the former; or
- 5 mandatory treatment programs for lawyers who have substance abuse or mental health problems.

In many respects, such a regime for regulating post-entry conduct and competence would also seem appropriate for most other professions.

6.5 Self-Regulation of the Legal Profession

In his insightful book *Legal Services Regulation at the Crossroads: Justitia's Legions*,²⁶ Professor Noel Semple compares two models of legal services regulation: the professionalist-independent model of legal services regulation, which has largely prevailed in North America historically and continues to prevail today; and the competitive-consumerist paradigm, which has come to predominate in much of Western Europe and Australasia. Semple argues that regulators must make four key policy choices with respect to legal services regulation: (1) occupational structure: whether to institute occupational unity (a single occupation of lawyer) as opposed to occupational multiplicity; (2) governance: how much scope to allow for self-regulation as opposed to state or co-regulation; (3) insulation: whether to pursue regulatory insulation of legal service providers from business relationships with non-lawyers (through prohibition of non-lawyer investment in firms providing legal services), as opposed to regulatory openness to such relationships; and (4) the unit of regulatory focus: whether individual legal service providers should be the exclusive focus of regulatory efforts, as opposed to also regulating the firms and enterprises

26 Noel Semple, *Legal Services Regulation at the Crossroads: Justitia's Legions* (Edward Elgar, 2015).

in which they work. Semple concludes that the competitive-consumerist paradigm that has emerged in Western Europe and Australasia has been more open to innovation with respect to all four of these issues than the traditional professionalist-independent model of legal services regulation that has predominated in North America. However, he then points out that the latter paradigm has many virtues in terms of preserving the independence of lawyers from the state, which is often adverse in interest to many citizens whom lawyers represent, and that the legal profession as a self-regulatory institution is able to bring expertise and appreciation of the day-to-day realities of legal practice to the challenges of formulating, monitoring, and enforcing appropriate regulations.

Yet many critics of the traditional professionalist-independent model of self-regulation of the legal profession argue that it exhibits inherent professional protectionist biases that render it inimical to innovation in the provision of legal services and in disciplining incompetent practitioners; that the unity of the profession is something of a mirage, given its increasingly diverse demographic make-up; that the profession is increasingly fragmenting into different areas of specialization; that law firms are becoming increasingly diverse in terms of size and orientation, from solo and small practices to major national and international firms; and that interactions between lawyers and members of cognate professions and other business actors are both proliferating and diversifying.²⁷

In his recent book, referenced earlier, Susskind argues that in law there are two distinct camps (and a few in between): the benevolent custodians and the jealous guards. The benevolent custodians regard it as their duty to nurture the law and make it affordable and accessible to members of society. In contrast, the jealous guards wish to ring-fence areas of legal practice and make it their exclusive preserve, whether or not the activity genuinely requires the experience of lawyers and with little regard to the impact of this quasi-protectionism on the affordability and viability of legal service. As he puts it, “turkeys rarely vote for an early Christmas.” He implores tomorrow’s lawyers to take up the mantle of the benevolent custodian.

I take a position somewhere between the two extremes of unqualified self-regulation and extensive direct state regulation of the legal profession, and have argued for the preservation of a qualified form of

27 Frank Stephen, *Lawyers, Markets, and Regulation* (Edward Elgar, 2013); Gillian Hadfield, “Legal Barriers to Innovation: The Growing Economic Costs of Professional Control Over Corporate Legal Markets” (2008) 60 *Stan L Rev* 102; Harry Arthurs, “Will the Law Society of Alberta Celebrate Its Bicentenary?” (2008) 45 *Alta L Rev* 15; Richard Devlin and Porter Heffernan, “The End(s) of Self-Regulation?” (2008) 45 *Alta L Rev* 169.

self-regulation of the legal profession. I do so for most of the same reasons that Professor Semple does, but mainly because I consider it important to preserve the independence of the legal profession from direct government control.²⁸ My views here are influenced by my observation of the severely deleterious impacts of subjugation of the judiciary and the legal profession by often autocratic and repressive governments in many developing (and some developed) countries.²⁹ However, self-regulation cannot be unqualified and unaccountable. Hence, I argue for a strengthening of both the number and the quality of lay representatives on the governing bodies of the legal profession. This must be done in such a way as to ensure that lay members are genuinely representative of a range of demand-side interests, paralegals, and cognate professions. Furthermore, the rules governing entry and post-entry conduct promulgated by the governing bodies of legal professions should take the form of regulations subject to government approval, and it must be possible for demand-side interests to launch challenges that can precipitate review by government. Also, consideration should be given to appointing non-lawyer ombudspersons to oversee and publicly report on the efficacy of the disciplinary processes of the legal profession; and governing bodies should be required to publish detailed annual reports covering admission and disciplinary data and regulatory activities.

It is an open question whether, in the absence of a credible threat of direct regulation by government, the legal profession in Canada (and elsewhere) is open to the challenges posed by regulatory rejuvenation both in terms of its governance structures and in terms of the substantive policies it chooses to adopt in the future. In particular, is the profession open to less restrictive entry regulations that facilitate more innovative and lower-cost delivery mechanisms? to more proactive post-entry competence policies? and to more tempered, publicly accountable forms of self-regulation? I remain cautiously optimistic, although the stakes are so high in terms of enhancing access to justice that failure to rise to these challenges will progressively undermine the credibility of the organized legal profession and inevitably, at some point in the future (as evident from recent experience in Western Europe and Australia), invite direct government intervention, for the simple reason that a broad range of the political constituents of government representatives will demand it.

28 See Trebilcock, "Regulating the Market for Legal Services," *supra* note 355.

29 See Michael J. Trebilcock & Ronald J. Daniels, *Rule of Law Reform and Development: Charting the Fragile Path of Progress* (Edward Elgar, 2008).

7 Conclusion: Reducing the Paradoxes of Professional Regulation

As I argued in [chapter 1](#), there is mounting evidence of the paradoxes of professional regulation: over-regulation of some occupations and professions, and under-regulation of others, or over- or under-regulation in the same profession. These paradoxes pose both normative and positive challenges. From a normative perspective, the challenge is to articulate clearly and precisely the justifications for regulating some occupational or professional markets (*why* regulate?), and, as or more importantly, the most appropriate form of regulation (*how* to regulate?), as well as the choice and design of the regulatory agency (*who* should regulate?). From a positive perspective, the challenge is to explain and to discipline political forces that have yielded highly discordant modes of regulation in the five case studies presented in this book (and in many other occupations and professions). I begin with lessons that might be gleaned from these case studies and indeed from other examples of professional regulation as to the rationales for regulation.

7.1 Problem Identification

As Malcolm Sparrow argues cogently in *The Character of Harms: Operational Challenges in Control*,¹ in achieving effective regulation of a vast array of actual or potential harms that many citizens of given societies may be exposed to, it is crucial to define the dimensions of the harms in an operationally useful fashion. For example, although – as pointed out in [chapter 1](#) – at a generic level the most cogent rationales for regulation of many professional service markets relate to information asymmetries,

¹ Malcolm Sparrow, *The Character of Harms: Operational Challenges in Control* (Cambridge University Press, 2008).

and to a lesser extent third-party externalities, these concepts are so broad and underspecified that they provide very little operational guidance. A focus on isolated examples of information failures or externalities scarcely provides a cogent basis for across-the-board regulation of entire occupational or professional service sectors. Taking, by way of example, information failures in professional markets, it is axiomatically true that information asymmetries pervade most professional–client relationships; if this weren't so, clients would provide their own professional services (or switch sides in the marketplace). Most market exchanges, especially consumer market exchanges, rarely attain informational completeness or perfection, but we generally accept that they are tolerably functional without extensive regulation. Even buying an apple from the local food store is not free of uncertainty as to the interior state of the apple. Yet many professional service markets subject to across-the-board regulation have adopted broadly exclusive licensure regimes that are insensitive to the severity of the potential information imperfections between supplier and consumer and the potential severity of the risks to consumers of information failures in these markets. For example, while the practice of medicine is typically subject to an exclusive licensure regime in most jurisdictions, so as to restrict the practice of medicine to licensed physicians, it is obvious that many other practitioners provide medical care, including nurses, nurse practitioners, midwives, and, most importantly for our purposes, complementary and alternative health care (CAM) providers (see the first case study in this book). Similarly, in the case of the legal profession, which, like medicine, is typically subject to an exclusive licensure regime in most jurisdictions that restricts the practice of law to licensed lawyers, it is obvious that many non-lawyers provide legal advice in a wide range of contexts – for example, bank personnel advise on mortgage, credit, and investment options; accountants advise on tax issues; insurance brokers or agents advise on alternative insurance options; real estate agents advise on the terms of real estate offers; pension administrators advise on various pension options; employers advise employees on employment options; government officials in various capacities advise citizens of their rights and obligations under a wide array of laws and regulations; volunteers in community service organizations advise members on their rights and obligations in various contexts, and so on. Thus, the nominal prohibition against the unauthorized practice of medicine or law is widely honoured more in the breach than in the observance, and indeed, it could not realistically be otherwise, given the broad and undefined scope of practice reserved to licensed practitioners, often implying a case for much more finely targeted regulatory responses.

Drawing on the five case studies presented in this book, and examples from other professional contexts, it is useful to decompose generic rationales for the regulation of professional service markets – in particular, information failures and externalities – into more discrete manifestations.

7.1.1 *Criminal Misconduct*

As exemplified particularly in the case study of the regulation of immigration consultants, some forms of misconduct by professional service providers constitute criminal offences that justify criminal law enforcement by general or specialized enforcement authorities of government, in addition to concurrent or consequential disciplinary actions by professional regulatory bodies. Fraud, forgery, document falsification, embezzlement, and the sexual abuse of clients clearly fall into this category. In some cases these forms of misconduct involve abuses of clients; in other cases clients are complicit in these forms of criminal misconduct (e.g., falsification of documents) so as to warrant the criminal prosecution of both provider and client. Other cases of criminal misconduct by professional service providers raise more subtle questions, especially when the criminal misconduct is not related directly to the provider's professional activities – for example, convictions for drug possession, domestic violence, or drunk driving – although in some cases inferences may reasonably be drawn about the professional integrity of the individual concerned.

7.1.2 *Externalities*

In many professional contexts, the provision of inappropriate or incompetent professional services may prejudice not only direct consumers of the services but also various third parties. For example, as noted in the case study of complementary and alternative medicines, an inappropriate choice of treatment by caregivers may endanger the life or health of those in their care. Similarly, counselling consumers against vaccinating children for infectious diseases (or now fellow citizens for the COVID-19 virus) may put at serious risk a wide range of third parties. The regulatory principles proposed in the CAM and mental health care studies attempt to take seriously the task of calibrating risks not only to direct consumers of CAM products and services but also to third parties. In other contexts, even where the suppliers and consumers of professional services are both well informed, it may well be the case that they have weak incentives to consider adverse impacts on third parties – for example, they might skimp on safety standards in designing a dam or a bridge,

thus putting at serious risk various involuntary or ill-informed third parties, no matter how well-informed the immediate parties to the professional service transaction may be. Other examples of potential shortfalls in the provision of professional services straddle the boundary between externalities and information failures. For example, auditors and credit rating agencies are typically hired by the managers of the corporations they are auditing or rating, although the ostensible beneficiaries of these services are investors or other third parties with financial interests in the corporation that is being audited or rated. Conflicts of interest between auditors or credit rating agencies and the corporate managers that retain them, on the one hand, and third-party investors, on the other, have provoked extensive debates over the years, most recently and notably in the context of the 2008 financial crisis, during which credit rating agencies were widely criticized for excessive deference to the managers of the corporations they were rating. In our case studies, conflict of interest manifests itself most strongly in the case of financial planners/advisers, in that employment, referral, or commission arrangements may bias the advice financial planners/advisers provide to clients. With regard to legal services, the legal profession in most jurisdictions has, over time, generated a complex set of conflict-of-interest rules, focused largely on cases where a particular law firm may represent clients with actual or potential interests adverse to one another. Other cases of inappropriate provision of legal services may entail pure externalities – for example, an inappropriately handled custody case may impair the long-term well-being of the children involved, or a poorly argued appellate court case may yield a socially undesirable long-term precedent. However, information failures or imperfections between legal service provider and client provide the principal rationale for regulating the market for legal services. I now turn more generally to information failures or imperfections as a rationale for regulating professional service markets.

7.1.3 *Information Failures or Imperfections in Professional Service Markets*

As noted earlier, most markets and market exchanges do not meet the standard of complete informational perfection. However, as Milton Friedman pointed out in 1962 in his critique of occupational licensure,² markets often generate their own responses to informational imperfections, in the form of satisfaction or money-back guarantees, consumer warranties,

2 Milton Friedman, *Capitalism and Freedom* (University of Chicago Press, 1962), ch. 9.

and brand names with large investments in reputational capital. In this new era of online shopping, combined often with consumer ratings and online dispute resolution processes, it is remarkable how high a percentage of transactions with sellers, buyers, and products unseen appear to be successfully consummated. Nevertheless, as our five case studies have shown, information failures or asymmetries can sometimes be severe and can entail potentially severe consequences for informationally afflicted consumers – in the case of complementary and alternative medicines and mental health care providers, severe adverse health consequences from the provision of inappropriate or incompetent professional services; in the case of immigration consultants, the risk of deportation as a result of inappropriate advice or representation; in the case of financial planners/advisers, loss of a life's savings; in the case of legal services, litigation or transactions that fail to protect reasonable client expectations.

In the first three case studies, heavy reliance on *ex post* remedies including civil liability will often provide inadequate assurance that shortcomings in the provision of professional services will be rectified. In the case of financial planners/advisers, while money is fungible, a delinquent financial adviser may lack assets or insurance, may face multiple claims beyond whatever assets or insurance he or she possesses, or may invoke bankruptcy. In the case of legal services, losses from incompetent services can sometimes be readily measured and compensated in money; but in other cases, such as custody disputes, wrongful conviction, deportation, and human rights abuses, this may not be the case. All five case studies stand in contrast to a number of the cases cited in [chapter 1](#) involving low to moderate levels of skill in the provision of occupational or professional services that entail relatively low risk for consumers– for example, hair braiders, cosmeticians, manicurists, and florists. Thus, the case for some form of regulation is much more compelling in our five case studies than in these instances. The critical question then becomes: what form should regulation take?

7.2 The Choice of Regulatory Instrument

Here I am influenced in part by an analogous question that has arisen in international trade law: under the GATT/WTO multilateral trading system, a member country's health and safety laws or regulations may be challenged as an undue restriction on trade, but such laws or regulations can be justified (under Article XX of GATT) if they are necessary for the protection of human health or safety; this in turn has been interpreted in subsequent case law as entailing a least trade-restrictive means test – that is, is the measure being challenged the least trade-restrictive means

available for achieving the regulating country's health and safety objectives?³ I find this an attractive starting point (substituting competition-restrictive for trade-restrictive) in that it injects an element of caution or constraint with regard to adopting excessive, unthinking, or politically driven overreactions to endemic problems of information imperfections in most markets, including professional service markets. Hence, in our five case studies, policy-makers have often been inclined to adopt the traditional hierarchy of regulatory interventions in professional service markets – that is, first exclusive licensure; then government-accredited certification; then mandatory registration. My own preference, though, is to proceed in the inverse order and ask whether mandatory registration of all professional service providers in a given market, along with prescribed information as to educational and training credentials, employment history, disciplinary, and civil liability complaints and disposition, and so on, along with the potential for consumer ratings of individual suppliers, might adequately address information imperfections without impeding legitimate forms of competition and innovation in these markets. If concerns remain that in high-skilled/high-risk professional service markets such a response may not do enough to help consumers make discerning choices of providers and monitor and evaluate their performance, then we should consider moving up to a government-accredited certification regime (as I propose in the case of complementary and alternative medicine providers, mental health care providers, and financial advisers). In setting minimum standards for certification, governments might usefully rely on the advice of a buffer body comprised of both supply-side and organized demand-side interests in evaluating the entry and post-entry regulations of accredited self-governing bodies in the sector in question, before submitting the regulations pertaining thereto for approval (but not initiation) by the accrediting government. Notably, I do not favour an exclusive licensure regime in the three sectors just mentioned. The case of immigration consultants presents more problematic features, given the endemic misconduct in this sector, the highly vulnerable clients, and the potentially severe consequences of fraudulent or incompetent advice. I thus propose a licensure regime in this case. The argument sometimes made that immigration services should be the sole preserve of lawyers largely ignores the access-to-justice implications of such a proposal, in that only immigrants (or their family or friends) with means would be in a position to retain an immigration lawyer. Moreover, legal aid programs in many jurisdictions are woefully

3 See Michael Trebilcock & Joel Trachtman, *Advanced Introduction to International Trade Law* (Edward Elgar, 2019), ch. 13.

lacking in the resources required to finance representation by immigration lawyers.

Once the choice is made between registration, certification, and licensure, a further key design choice must be addressed: who should administer the regime? Most professional regulatory regimes operate under a delegated form of self-government. But if consumer protection is the principal rationale for professional regulation, it is not obvious why the regulatees should also be constituted the regulators – akin, some would argue, to putting the foxes in charge of the chicken coop, Dracula in charge of the blood bank, or predators in charge of their prey. Clearly, this creates fundamental tensions between consumer and producer protection. After all, we do not delegate to the concentrated commercial banking sector the right to self-regulate, for we have legitimate concerns about cartelization and lax prudential standards; nor do we delegate to used car dealers or door-to-door salespersons the right to self-regulate, for we have legitimate concerns that these industries lack a settled core of norms of appropriate ethical conduct. Nor do we allow associations of restaurants or bars to formulate and administer hygiene or liquor consumption rules; nor do we allow associations of airlines or automobile or other product manufacturers to set and enforce safety standards, out of concern that industry self-interest may not be fully congruent with the public interest (and similarly with environmental standards).

In some contexts, however, self-regulation may conserve government regulatory resources, enlist relevant professional expertise in setting appropriate entry and post-entry conditions of practice, and inculcate and collectivize norms of appropriate professional conduct in myriad individualized interactions with clients, doing so in ways that a formal legal orders regime cannot. That said, the risks of provider protectionism dominating consumer protection are real and call for tempered forms of self-regulation to ensure adequate accountability to the public – for example, significant representation of organized demand-side interests on professional governing bodies; the ability of such interests to challenge professional entry and post-entry regulations before governments; regular and detailed public reporting on key activities of such bodies; and possibly an independent ombudsperson to ensure that consumer complaints about lack of professional competence or integrity are addressed seriously by a profession's disciplinary process and utilized as an element in a broadly proactive competence strategy of the kind that I have sketched in the case study on the regulation of the legal profession. I am circumspect about entrusting to self-governing bodies the function of prosecuting non-members for unauthorized practice, especially given the broad and ill-defined scope of practice in many licensure regimes:

it may be appropriate for such bodies to investigate such violations, but prosecution may be more appropriately vested in public criminal law enforcement agencies with a more dispassionate view of the merits of prosecution. In the case of immigration consultants, I propose direct regulation by government or a specialized agency of government, vested with full enforcement powers, including the power to investigate and prosecute unauthorized practitioners.

7.3 The Political Economy of Professional Regulation

However cogent the normative case for regulation, we must confront the undeniable fact that at the end of the day in liberal democracies, politics will determine regulatory policy. As the brief survey provided in [chapter 1](#) suggests, there are good reasons not to assume that political processes will yield policy outcomes that conform closely to normatively defensible precepts of occupational and professional regulation. At the intersection of normative and political theories of regulation, economics as a profession has often not been especially helpful. A long tradition in economics – often referred to as welfare economics – typically subjects prevailing or proposed policies to a welfare analysis and often pronounces them seriously inefficient. This tradition seems to assume that once these findings enter the public domain, well-intentioned but hitherto ill-informed but now enlightened politicians will immediately endorse and implement the findings of these studies or will face an informed and aroused citizenry – an assumption that in a vast range of cases has proven a forlorn hope. Another, more recent school of economics – public choice theory – takes the political process more seriously and in the light of the self-interested incentives of major actors – politicians, bureaucrats, special interest groups – views the political process as a marketplace where policies get traded for political support in the form of votes, campaign contributions, or less overt forms of support. In this more realistic – or cynical – view of the political process, in a world not populated by angels the political outcomes we observe are typically the best that can be achieved in the political marketplace, notwithstanding often serious divergences from normatively defensible policies. Moreover, it is unclear on this view what factors lead to policy change if the iron triangle of politicians, bureaucrats, and special interest groups hold a vice-like grip on the policy status quo – yet we observe policy changes all around us. The question I address in this closing section of the book is whether we can close or reduce the gap between these two perspectives on the policy-making process.

In highly competitive, well-functioning markets with many suppliers and demanders, modest information imperfections, and

negligible externalities, one would assume that most suppliers will earn only a competitive return on their investments and efforts, and no supra-competitive rents. To realize supra-competitive rents, incumbent suppliers will strive to cartelize these markets. But private collusive arrangements are unlikely to be sustainable, given the large number of suppliers (and the risk of prosecution under competition laws), so those suppliers will have a strong incentive to enlist the state's help in creating a form of exclusive licensure that raises barriers to entry for future suppliers, casts the scope of licensed domain of practice broadly, and ideally is administered by the incumbents themselves through a self-governing professional body. This, in many respects, is the historical paradigm of professional regulation dating back to the medieval guilds, despite the lack of any compelling normative justification either for regulation at all or for the more extreme forms of regulation than have often historically obtained or for delegated self-regulation of the activity in question.

In some professional service markets, information imperfections may be severe or externalities pervasive or significant. Here, suppliers will entertain mixed motives when deciding whether to enlist the state in regulating such markets. As in the lemons market famously addressed by Nobel Laureate George Akerlof,⁴ "lemon" suppliers who are able to exploit these information asymmetries or externalities will be opposed to regulation, whereas superior-quality service providers who are unable to differentiate the quality of their services from those provided by inferior service providers may favour enlisting the state to solve or mitigate the lemons problem (i.e., they may favour a separating rather than pooling equilibrium) or exit the market, leading to a downward spiral in average quality of service.

On the demand side, in both cases consumer interests are likely to be diffuse and unorganized and unlikely to be able to counter cartelization effectively in the first case or to advance a normatively defensible political case for resolving the lemons problem in the second case, exemplified in four of the case studies in this book by the difficulties many jurisdictions have encountered when developing coherent regimes for regulating complementary and alternative providers, mental health care providers, financial advisers/planners, and immigration consultants, where prevailing regimes have often permitted the coexistence of "lemons" and providers of superior service.

In many cases, of course, exemplified by long-established mainstream professions like medicine and law, the "lemons" problem has in theory

4 George Akerlof, "The Market for Lemons" (1970) 84 *Quarterly Journal of Economics* 488.

been resolved by the adoption of an exclusive-licensure, self-governing form of professional regulation, although the broad and ill-defined scope of the licensed domain has often not prevented the continued existence or emergence of competing service providers either within or adjacent to the licensed domain. In some cases, the “lemons” problem arguably persists among these substitute service providers. Indeed, the increase in prices and costs associated with the provision of these services by licensed practitioners clearly provides an additional impetus for the emergence of substitute providers. In other cases, the excessive breadth of the licensed domain has inhibited the emergence of potentially consumer-welfare-enhancing forms of competition and service innovation.

I have no easy solution to this messy and indeed often incoherent interface between the politics and the economics of professional regulation, except for the following. In many areas of public policy-making, an independent or quasi-independent agency is often tasked with providing *ex ante* cost-benefit or cost-effectiveness assessments of various tax, expenditure, or regulatory proposals, or *ex post* assessments of their efficacy. Such agencies include auditors general (in many jurisdictions), the Office of Management and Budget in the US, and regulatory agencies with responsibility for proposing or adopting major health, safety, or environmental regulations. In this respect, one might do well to assign this sort of agency the responsibility for assessing newly proposed forms of occupational or professional regulation and for periodic re-evaluation of existing forms of occupational or professional regulation. Placing such assessments in the public domain as an additional, normatively based and empirically grounded assessment of regulatory options ideally provides an additional resource for demand-side interests, faced with major collective action problems, to coalesce around demands for regulation that on balance advance their interests rather than producer interests on the other side of the marketplace.

In various of the case studies in this book I have proposed the creation of a buffer or advisory body between self-governing professions and government: professions would propose regulations governing entry and post-entry standards of competence and conduct for government approval or disapproval (but not initiation) as government regulations in light of the advice of such intermediate bodies. This model might well be generalized to most professions, in part inspired by the much more systematic model of professional regulation in the province of Quebec, where l’Office des Professions serves as the central oversight body. Such a body would review proposed entry and post-entry regulation of all or most professions within a common analytical framework, and solicit input not only from the professional bodies themselves but from other affected

stakeholders, including demand-side interests, before formulating its advice to government. Professions with these stakeholders well-represented in their governance structures would be entitled to more deference than those where such representation is lacking. Particular professions might be nominally accountable to different ministries of government (as at present), but this silo effect would be substantially mitigated by the existence and mandate of a central oversight body directed and staffed by personnel with appropriate analytical skills to address the case for regulation and the costs and benefits of alternative modes of regulation. As well, such a body might be charged with promoting harmonization of professional entry requirements across sub-national jurisdictions or mutual recognition agreements. As our economies become increasingly service-intensive, the *ad hocery* that characterizes much contemporary professional and occupational regulation will exact increasing social costs that will demand more systematic policy responses than those reflected in current policies.

At the end of the day, only with a broader public recognition of the costs of over-regulation of occupations and professions in terms of higher prices, reduced access, reduced innovation, and reduced job mobility, and the costs of under-regulation of other professional service markets, where inappropriate or incompetent services pose severe risks to consumers, is it likely that the paradoxes of professional regulation can be mitigated, if not fully resolved.

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