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An independent mind

THE REGULATION OF BARRISTERS: PAST, PRESENT AND FUTURE*

June 2018

1. Introduction

We are fortunate in Lincoln's Inn to have our Black Books as the longest continuous records of its members and affairs of any of the Inns of Court. The Black Books date from 1422, and the earliest record also provides a list of 96 men who were members of the Inn before 1420. The profession of barrister thus has a long history.

Holdsworth in his multi-volume work, *A History of English Law*, writes¹ that it is difficult to say whether there was ever a time when a man was not allowed assistance from his friends when appearing before a court. This right was certainly available as early as the reign of Henry I (1100-1135). A profession of pleaders had undoubtedly emerged in the King's Courts by the middle of the 13th century², and they are referred to as early as 1235³.

The notion of a legal profession therefore appears to have emerged during the reign of Edward I (1272-1307). At this time, there were already two distinct types of lawyer – the early forerunners of barristers and solicitors. There were those known as 'serjeants', who would act as pleaders, appearing in court and speaking for their clients; and there were those known as 'attorneys', who were also present in court but were there to handle procedural matters and manage their clients' litigation.⁴

Although initially, both types were unqualified amateurs, those who, through frequent appearances, developed recognised expertise became sought-after legal representatives. Even in the 13th century, it would seem that an increase in both the volume and complexity of litigation were contributing factors. It then appears that by the late 13th century those who specialised in pleading became sub-divided into serjeants as the senior advocates (rather like today's QCs) and apprentices who, despite the title, were practising law and representing clients in their own right. These apprentices were the predecessors of barristers, though it is possible that they might have started out as attorneys (and, indeed, attorneys were initially members of the Inns of Court, although later excluded).

* This paper is the text of a lecture given in the Old Hall, Lincoln's Inn on 12 June 2018.

1. Holdsworth (1922), at page 262.

2. Baker (2002), at page 76.

3. Holdsworth (1922), at page 263.

4. In the interests of time, I have generalised this early history. For a comprehensive account of the emergence of the legal professions, see Brand (1992).

2. The Past

2.1 Early days to the 13th century

It is tempting to think of regulation as a recent phenomenon. But regulation takes many forms, and is often incidental to other developments. Thus, although originally litigants would have been expected to appear in person, by medieval times a practice had already developed under which litigants were allowed to bring someone into court to counsel them. This gradually evolved into royal or judicial permission, and then authorisation, for individuals to practise before the courts. From this, judges used their inherent powers to fine lawyers for poor pleading and other misconduct.

These developments were facilitated by statute as early as 1275, and clearly lay the foundations for elements of the regulation of lawyers that we would recognise today.⁵ For example, the Statute of Westminster I in 1275 prohibited deceit or collusion by any pleader in the King's Court, and also addressed concerns about excessive litigation with prohibitions on maintenance and champerty as well as on abusive litigation tactics. Its novelty also included the ability to imprison lawyers as a remedy for misconduct!

The statute of 1275 was followed by other enactments in similar vein, including those addressing conflicts of interest and competence requirements, all of which seem to have assumed that limiting the number of lawyers would increase competence and conduct⁶. Indeed, an Ordinance of Edward I in 1292, in recognising apprentices as a separate part of the emerging legal professions, might well have led to the creation of the Inns of Court.

Although the 14th century was much quieter in regulatory terms than the 13th century, it would appear that certainly by the time of the Inn's formation professional serjeants, apprentices and attorneys had achieved their monopoly on legal advice and representation. Also by then, much of what we now recognise as the regulatory requirements applying to practising lawyers were established: as one commentator has put it: "All in all, the medieval regulation of lawyers created the foundations of modern regulation"⁷.

2.2 From the Inn's formation to Victorian times

As a result of this early history, therefore, the distinction that we now have between barristers and other legal professions – particularly solicitors – was firmly established. It was also clear that call to the Bar and associated rights of audience originated from the judiciary, rather than being derived from statute. This led Lord Mansfield to declare in *R. v. Gray's Inn Benchers* in 1780 that⁸:

The original institution of the Inns of Court nowhere precisely appears, but it is certain that ... all the power they have concerning the admission to the Bar, is delegated to them from the judges.

As we know, the right of the Inns of Court to call to the Bar continues to this day. However, the regulation and discipline of barristers has gradually been transferred from the Inns to the

5. Again, in the interests of time, I have greatly simplified this part of the lecture in describing early developments. Rose (1998) provides a detailed review of the history of regulation of the legal profession in medieval England.

6. Such as the London Ordinance of 1280 (applying to the courts in the City of London, and probably resulted in a monopoly for serjeants) and the Ordinance of 1292 (which was not restricted to London and did not apply to serjeants, but created standards of competence for admission, and for integrity, and regulated the number of apprentices and attorneys who could be admitted to practise in each county).

7. Rose (1998).

8. (1780) 1 Doug 353, at page 364.

General Council of the Bar (formed in 1894) and then to the Bar Standards Board (BSB) from 2006.

Over time, though, rights of audience have been increasingly subject to statutory confirmation. I shall address the current position shortly, but let me draw this historical section to a close with a brief look at the position in the county courts. I have chosen an episode from the mid-1850s to take a short-cut through 500 years of history as well as to illustrate the professional and social elitism then achieved by the Bar.

The County Courts Act 1846 (“an Act for the more easy Recovery of Small Debts and Demands in England”) is the basis of the current county courts system⁹. Section 91 allowed both barristers and attorneys to appear, and was designed to dismantle the monopoly on appearing in the county courts then held by barristers. It was later viewed by some as having been “a great boon to the public”¹⁰ by removing technicalities in existing rights of audience. However, the Attorney-General (Sir Alexander Cockburn) claimed that attorneys had been colluding to fix prices and monopolise work in the county courts by excluding the Bar. He argued that this was to the detriment of the public¹¹, and that the monopoly had merely been transferred from barristers to attorneys¹².

Now my reason for sharing this with you is not so much the statutory outcome, but rather this extraordinary statement attributed to the Attorney-General by *Hansard* as the matter was discussed in Parliament¹³:

the business of the advocate in all our courts, superior or inferior, should be conducted by men of trained education as advocates, of established position as gentlemen, as men of honour. He did not believe that any one was visionary enough to imagine that it would be an advantage to dispense with the advocacy of a class of men who had enjoyed the highest education, and who were known to be influenced by the highest feelings if any monopoly at all were allowed to exist, it would surely be better to place it in the hands of a highly-educated class of men, rather than in those of an inferior class.

It is perhaps difficult to imagine such comments being made in the House of Commons today! Nevertheless, amendments to the 1846 Act were proposed and, despite more convincing opposing arguments, the Attorney-General’s view prevailed. A prohibition on the appearance of attorneys acting for other attorneys was included in the County Courts Act 1852, and the practice of solicitors instructing barristers to appear in county courts was thus fortified by the Attorney’s elitist advocacy!

While the medieval period might have provided the foundations for regulation, and the Victorian era the high-point in professional ascendancy, the 20th century marked a significant turning point in political and economic thinking about regulation as well as in social attitudes towards professional elites.

9. Baker (2002), at page 27.

10. Hansard Official Report, HC Deb 15 July 1851, Vol. 118, c. 783 (Sir George Strickland MP).

11. Hansard Official Report, HC Deb 15 July 1851, Vol. 118, c. 778.

12. Hansard Official Report, HC Deb 15 July 1851, Vol. 118, c. 780.

13. Hansard Official Report, HC Deb 15 July 1851, Vol. 118, cc. 779-780.

3. The Present

We now move to the turn of the 21st century. Interestingly, we find that some of the same concerns of the medieval era are still with us – for instance, a feeling that there are too many lawyers, a sense that the quality of practitioners is not universally high and ethical, and a view that the behaviour of lawyers is not always as it should be.

3.1 The stirrings of reform

In 2001, the Office of Fair Trading produced a report on *Competition in Professions*¹⁴, which recommended that unjustified restrictions on competition should be removed. The government of the time responded with a consultation paper and report into competition and regulation in the legal services market. That report¹⁵ concluded that “the current framework is out-dated, inflexible, over-complex and insufficiently accountable or transparent ... [and] that a thorough and independent investigation ... is needed”. There was also a lot of evidence that, in the pursuit of professional self-regulation, client complaints about lawyer performance and service were not being dealt with in a timely and effective way: to suggest that the regulatory functions were perceived to be discharged in a way that resulted in the legal professions appearing to ‘look after their own’ would probably be to put it as dispassionately as one might.

In July 2003, Sir David Clementi was appointed to carry out an independent review of the regulatory framework for legal services in England and Wales. He was an accountant by background and at the time chairman of the financial services giant, Prudential plc, and a deputy governor of the Bank of England.

Sir David reported in December 2004¹⁶ and, following a consultation paper from the then Department for Constitutional Affairs subtitled *Putting Consumers First*¹⁷, his recommendations were broadly adopted in the Legal Services Act 2007.

3.2 The Legal Services Act 2007

The 2007 Act is large (with 214 sections and 24 Schedules) and has a number of notable features:

- (1) It defined ‘barrister’ for the first time in statute – as an individual who has been called to the Bar by an Inn of Court and is not disbarred¹⁸. In doing this, the Act recognised the role and right of the Inns in the conferment of the professional title.
- (2) It sets out eight statutory regulatory objectives for legal services regulation. These include¹⁹: protecting and promoting the public interest; supporting the constitutional principle of the rule of law; encouraging an independent and strong legal profession; and promoting and maintaining adherence to a number of professional principles. Those professional principles include²⁰ such things as acting with independence and integrity, complying with the duty to the court to act with independence in the interests of justice, acting in the best interests of clients, keeping clients’ affairs confidential, and

14. Office of Fair Trading (2001).

15. See Department for Constitutional Affairs (2003).

16. Clementi (2004).

17. Department for Constitutional Affairs (2005).

18. Legal Services Act 2007, section 207(1).

19. Legal Services Act 2007, section 1(1).

20. Legal Services Act 2007, section 1(3).

maintaining proper standards of work. I would hope that all barristers would consider these objectives and principles to be entirely appropriate for an effective regulatory framework.

- (3) The Act confirms six 'reserved legal activities' for which suitable qualification and authorisation are required before they can be provided to the public²¹. The reserved activities include the exercise of a right of audience, thus ensuring that the principal skill of a barrister can only be offered to the fee-paying public by those who are appropriately trained and qualified. It is now a criminal offence to perform a reserved activity if not entitled to do so²², as well as to pretend to be entitled, or to use a name, title or description to imply falsely that one is entitled²³, and specifically to pretend to be a barrister when not so qualified²⁴.
- (4) Recognising that the professional bodies had historically carried out both representative and regulatory functions, the 2007 Act requires that those functions should now be discharged separately, so that representative activities do not prejudice the exercise of independent regulatory functions²⁵. It is this requirement that led to the establishment of the BSB as the regulatory arm of the Bar Council.
- (5) It established the Legal Services Board (LSB) as a new legal services regulator to provide consistent oversight regulation²⁶ of front-line regulators such as the BSB. It also created the Office for Legal Complaints and the Legal Ombudsman to handle consumers' service complaints in respect of all regulated persons, subject to oversight by the LSB²⁷.
- (6) Finally, in line with Sir David Clementi's liberalising intentions, the Act allows the creation of alternative business structures (ABSs) through which different types of lawyers and non-lawyers can own, invest in and manage legal practices²⁸. Since the implementation of these provisions, about 1,000 – roughly 10% of all legal practices – are now established as ABSs, including a handful regulated by the BSB but many more licensed by the Solicitors Regulation Authority that have barristers as members.

The Legal Services Act 2007 therefore now includes the exercise of a right of audience in its list of reserved legal activities²⁹. It covers the right to appear before and address a court, including the right to call and examine witnesses³⁰. The BSB is, through the framework of the 2007 Act, one of several approved regulatory bodies that may authorise those who are appropriately qualified to carry on the reserved activity of exercising rights of audience³¹.

The Act also contains a number of exemptions. The expectation seems to be that anyone who exercises rights of audience (other than as a litigant in person) will be appropriately qualified, because – unlike some of the other reserved activities – there is no exemption in respect of someone appearing 'otherwise than for, or in expectation of, any fee, gain or reward'. However, judicial discretion will exist to allow a friend to represent a party without payment.

21. Legal Services Act 2007, section 12 and Schedule 2.

22. Legal Services Act 2007, section 14.

23. Legal Services Act 2007, section 17.

24. Legal Services Act 2007, section 181.

25. Legal Services Act 2007, section 30

26. Legal Services Act 2007, section 2 and Schedule 1.

27. Legal Services Act 2007, section 114 and Schedule 15.

28. Legal Services Act 2007, Part V and Schedules 10-14.

29. Legal Services Act 2007, section 12(1)(a).

30. Legal Services Act 2007, Schedule 2, paragraph 3.

31. Legal Services Act 2007, sections 18 and 20, and Schedule 4 (though rights that existed before the Act came into force in 2010 were preserved: section 22 and Schedule 5, paragraphs 1 and 4).

We also have the sometimes vexed issue of 'McKenzie friends' that can, in effect, drive a coach and horses through the Act's requirements for legally qualified representation.

Through this regulatory framework, therefore, barristers are now regulated by the BSB, and subject to its Code of Conduct and disciplinary arrangements (all contained in the BSB Handbook), and through which they are authorised by a practising certificate to pursue their professional calling, in return for paying an annual practising certificate fee.

In relation to disciplinary matters, the BSB investigates allegations of professional misconduct and, if taken further, then pursues charges before a disciplinary tribunal. Tribunals are appointed and administered by the Bar Tribunal and Adjudication Service, on behalf of the Council of the Inns of Court.

For its own part, the BSB is looking to modernise its approach to regulation, training and decision-making. Some might suggest that it is an open question whether in doing so it is achieving more targeted, effective, proportionate and cost-effective regulation, or is succumbing to 'regulatory creep' by straying into areas of professional activity that should perhaps be beyond a regulator's remit.

And that brings me to the final part of this lecture: the future.

4. The Future

What happens in the future to legal services regulation and to barristers in particular is, to my mind, dependent on two factors. The first is what might be considered to be wrong or misconceived in the current framework; and the second is the political will to do anything about that – in circumstances where political will is both consumed and overshadowed by Brexit.

4.1 Where the 2007 Act falls short

So let me first try to articulate the shortcomings of the Legal Services Act 2007. I think there are six.

- (1) As I have already indicated, the Act is a large one. Part of the reason for this is that many in the legal professions at the time the Bill was making its way through Parliament – and, indeed, supported by the many lawyers who inhabit the Palace of Westminster – were concerned. They feared that a fundamental shift away from self-regulation could provide too much discretion and latitude to a new style of regulator (with the involvement of lay persons) who might not understand well enough the particular value and circumstances of legal practice. Consequently, much prescriptive and protective detail was ‘hard-wired’ into the Act, and that has now left us with a rather inflexible statutory structure that often requires over-stretched Parliamentary or ministerial time and attention to use, let alone to change.
- (2) As I referred to earlier, the Act contains regulatory objectives and principles to which few lawyers would take exception. However, it also contains regulatory objectives that are more challenging. For example, the objective to protect and promote the public interest³² does not always sit easily with another to protect and promote the interests of consumers³³, or with yet another to promote competition in the provision of legal services³⁴.

There are also objectives to improve access to justice³⁵ and to increase public understanding of citizens’ legal rights and duties³⁶. Given the complexity of the underlying issues, and their interdependency with so many other social and political factors, one might question whether these are entirely appropriate outcomes to impose on regulators.

The eight regulatory objectives are also presented with no indication of an overarching purpose or of hierarchy among them, which then provides insufficient guidance to regulators seeking to balance competing aims.

- (3) I have already referred to the reserved legal activities. There are six³⁷, and they form the pivot around which the whole Act revolves. Thus, the regulators are approved in relation to one or more of the reserved activities³⁸; those approved regulators then authorise individuals to practise one or more of those activities³⁹; one of the new alternative business structures (ABS) can only be licensed by a regulator in respect of a

32. Legal Services Act 2007, section 1(1)(a).

33. Legal Services Act 2007, section 1(1)(d).

34. Legal Services Act 2007, section 1(1)(e).

35. Legal Services Act 2007, section 1(1)(c).

36. Legal Services Act 2007, section 1(1)(g).

37. Legal Services Act 2007, section 12 and Schedule 2.

38. Legal Services Act 2007, section 20 and Schedule 4.

39. Legal Services Act 2007, sections 18 and 20(6).

reserved activity⁴⁰; each ABS must have an approved head of legal practice who must also be personally authorised as a practitioner in respect of at least one of the reserved activities for which the ABS is licensed⁴¹; and although the Legal Ombudsman can consider complaints about poor service in relation to *any* legal activity undertaken by a practitioner, the Ombudsman can only do so if that practitioner is authorised for one or more of the reserved activities⁴².

While this might appear at first blush to present a reasonable and even robust approach to regulation, the problem is that the six reserved activities are in fact largely an accident of history or the result of political bargaining⁴³. There is no modern, risk-based foundation for what is reserved or not reserved.

I would agree entirely that the exercise of a right of audience⁴⁴ and conducting litigation⁴⁵ are two public interest legal activities that are properly reserved only to those who are suitably trained and qualified. However, also included are notarial activities⁴⁶ (which none of the mainstream legal regulators are able to authorise) and the administration of oaths⁴⁷ (which, although a reserved legal activity, barely features – if it features at all – in the training programme for call to the Bar – or for any other legal profession, for that matter).

The remaining two reserved activities are often referred to as the conveyancing and probate reservations. However, it is not conveyancing and the administration of estates that are reserved but, respectively, *preparation of the instrument* of transfer or charge of property⁴⁸ and *preparing papers* on which to found or oppose a grant of probate or letters of administration⁴⁹. These are thus incredibly narrow reservations, and do not in themselves address the main risk for consumers in these circumstances, which is the potentially large amounts of money and assets involved in property purchase or the administration of a deceased's assets and liabilities.

- (4) The Act requires that those who wish to carry on reserved activities for members of the public must first be authorised by an appropriate regulator. The Act was a product of its time, and the principal route to authorisation was through the award of one of the professional titles, such as barrister or solicitor. In practice, the award of the title barrister and solicitor usually carries authorisation for five of the six reserved activities (that is, all save notarial activities) – as, indeed, does an ABS licence.

While this might appear to be a benefit, given the complexities of modern legal practice, it is hardly risk-based. I have, for instance, spoken to many litigators who would regard themselves as a liability if engaging in conveyancing transactions or applications for probate, as well as to many corporate transactional lawyers who acknowledge that they would be well out of their depth in, say, clinical negligence litigation.

40. Legal Services Act 2007, sections 71(1) and 85.

41. Legal Services Act 2007, Schedule 11, paragraph 11(2) and 3(b).

42. Legal Services Act 2007, section 128(1).

43. See Mayson & Marley (2010) 'The regulation of legal services: reserved legal activities – history and rationale', Legal Services Institute; available at <https://stephenmayson.files.wordpress.com/2013/08/mayson-marley-2010-reserved-legal-activities-history-and-rationale.pdf>.

44. Legal Services Act 2007, section 12(1)(a) and Schedule 2, paragraph 3.

45. Legal Services Act 2007, section 12(1)(b) and Schedule 2, paragraph 4.

46. Legal Services Act 2007, section 12(1)(e) and Schedule 2, paragraph 7.

47. Legal Services Act 2007, section 12(1)(f) and Schedule 2, paragraph 8.

48. Legal Services Act 2007, section 12(1)(c) and Schedule 2, paragraph 5.

49. Legal Services Act 2007, section 12(1)(d) and Schedule 2, paragraph 6.

On top of this, there is of course the prospect of different title-based regulators having authority to regulate the same reserved legal activity. For example, both the BSB and Solicitors Regulation Authority (for solicitors with rights of audience in the superior courts) will be prescribing different routes to authorisation and applying different codes of conduct and discipline to advocates potentially appearing in the same courts and perhaps even in the same cases. Solicitors and licensed conveyancers could be on different sides of the same house purchase, but subject to different authorisation, conduct and discipline regimes.

What is a consumer to make of this potential for overlap, duplication and inconsistency? And in new multidisciplinary businesses where practitioners from differing professional backgrounds come together in the same business entity, which regulator's approach should prevail? We already have barristers in firms regulated by the SRA, so are we comfortable, as now, that where there is a conflict, the entity regulator's rules take precedence⁵⁰?

But there is, perhaps, an even greater 'sting in the tail' of authorisation through professional title. Once an individual is authorised as a barrister or solicitor for even just one of the reserved activities, their regulator will then assume jurisdiction over *all* of the activities carried out by that person, both reserved and non-reserved, even though Parliament has determined that *only* reserved activities *must* have regulatory attention⁵¹. A barrister and solicitor are therefore forced bear the burden and cost of all of their professional activities being subject to regulation where Parliament has not judged the inherent risks of all of those activities to require it.

- (5) The distinction between the reserved and other (non-reserved) legal activities, combined with authorisation and regulation flowing from a professional title, creates a 'regulatory gap' or, in other parlance, an unlevel playing field that potentially disadvantages qualified lawyers. Once title is awarded and an individual is in practice (with a valid practising certificate) then, as I have just said, all of that practitioner's activities are subject to regulation – even if he or she only practises in non-reserved areas. On the other hand, because non-reserved legal activities do not require authorisation, someone who is not legally qualified can legitimately offer those services to the public for payment without being subject to regulation (other than the general law and normal consumer protections).

The preparation of wills is often cited as the example here. A barrister or solicitor advising on this would be regulated (with the attendant burden and cost – but also with, of course, the consequent protection and redress available to a dissatisfied client). The adviser who is not legally qualified does not need to demonstrate any training or certification, carry any indemnity insurance, or offer any prospect of redress should things not go to plan – which, of course, in the case of a will might not be until many years later, when the client is dead and can no longer complain. Does it not seem a faintly absurd structure under which the unqualified are not subject to regulation – indeed, *cannot* be regulated by a front-line legal regulator even if they wanted to be – whereas those who are qualified cannot escape regulation even though they ought to be better placed to provide competent advice⁵² and Parliament does not mandate it?

50. Legal Services Act 2007, section 52(4).

51. This follows from the previous approach to professional self-regulation effectively being preserved by the 2007 Act allowing the regulators under the Act (such as the BSB) to continue with the pre-existing regulatory arrangements: Legal Services Act 2007, section 21 and Schedule 4, paragraph 2.

52. The operative phrase here is 'ought to be': LSB research has shown issues with the quality of wills and customer service being provided both by solicitors and unregulated will-writers: see Legal Services Board (2013).

- (6) The final significant flaw in the 2007 Act is that although it requires the functional separation of regulatory and representative activities⁵³, it does not require the structural, financial or material separation of the respective bodies carrying them out. Thus, for example, the BSB shares premises with the Bar Council, and uses many of the same resources such as technology. It also has to bid for funding from the Bar Council to cover its regulatory activities – even though that money is actually collected by the BSB through practising certificate fees. The separation and independence between regulatory and representative activities is far from complete, and gives rise to some tension between the BSB and Bar Council, as well as to perceptions from those outside the system that there is at least a prospect of ‘regulatory capture’ of the regulator by those whom it regulates.

In short, then, there are some significant shortcomings in the present structure: inflexibility; competing and inappropriate regulatory objectives; a pivotal set of reserved activities that are anachronistic and do not necessarily include all activities that ought to be regulated; title-based authorisation that results in additional burden and cost in relation to some activities being regulated that do not need to be; a regulatory gap that exposes consumers to potential harm and puts qualified practitioners at a competitive disadvantage; and incomplete separation of regulation and representation.

To complete the picture, I should probably also add that Sir David Clementi finished his work on which the 2007 Act is based in 2004. The structure we have therefore pre-dates the global financial crisis (which has arguably led to austerity, shortfalls in the funding of legal aid and the wider courts and justice system, and then to a rise in litigants-in-person). It also pre-dates a use of technology that has become more extensive and pervasive, and the rise of artificial intelligence in law. The world that existed in 2004 simply does not exist in the same way now, and the inherent tensions in the 2007 Act have become increasingly apparent.

4.2 The momentum for further reform

If the case for change is there, then the second factor relates to political will. In June 2013, the Ministry of Justice issued a call for evidence in relation to the regulatory framework for legal services, inviting views on the regulatory burdens on practitioners and how they could be reduced while ensuring appropriate protection for consumers. Perhaps not surprisingly, the responses produced no consensus on a longer-term solution or, indeed, any suggestions acceptable to government for ‘quick-win’ amendments to the 2007 Act.⁵⁴

In July 2014, the then Secretary of State for Justice, Chris Grayling, called a Ministerial Summit of legal services regulators. As a result of this, the regulators were invited to consolidate their collective strategic view of the difficulties they were experiencing under the Legal Services Act 2007 and related legislation and to identify possible legislative options for creating a regulatory framework that would better support an effective, diverse and healthy legal services sector. Cross-regulator discussions then took place (chaired, as it happens, by me), and the regulators’ views were published (as ‘the Legislative Options Review’⁵⁵) and submitted to Ministers in July 2015.

Shortly before the Legislative Options Review report was published, the (new) Secretary of State, Michael Gove, said in his first appearance before the Justice Select Committee in July 2015 that there would be a review of the Legal Services Act within the lifetime of that

53. Legal Services Act 2007, section 30.

54. Ministry of Justice (2013).

55. Legislative Options Review (2015). The LSB subsequently developed and published its own more detailed views on the options: Legal Services Board (2016).

Parliament⁵⁶. Later that year, in November 2015, HM Treasury announced in a Command Paper that the government would consult in spring 2016 on removing barriers to entry for alternative business models in legal services, and on making legal service regulators independent from their representative bodies⁵⁷.

Then in January 2016, the Competition and Markets Authority launched a market study into the supply of legal services in England and Wales. Its work took a year, and its final report was published in December 2016⁵⁸. The principal conclusion from its review was that the legal services sector is not working well for individual consumers and small businesses, largely because those consumers lack the experience and information they need to understand their needs, to make informed choices, and to engage confidently with providers of legal services.

More importantly, perhaps, the CMA also concluded that these issues are likely to increase over time and *make the current regulatory framework unsustainable in the long run* (especially since some aspects of that framework do not meet the better regulation principles⁵⁹). The CMA also concluded that “the majority of issues cannot be addressed by tweaking the current framework but would be better addressed through legislative and/or structural changes by the government”⁶⁰. Accordingly – in parallels with its predecessor, the OFT, in 2001 – the CMA recommended that government should undertake a review of the current regulatory framework.

4.3 The Brexit pause

By the end of 2016, therefore, there would appear to have been a degree of acceptance that something needs to be done, and political momentum towards doing it. However, during the period of the CMA market study, and before the government was able to respond to the CMA’s recommendations, both the EU Referendum and a General Election took place. As a consequence, the political backdrop changed considerably. Not entirely surprisingly, when the government did respond formally to the CMA report in December 2017, it did not feel able to commit to the fundamental review recommended by the CMA. It did, however, agree that it would “continue to reflect on the potential need for such a review”⁶¹.

The government’s reluctance to commission a review in current circumstances is understandable. Some, however, use this as a basis for suggesting that now is not the time to be considering regulatory change at all. I disagree. In the context of the outcome of the EU Referendum and the UK’s impending exit from the European Union, surely it is even more important that the regulatory framework for legal services is fit for the future. The democratic intention that is central to ‘taking back control’ presumes full confidence in our domestic rule of law and legal institutions, as well as maintaining our performance and competitive position in the global economy. This in turn requires that the supporting regulatory structure for legal services is as robust as it can be – which must be in question given the CMA’s conclusion that the current regulatory framework is unlikely to be sustainable in the future.

56. See Justice Select Committee (2015), Question 27.

57. HM Treasury (2015).

58. Competition & Markets Authority (2016).

59. These are the principles under which any regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed; they are confirmed in the case of legal services regulation by the Legal Services Act 2007, section 28(3)(a).

60. Competition & Markets Authority (2016), at page 213.

61. Ministry of Justice (2017).

It seems to me that this period of government hiatus in regulatory reform is exactly the right time for some serious thinking to be undertaken. When reform comes, we would not wish it to be rushed or ill-considered.

4.4 What next?

As a consequence of these various initiatives, we can now with a degree of confidence identify the issues that any review and discussion about the future of legal services regulation will need to address. The agenda for serious consideration has already been set by the Legislative Options Review and the CMA market study recommendations.

When a review takes place, perhaps of most interest to barristers will be whether regulation should primarily be focused on one or other (or both) of legal activities or the providers who carry them out (whether individuals, professions, or organisations). Of particular relevance is the future role and regulation of the professional title. In this context, it is worth noting that, in its market study, the CMA said that, for the longer term⁶²:

we consider that, in a more competitive legal sector, with appropriately scoped risk-based regulation, title might cease to be subject to statutory regulation. Instead, relevant professions could be responsible for the title.

This, and the other issues for the future, are not necessarily straightforward matters with an obvious solution. All regulation is a balancing act of competing interests. However, the outcome will affect all current and future practising lawyers, both in respect of what it takes to become and remain a practitioner, and how much it costs to do so.

62. Competition & Markets Authority (2016), at page 216.

5. Conclusion

Regulation, then, is not just a modern phenomenon. Nor, even though we have a relatively inflexible statutory framework for current regulation, is it simply a static product of a prior moment. Formal regulation evolves to reflect changed circumstances and expectations. When the weight of those circumstances and expectations becomes too great for the formal framework to bear, pressure arises for reform. We are on the cusp of that now.

However, in closing, I also wish to emphasise that formal, statutory regulation is not the only way of regulating the behaviour and performance of barristers. In many ways, informal influences are more powerful. There is a strong sense of professional and collegiate identity and obligation built into the very notion of what it means to be a member of the Bar. We can call these influences 'norms', or even 'peer pressure'. But whatever we call them, we should not underestimate their power. And we should be careful to ensure that formal regulation does not undermine or displace them – because no formal system can ever be flexible or pervasive enough to influence professional behaviour at the moments when the right response matters most.

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