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**THE LEGAL SERVICES ACT:
WHAT MIGHT REPLACE IT AND WHEN?¹****Professor Stephen Mayson²****1. Introduction**

It is now more than ten years since Sir David Clementi issued his final report in December 2004 on the regulatory framework for legal services in England & Wales³. The report laid the foundations for the Legal Services Act 2007 (even though the Act went further on alternative business structures than Sir David had been willing to recommend). Its principal aims can be summarised as:

- Creating the Legal Services Board and establishing the principle of regulation that is independent from professional representation.
- Improving the way in which – and the speed with which – service complaints against legal services providers are handled, including setting up the Office for Legal Complaints and the Legal Ombudsman.
- Liberalising the business structures through which lawyers and others can operate by permitting ownership and investment by individuals who have not qualified as lawyers, and allowing legal businesses access to additional sources of capital. Those who oppose these permissions have often portrayed them as allowing ‘external’ forces to exercise a malign influence over a law firm, contrary to lawyers’ ethical duties. But the new investors could just as well be

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³ Available at: <http://webarchive.nationalarchives.gov.uk/http://www.legal-services-review.org.uk/content/report/index.htm>

internal to the law firm (professional managers and other staff) – they happen not to be lawyers. To oppose third-party ownership and investment from a moralising standpoint of lawyers’ ethics can be an uninformed and misguided undertaking⁴. Indeed, to perceive these developments only in terms of threats to the established legal professions is to run the risk of missing valuable commercial opportunities in other parts of the legal and wider worlds.

All of these primary objectives have been achieved.

The Clementi Report was inevitably built on compromise. Although considered by some at the time to be too radical (witness the howls of protest and the resistance mounted against the report and its implementation), it was in fact the considered articulation of the incrementally possible. That the then government felt it necessary to go further than Sir David’s recommendations on alternative business structures (ABS) perhaps demonstrates how restrained he had been.

2. What has happened since 2004?

Contrary to some predictions, English law firms have not been taken over *en masse* by crooks, sharks and charlatans; lawyers’ ethics have not been abandoned in the pursuit of profit; and the price and quality of legal services have not plummeted to the lowest common denominator.

The Clementi Report and the Legal Services Act were necessary catalysts for the process of market liberalisation that was long overdue in UK legal services. But they were just that: enablers, and not causes. Liberalisation and innovation would have happened anyway – although I willingly accept that the regulatory settlement of the Legal Services Act could well have been different in tone, form, and content had it been created in the aftermath of the global financial crisis rather than before it (albeit that a more restrictive approach could have proved damaging to growth and competitiveness).

Even so, that crisis has, in itself, increased pressures on the pricing, quality and delivery of legal services. It has accelerated and sharpened competition for a decreasing volume of external legal advice. Consolidation, better and more extensive use of technology, alternative providers, value pricing and project management, have all driven restructuring, mergers, the need for capital investment, and the reshaping of traditional partnerships and their distorted profit-sharing arrangements.

The world is not the same – and would not have been the same – even without the Legal Services Act and its regulatory reforms. Indeed, arguably, because the Clementi Review had encouraged more enlightened law firms to start their thinking about new ways of being and working, they were in a better shape to ride through the financial crisis and its consequences than they would have been without it.

So liberalisation and innovation are with us. The doubters will point to some ABS failures and challenges, and claim that they were right to resist. For example, we have

⁴ Cf. footnote 6 below, and see Mayson (2012) External ownership and the forked tongue of ethics: available at: <http://stephenmayson.com/2012/04/>.

seen ABSs being sold back to founders (Indeed Online plc), being negatively affected when a parent company suffered from a banking crisis (Cooperative Legal Services), going into liquidation (Hacking Ashton), having the ABS licence revoked (GPB Solicitors), and closing down (Sai-Donne Ltd).

Certainly, these are all disappointments. But one could also argue that the causes are the result of a market functioning as it should (with entries and exits), and that the actions taken are a sign of a strong regulatory framework, not a weak or inappropriate one. Let us also not forget the collapses and mishaps of large law firms like Halliwells, and Cobbetts, as well as other non-ABS law firms. In truth, commercial success and failure have nothing to do with whether or not the business holds an ABS licence – and nor do regulatory compliance and ethical behaviour, for that matter.

3. Where are we now?

Clementi's work and the 2007 Act were necessary contributors to fair and regulated market liberalisation. The key words here are 'fair' and 'regulated'. These reforms did not create a liberated free-for-all. They were not the pursuit of consumerism and profit at the expense of everything else⁵; nor were they the end of professionalism and ethics in legal practice⁶. They were part of the enabling framework that allowed a new future to evolve.

Although much has been achieved and progress made in the past ten years, nevertheless, with the benefit of ten years' hindsight we can now see that the consequences of the 2004 compromises and the limitations of the 2007 regulatory settlement are inhibiting a more effective future. More particularly, in my view:

- (1) the Act's regulatory objectives are in places conflicting with each other, too extensive, or impractical – and therefore do not provide the over-arching direction or guidance that they should;
- (2) building the entire regulatory framework around the historical, anachronistic, and limited list of reserved legal activities⁷ cannot hope to provide a balanced, comprehensive or sustainable foundation for modern, effective regulation;
- (3) we continue to have a maze of regulation by activity, individual, entity, and professional title; this will necessarily struggle to meet any objectives of clear, targeted, proportionate, consistent, accountable, cost-effective and less

⁵ The Act contains, in its first section, a set of regulatory objectives that regulators and providers are bound by. These include, among others, promoting the public interest, maintaining the rule of law and access to justice, and encouraging an independent, strong, diverse and effective legal profession.

⁶ Indeed, the regulatory objectives in s. 1 include an obligation to promote and maintain professional principles, such as independence, integrity, duty to the court, client confidentiality, and acting in the best interests of clients; these principles and duties apply to ABSs in the same way that they apply to traditional law firms.

⁷ The history and origins of these activities is explored in Mayson & Marley (2010) *The regulation of legal services: reserved legal activities – history and rationale*, available at: <http://www.stephenmayson.com/downloads/>.

- burdensome regulation⁸;
- (4) the current ‘regulatory gap’⁹, through which non-reserved activities can be carried out by those who are not otherwise legally qualified or hold a regulated title and so allowing some legal services to be beyond the reach of the sector’s regulatory framework, is not justifiable or tenable because it results from the existing, inadequate, list of reserved activities;
 - (5) the independence of regulation from government and professional representation is not complete;
 - (6) the multiplicity of regulators needs closer examination (perhaps along with the parallel structures for claims management and immigration) if we are to avoid the resulting potential for overlap, inconsistency, regulatory competition and arbitrage;
 - (7) the over-prescription of regulatory requirements in statute needs to be questioned¹⁰; and
 - (8) the regulatory framework for legal services is still derived from a series of statutes (including the Public Notaries Act 1801, Commissioners for Oaths Act 1889, Solicitors Act 1974, Administration of Justice Act 1985, Courts and Legal Services Act 1990, as well as the Legal Services Act 2007): this does not advance the general cause of consolidated, simple and accessible legislation.

The nature and pace of change in legal services since 2004 leaves many (myself included) in no doubt that well before 2024 we will need a different and more robust framework for legal services regulation.

In June 2013, the Ministry of Justice issued a Call for Evidence¹¹ stating that it was “interested in hearing legal service providers’ concerns with, and ideas for reducing, regulatory burdens and simplifying the legal services regulatory framework”. Having given a mere 12 weeks over the summer for responses¹², the Government then considered its position for eight months and issued its conclusions in May 2014¹³:

it was clear from the wide-ranging responses to the Call for Evidence that there is no consensus on the longer term vision for regulation. In the absence of consensus, more work is therefore needed before bringing forward any major reforms. In addition, it did not draw out any simple changes that could be made by Government within the

⁸ The UK ‘better regulation principles’ are incorporated through s. 3(3)(a) and (b) of the Legal Services Act which requires the Legal Services Board to have regard to the principles under which “regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed” and to any other “best regulatory practice”.

⁹ This gap was identified and acknowledged in the Clementi Report.

¹⁰ The degree of statutory prescription in the Act in Sch. 13 relating to the ownership of ABSs (licensed bodies) is increasingly recognised as unnecessary and denies regulators much-needed flexibility and discretion to deal with evolution in the market and in ABS ownership structures.

¹¹ See <http://www.redtapechallenge.cabinetoffice.gov.uk/moj-review-of-legal-services-regulation/>.

¹² My personal response to the Call for Evidence is available at: <https://stephenmayson.files.wordpress.com/2013/09/mayson-2013-review-of-legal-services-regulatory-framework.pdf>.

¹³ See <https://consult.justice.gov.uk/digital-communications/legal-services-review/results/legal-services-government-response.pdf>.

existing statutory framework that would actually reduce unnecessary burdens on practitioners....

Interestingly, having said in the Call for Evidence that it “would be interested in ideas covering the overall legislative framework, and any specific provisions or aspects within it”, the conclusion seemed to be founded on a somewhat narrower objective¹³:

As might be expected, we found that the majority of responses focused primarily on the structure of the regulatory landscape ... rather than on the detail of particular burdens that could be removed or reduced. While Government will continue to consider the question of whether the existing statutory framework is the right one, our key concern at this time is to find ways to reduce unnecessary burdens on practitioners, rather than on re-balancing powers or roles between the regulators and professional bodies, through which the potential for reducing burdens on practitioners is less clear.

Not surprisingly, therefore – and some would say inevitably – this was the outcome¹³:

Given the lack of simple change options brought forward through the Call for Evidence without unpicking the existing statutory framework, Government is not minded to take forward any significant proposals for reform at this time.

4. Where do we go next?

Despite the Government’s conclusion last year that the Call for Evidence had not resulted in any proposals for reform that could be implemented, the story does not end there.

In July 2014, the Secretary of State for Justice held a Ministerial Summit and invited the chairs of the Legal Services Board and the front-line regulators. As a result of that Summit, the regulators have collectively and collaboratively started working on a number of work-streams. One of them is the exploration of legislative options for development of legal services regulation beyond the Legal Services Act. These options will be submitted to incoming Ministers for consideration within the Ministry of Justice when the new Government is formed after the General Election.

This work stream is described by the Legal Services Board¹⁴ as one which:

... will explore the different options available for a new framework beyond the current Act. Meetings are being chaired independently by Professor Stephen Mayson, and attended by representatives from each of the front line regulators and the LSB. Its intended output is a report outlining to Ministers options for the future development of legal services regulation. The report will not make any recommendations, but is intended simply to lay out the different routes regulation in this sector could take.

While it might seem a little premature so soon after 2007 to be considering what could follow the Legal Services Act, the flaws and fudges on which the Act was necessarily built will not allow us to wait too much longer before turning attention to its successor. Although the 2007 Act took the reform of regulation further than Sir David Clementi had recommended, it was not party political legislation, so we have no

¹⁴ At http://www.legalservicesboard.org.uk/what_we_do/Ministerial_Summit_2014_Follow_Up.htm.

reason to think that the possibility of change in the near future will be entirely dependent on the political persuasion of the government from May 2015. What is more important, perhaps, is the preparation that goes into the amendments or replacement.

As part of that preparation, I am honoured to be chairing this particular work-stream, which started in January. Hopefully, the results will address the limitations of the current framework, make the most of the experience gained in the past ten years, and anticipate the issues and flexibility required to sustain a new regulatory settlement.

It would be fair to acknowledge that there is no ministerial commitment to do anything at all in relation to changing the legislative framework for the regulation of legal services. There is also a general acknowledgement that regulating legal services rarely finds itself at the top of the political agenda or public consciousness! Accordingly, to address the question of this paper (What might replace the Legal Services Act?) there is a short-term probability that the answer is 'Nothing'.

4.1 What?

What needs to happen, in my view, is a significant revision of the current Act (or a replacement of it) to address the eight issues identified in Section 3 above. In this sense, what needs to happen seems reasonably clear. But perhaps what it first requires is a recognition that the 2007 Act was, in effect, a job half done.

Sir David wanted to see reform landing short of multidisciplinary practice, and of third-party ownership and investment beyond a 25% share. As he put it, he wanted us to walk with the foundational reforms before we started running with the more ambitious ones. He therefore was advocating a two-stage approach. That in itself may be a strong argument in favour of a review at this time.

Perhaps even more persuasively, one might suggest that the Government in 2007 pressed ahead with the more extensive reforms in relation to ABSs but did so only on the compromise structure that Sir David had recommended for more limited purposes. The Government's more ambitious proposals really have been based on further work on some of the fundamental issues, particularly the content and scope of the reserved activities, and of regulation by title – both of which are now limiting further development and innovation in the legal services market that ABSs were intended to deliver.

It is, in short, time to move to stage two of the process initiated in 2007 and to finish the job.

However, in addressing the limitations identified, there will be some challenging questions to be faced, and a range of available solutions, in framing a reformed approach. For example:

- (1) What is the proper role of *before-the-event* barriers such as the need for qualification (say, a professional *title* carrying the right to carry out certain activities), direct authorisation only for certain *activities* (such as reserved legal activities), or licensing of certain *entities* (such as alternative business

structures)? Should the barriers extend only to the right to conduct certain activities (reservation) or effectively to universal regulation through the unauthorised practice of law?

- (2) What is the need for **during-the-event** protection, such as professional indemnity insurance, risk monitoring and supervision, provisions for the handling of client money, or continuing professional development?
- (3) What is the proper role of **after-the-event** redress through support for complaints-handling and adjudication, compensation, restitution, and disciplinary action? Where is the real value of sector-specific redress that is different from general consumer protection? Does redress need to be connected to authorisation, or should it be made universally available against any provider offering legal services for reward?
- (4) Who should carry out sector-specific regulation? How can we best secure independence of regulators, sector-specific specialisation and oversight, within a proportionate and risk-based framework for regulatory intervention?

4.2 Why?

If the What? is reasonably clear, what is more difficult is to address the associated questions of Why? and When? In other words, when might the political motivation reach a point where action by Ministers is justified?

This is clearly a difficult issue to judge. Part of the challenge will lie, first, in making the case that the 2007 Act is a job half done and, second, in framing the eight issues in such a way that Ministers see a sufficient mischief or risk arising from them to justify their attention and Parliamentary time.

Let me therefore venture a 'first draft' in articulating that framing by expressing my personal perception of the risks and threats:

- (1) *Risks to the legitimate participation of citizens in society:* The reality of the UK's post-financial-crisis economy has resulted in fewer citizens either being able to afford, or being eligible for publicly funded, legal advice and representation. Although hard evidence of the effects is hard to find¹⁵, it is possible that this could increase the nature and volume of unmet legal need, and give rise to citizens having rights that they cannot in practice enforce or defend.

Recent increases in civil court fees might also deter some potential claims and exacerbate the challenges of funding them, running a related set of risks to the enforceability and defence of rights.

- (2) *Risks to the fabric of society and the rule of law:* Following on from (1) above, if there are risks of legal rights being too difficult or in effect incapable of being enforced or defended, this could lead to the rule of law being undermined, and also to costs being shifted to other areas of the social structure or public purse.

¹⁵ A number of helpful reports and analysis are available from the Legal Services Board: <https://research.legalservicesboard.org.uk/reports/consumers-unmet-legal-needs/>.

Further, as many more litigants turn to self-representation in court, and judges are consequently distracted from their true role, there are risks to the cost-efficiency and effectiveness of the justice system (as well as a judicial career becoming less attractive, resulting in the best candidates refusing judicial appointment)¹⁶. These will add further pressure to protecting, promoting and maintaining the rule of law.

Finally, there is also the additional risk of fewer judicial determinations in the future on matters of law, so reducing the potential public good of greater clarity and certainty in the formulation and pursuit of legal rights that could otherwise arise from those determinations, as well as undermining the stability and predictability of personal, business and social relationships that flow from that clarity and certainty.

- (3) *Threats to global standing and competitiveness, or to economic growth:* The quality of English law, courts and judges, and of English lawyers and law firms, is held in high regard around the world. Risks to the rule of law, to the cost-effectiveness of the justice system, and to the availability and value of judicial determination, as described in (2) above, could easily lead to the perception that this quality has declined relative to other competing jurisdictions.

This would have serious implications for the UK's reputation and economy, with English law becoming a less attractive governing law of choice, and English courts and judges no longer being such a preferred forum for dispute resolution. This would reduce the economic participation and contribution of English law and law firms to 'UK plc'.

- (4) *Risks to consumers:* The current regulatory framework contains the significant 'regulatory gap' referred to in Section 3 whereby legal activities that are not reserved by Parliament to those who are appropriately qualified and authorised can be provided without any form of sector-specific regulation or redress. In some very important areas of their lives, therefore, consumers are significantly exposed to incompetent or sub-standard providers who are beyond sector-specific regulatory reach. As in (1) and (2) above, public confidence in the rule of law, the justice system and the regulation of legal services could be seriously damaged by repeated or high-profile detriment arising to consumers from such exposure.
- (5) *The cost and burden of regulation:* Finally, the flip-side of the regulatory gap is that the current framework results in all legal services provided by those who are regulated by title or entity falling within the reach of sector regulators – even those which are not reserved legal activities and can be provided by others without sector-specific regulation. Arguably, this is unduly burdensome on practitioners who do fall within the regulatory framework. If those who are not legally qualified or regulated may lawfully perform those activities, it is difficult to see why those who are so qualified and regulated should be subject to additional regulatory burdens and costs.

¹⁶ In turn, these pressures might add to the calls that England & Wales should explore a shift from an adversarial to an inquisitorial approach to dispute resolution in court.

If the cost and burden of regulation – either on this point or more broadly – is (or is perceived to be) too high for providers¹⁷, this will create barriers to entry, will hasten some to exit the market, will unhelpfully raise prices for consumers or reduce profits for providers (thus reducing their scope and appetite for innovations in structure and delivery). This could also harm future economic activity and growth, not only within the legal sector but also in other areas of economic activity that rely on cost-effective advice and representation in securing and supporting their own growth and competitiveness.

There are a number of responses to these risks and threats. For present purposes, the contribution that the legal sector can make towards providing more cost-effective legal advice and representation for a greater number of citizens and for a wider range of issues is certainly one of them. The regulatory framework for legal services must therefore be correspondingly appropriate so that it minimises and does not exacerbate these risks and threats, and is not inappropriately restrictive or onerous on providers such that it stifles growth, innovation and effective competition.

These five ‘framing’ sets of mischiefs and risks address a range of public interest¹⁸ issues, including maintaining the rule of law and an effective justice system, preserving and enhancing public good, and protecting consumers. They are not about professional protectionism or the desirability of self-regulation. They do not contain a plea for greater public funding of legal services or providers. Instead, they articulate a broader range of social and economic issues that are significantly dependent on and influenced by the regulatory framework for legal services. They provide cause and force to the case for improved coherence, balance and proportionality in our regulatory approach to legal services and those who provide them.

4.3 *When?*

If these framing issues address the question of why further reform is needed, that leaves only the question of when. Whatever the outcome of the General Election in May, the pressures arising from public funding cuts, unmet legal need, litigants in person, uneven competition between regulated and unregulated providers, and regulatory burdens and costs, will not reduce. If the foundations and infrastructure of the Legal Services Act 2007 are not currently as fit for purpose as they should be, the next few years will only test them further.

The need for further primary legislation to complete the reform process started by Sir David Clementi and the Legal Services Act 2007 necessarily means that substantial revision or replacement will take time. While there is not currently a burning platform, that necessary passage of time in the Parliamentary process suggests that to have something more appropriate and effective in place by 2020 (by which time the market will have evolved yet further) we should start in earnest sooner rather than later.

¹⁷ The Legal Services Board is currently undertaking a project to examine the actual and perceived burden and costs of legal services regulation. Further details are available at: http://www.legalservicesboard.org.uk/Projects/Reviewing_the_cost_of_regulation/index.htm.

¹⁸ I have addressed the issue of the public interest in more detail in Mayson (2013) *Regulation of legal services and ‘the public interest’*, available at: <http://www.stephenmayson.com/downloads/>.

Assuming that the Election results in another five-year Parliament, my hope and prediction therefore is that the 2007 Act will have been substantially revised or replaced by the end of it.

5. Conclusion

Ten years on from the Clementi Review we can see that a new regulatory settlement has achieved much in terms of regulatory infrastructure and independence, the handling of consumer complaints, and the liberalisation of the legal services market. The Legal Services Act 2007 was a necessary enabler of change, and a pragmatic solution for its times.

However, the successes of the Act and the effects of market liberalisation have exacerbated some of its own inherent flaws. A new regulatory settlement is therefore imminently required in order to continue to protect and promote the public interest in the rule of law, the effective administration of justice, the global position of English law and courts, and the public value of judicial determinations; to protect consumers of legal services appropriately; and to allow the market providers to grow, adapt and innovate further, given the realities of a different economic climate.