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An independent mind

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THE FUTURE FOR LEGAL SERVICES REGULATION[1]

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1. Introduction

Let me begin with a disclaimer. I hold a number of non-executive and advisory appointments with various organisations[2]. What I say here represents my own thoughts and should not be attributed in any way to any of them.

In addressing the fascinating issue of the future for legal services regulation, I confess that I am starting from a possibly contentious proposition: that the current framework is still essentially founded on a Victorian guild and apprenticeship model.

Despite Sir David Clementi's recommendations ten years ago for a new regulatory approach, unfortunately – though our structure has certainly been reconditioned – it is not as good as new. It is perhaps worth reminding ourselves that his proposals were not as radical as the provisions of the Legal Services Act 2007 itself (in that his views in relation to external ownership and multidisciplinary practice were more conservative than the Act). And so, in a strange twist, the changes in the legal services market heralded by Sir David's report and enabled by the Act have resulted in a regulatory framework that is not truly fit for the purpose of regulating the liberated market that they have created.

The flaws and limitations of the Act are now all too apparent, and undermine the long-term sustainability of the current framework. As each year passes, the Act surely moves closer to the entrance to whatever is the regulatory equivalent of the knacker's yard.

Let me take a brief look at current trends and challenges, and then offer some thoughts and suggestions for the future.

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[1] This paper is a slightly expanded version of a speech to the Westminster Legal Policy Forum on the future of legal services regulation held in London on 4 September 2014.

[2] Details are at: http://stephenmayson.com/appointments/.

2. Trends

The Clementi report began the now-accelerating process which is disrupting the correspondence of the legal professions with the legal services market. No longer in practice are the two the same thing, and the proportion of market share of legal services taken by the legal professions is reducing. One of the profound consequences of this disruption is that law is not a supply-led market any more, where providers dictate terms, delivery and prices. These days, providers of legal services cannot impose their own wishes on the market and buyers; nor, in many senses, can they control the factors that influence them.

The shift towards liberalisation is in part a response to the continuing unmet need in society for legal advice and access to justice, and in part a response to the increasing diversity and innovation in legal practice in terms of individuals, entities and business models. These in turn are being driven by technology, globalisation, and increased interest in multidisciplinary provision.

As a consequence of globalisation, the world is simultaneously larger and smaller: larger in the sense that there are more markets opening up to new entrants; and smaller in the sense that travel, mobility and technology result in closer interconnection, integration and inter-dependency. That is why we can see jurisdictions such as Singapore and Canada following the lead in liberalisation set by Australia and the UK. More are sure to follow – even the United States (or at least New York) if their law firms wish to continue competing globally for clients, talent and capital.

A significant consequence of these developments is then greater variety and complexity of delivery, ownership structures, technological and other integration, financing, and reward-sharing. This is not a world in which the Victorian guild, one-size-fits-all, model can operate, designed as it was for a market of homogeneity, simplicity and inertia for which rules-based regulation is suitable. Indeed, the current approved regulators should be commended for all the bold steps they have taken to reshape legal services regulation since 2004.

Given that asymmetry of information is one of the 'market failures' that leads to regulatory intervention, perhaps disturbingly, variety and complexity are *increasing* the asymmetry of both information and power as between provider and client, which must have implications for future regulation policy. But more important, to my mind, is that this variety and complexity in services, people, entities and business models is also increasing the asymmetry of information and power as between providers and the regulators.

If heterogeneity, and the pace of change and innovation, are such that regulators face increased challenges in the timely tracking, understanding and monitoring of new developments within a regulated community, then it is highly unlikely that rules-based regulation could ever work effectively. It is time, therefore, for the legal professions to stop expecting a return to rules. They need to accept that the obligation on regulated providers to 'do the right thing' has increased, and that they must make both

professional and business judgements without the often-illusory certainty of rules or definitive guidance[3].

3. Challenges

Against this background, then, what are the challenges for the future of legal services regulation?

(1) At a general level, it strikes me that the principal challenge for regulation arises from the likely inability of the traditional legal services market to provide gainful employment for all those who are professionally qualified working in it, or who wish to qualify and do so. At a time of continuing and significant unmet legal need, this paradox of over-supply of qualified lawyers and the under-supply of legal services to the vulnerable needs both policy and regulatory attention. This general challenge raises issues of regulating for competence and quality, ethics and integrity, and competition and conflicts.

I doubt that even current levels of employment of qualified lawyers in traditional law firms are sustainable in a market economy for legal services[4]. This description of the employment challenge should not be misinterpreted as one about the undesirability of competition in legal services, or the distorting effect of the profit motive supposedly inherent in external ownership and investment[5]. We should be under no illusion that this market needs to be more efficient and effective; equally, we should also be under no illusion about the distorting effects on behaviour and ethics that are driven by the hours and billing targets of traditional law firms and by many of their ownership and profit-sharing arrangements[6].

(2) The second general challenge relates to the need within the legal professions for a better understanding of the interrelationship between competition and regulation. They are not mutually exclusive, and the importance and effects of markets operating alongside formal regulation, as well as of professional and organisational culture, all as part of the regulatory ecosystem, need to be better understood and appreciated.

I have always regarded the Legal Services Act 2007 as welcome. But there are a number of widely recognised issues that now leave us in an uncomfortable place for the future, probably because in reality we are still in the infancy of developing a modern regulatory

[3] See also Mayson (2013) Restoring a future for law (available in summary at http://stephenmayson.com/2013/10/14/restoring-a-future-for-law/and in full at http://stephenmayson.files.wordpress.com/2013/10/mayson-2013-restoring-a-future-for-law.pdf).

[4] There is, of course, a broader policy question about whether all aspects of legal services are amenable to a market approach – for instance, the monopsony that is legal aid.

[5] Cf. External ownership and the forked tongue of ethics (available at http://stephenmayson.com/2012/04/13/external-ownership-and-the-forked-tongue-of-ethics/ - more-406).

[6] See Law firm partnership: the grand delusion (available at http://stephenmayson.com/2012/10/09/law-firm-partnership-the-grand-delusion/ - more-416).

structure for legal services. I won't rehearse all the challenges arising from the 2007 Act[7], but let me highlight three:

(1) The reserved legal activities are pivotal to the current regulatory structure, because they are crucial to the position of the approved regulators and licensing authorities, to authorised persons and alternative business structures, to the approval of heads of legal practice, to the reach of the Legal Ombudsman, and so on. Basing a fundamental regulatory pivot on such narrow, arbitrary, flawed, incoherent, and historically anachronistic foundations cannot possibly provide a sustainable basis for effective future regulation[8].

(2) In a consequential vein, we know that there is a regulatory gap in relation to legal activities which are not reserved being carried out by individuals or organisations who are not authorised persons. The virtual impossibility of regulating such activities drives a cart and horses through any meaningful notion of the 'regulation of legal services'.

(3) The plurality of regulators, often in relation to the same reserved legal activity, creates a serious potential for duplication, inconsistency, conflict, inefficiency of resourcing, and unnecessary cost.

None of these challenges is in my view open to an 'easy fix' or 'quick win' tweak, given that they are a foundation or consequence of the very infrastructure of the Legal Services Act. Such tweaks would be akin to using sticking plasters to treat a fracture. We need more fundamental reform. I understand the current political and pragmatic wish to find better ways of working with what we have in the Act's framework. But the day will come when the time and political will for more substantial reform are there: we must be ready with a well-considered and coherent set of proposals for that reform.

4. Thoughts and suggestions about the future

Let me finish, therefore, with some thoughts and suggestions about future reform[9].

First, while I applaud the regulatory objectives in the Act, the co-existence of eight sometimes contradictory and conflicting statutory objectives is, to put it mildly, unhelpful. I would welcome one predominant and overriding objective, and that would have to be to protect and promote the public interest. I realise that there are different

[7] More detail is in Mayson (2013) Review of the legal services regulatory framework (available at http://stephenmayson.files.wordpress.com/2013/09/mayson-2013-review-of-legal-services-regulatory-framework.pdf).

[8] See Mayson & Marley (2010) Reserved legal activities – history and rationale (available at http://stephenmayson.files.wordpress.com/2013/08/mayson-marley-2010-reserved-legal-activities-history-and-rationale.pdf) and Mayson & Marley (2011) The regulation of legal services – what is the case for reservation? (available at http://stephenmayson.files.wordpress.com/2013/08/mayson-marley-2011-what-is-the-case-for-reservation.pdf).

[9] Further details are available in Mayson (2013) Review of the legal services regulatory framework (available at http://stephenmayson.files.wordpress.com/2013/09/mayson-2013-review-of-legal-services-regulatory-framework.pdf).

interpretations of the concept[10], but it would be better to my way of thinking to explore (if necessary) the scope of one overriding objective than to argue about the scope of eight supposedly equal objectives *and* about any conflict of one in relation to another. Indeed, I would wish to go further and see the duty to act in the public interest explicitly becoming an additional professional standard applied to all regulated persons. Perhaps then we could address the more egregious, aggressive, bullying, time-wasting and cost-insensitive behaviour exhibited by some lawyers in the name of acting in the best interests of their clients.

Second, we could move to proper activity-based regulation of legal services by extending the regulatory reach to *all* legal activities offered or carried out for reward. This would not necessarily entail authorisation of all providers, whether individuals or entities. It seems to me that the Legal Ombudsman's ability to offer a route to redress or compensation does not need to be limited to or constrained by any earlier process of authorisation or licensing.

Third, therefore, we need a more coherent approach to those activities for which before-the-event accreditation, authorisation or licensing should, in the public or consumer interest, be required. As a starting point, I would suggest that the public interest would require this where a provider is in some way acting as an officer of the court (for example, by issuing proceedings or exercising rights of audience, or administering an oath). The consumer interest would also require it where after-the-event redress cannot represent an adequate response when something has gone wrong (for example, where an individual's life, liberty, safety, health, education or citizenship is at stake).

If we retain the idea of reserved activities, therefore, it could be applied in all circumstances where this type of before-the-event authorisation is required. Authorisation would then be based on initial accreditation and continuing assurance of competence in relation to each reserved activity. I would seriously question whether authorisation for a reserved activity should continue to be wrapped up in a portmanteau authorisation resulting from the award of a professional title. I would have no difficulty with professional titles continuing (possibly awarded by the representative bodies) but with the regulators being concerned only with authorisation for specific activities[11]. I would also have no difficulty in representative bodies, as a condition of continued membership, applying standards of competence to the retention and use of a professional title which are higher than any regulatory minimum.

Finally, with a move to true activity-based regulation, there should be no need for duplication or overlap in approved regulators for each activity. But I'll confess that I am presently ambivalent about whether this would drive us toward a single regulator. It seems to me that, with the increasing heterogeneity and complexity of provision and providers, coupled with the growing asymmetry between regulators and the regulated that I referred to earlier, specialised regulation and therefore specialist regulators will most likely be needed. To a degree, we already have some of this specialisation in

[10] See further Mayson (2013) Legal services regulation and 'the public interest' (available at http://stephenmayson.files.wordpress.com/2013/08/mayson-2013-legal-services-regulation-and-the-public-interest.pdf).

[11] The criminal offences currently associated with some protected professional titles could then be removed in favour of the more general s.14 and s.17 offences of carrying on reserved activities when not entitled or pretending to be entitled.

relation to advocacy, notarial activities, costs, immigration and claims management – though even here there are overlaps. Whether this line of thinking then leads us to a single General Legal Council with specialist sub-units within it, or to (say) an Advocacy Standards Board, a Litigation Standards Board, and so on, with or without some over-arching coordination or accountability, would no doubt be the subject of heated debate!

5. Conclusion

The future envisaged by Sir David Clementi's proposals has already arrived. In some aspects, we have gone further. I do not have confidence that the Legal Services Act 2007 will see us through to a sustainable future – one which properly enables providers of legal services to innovate and serve both the public and the consumer interest, *and* which properly and appropriately protects clients and consumers of all legal services. We will need a new regulatory settlement within the foreseeable future, and I cannot escape the conclusion that this would require primary legislation.

For me, there is no public interest in liberalising and deregulating the legal services market simply as an article of faith. Regulation must be appropriate, proportionate and effective. I am also in favour of simplification, too; but clarity and coherence are more important. I think that there is a strong case for extending the regulatory net, not reducing it. But I am also convinced that this could be done in a way which would simplify and clarify our current arrangements, deliver coherence to the regulatory framework, and institute more effective regulation, ultimately for the benefit of all.