STEPHEN MAYSON

An independent mind

June 2017

CONFIDENCE IN REGULATION

1. Introduction

This paper[1] addresses 'trust and the market' and building confidence within the sphere of legal services regulation. I shall therefore open with the observation (or reminder) that regulation is a public intervention in otherwise private transactions and free markets. It must therefore stem from a political judgement that we should not have complete trust and confidence, and should instead rely on the intervention in the market. The issue of how confidence in regulation develops and is then sustained is a fascinating one. It begs preliminary questions of what we mean by 'confidence', and from whose standpoint we are assessing it.

So let me start with definitions of 'confidence'[2]. I am going to skate over the definition of confidence as "belief in one's own abilities". This might also be characterised as *internal* confidence, and is more usually referred to, of course, as 'self-confidence'. It can be assessed from any external standpoint with reference to both the regulated and the regulator. In relation to both, I would make the preliminary observation that there is often the finest of lines between self-confidence and over-confidence (arrogance, even).

For regulators, it seems to me that the biggest danger here is the self-belief that 'we know best'. This is not to deny the importance of leadership, but to caution against getting too far ahead of those who are regulated. For instance, the previous and present challenges for the SRA in moving to outcomes-focused regulation, a shorter code of conduct, the Solicitors Qualifying Examination, and the approach to solicitors practising in unregulated entities, all demonstrate, not that such developments are

[1] The paper is based on a keynote address to the Solicitors Regulation Authority conference on 'Trust and the Market', held in London on 22 June 2017. I am expressing personal views only, and nothing should be attributed to or associated with any organisation with which I have a connection.

[2] For the purposes of this paper, I am ignoring the notion of confidence as something confided, as in 'in confidence' or 'confidential', as well as the derogatory use of the word, as in the expression 'confidence trick': it is not that these meanings are necessarily inappropriate in the context of regulation, but I will leave it to the reader's imagination to work out any possible relevance!

misguided, but that the tightrope between regulatory leadership and losing the confidence of the regulated community can be taut and fraught.

The most relevant definition for my purposes today is confidence as "a feeling of trust in a person or thing" or, in other words, trust in someone or something *external* to oneself. This idea of confidence has two potential objects – a person or a thing. In the context of legal services regulation, that seems to me to boil down to the 'thing' being the structure and framework of regulation, and the 'people' being those who populate that framework as regulators, providers, consumers, the wider public, and government.

2. Confidence in the structure

First, then, can we have confidence in the structure? This is the structure created by the Legal Services Act 2007 and related legislation: the objectives set out in the Act; the infrastructure of oversight and front-line regulation established by it, and the regulatory codes, outcomes, rules and guidance promulgated by the regulators; and the relationships hard-wired into this structure between government and the Legal Services Board, between the Board and front-line regulators, between front-line regulators and professional bodies, between regulators and the regulated, and between both the regulators and the regulated in their dealings with clients and consumers.

From section 1 of the Legal Services Act onwards, there is inherent – and often deliberate – tension built into the very framework of regulation. For example:

- The eight regulatory objectives in section 1 do not all sit happily or consistently together.
- The partial and anachronistic list of reserved legal activities[3] creates an acknowledged regulatory gap through which those who *cannot* be regulated are at liberty to provide important legal services to consumers with, effectively, a state-backed competitive advantage.
- The pragmatic artifice of establishing some of the professional bodies as 'approved regulators' with an obligation to separate their regulatory functions has an inevitable potential for tension and conflict (which potential, as we now know, has been realised).
- The Act maintains a multitude of front-line regulators, a number of which regulate the same legal activities as others, and who increasingly regulate the activities or workplaces of individuals whose primary professional title is regulated by another.

From this perspective, it is perhaps a stretch to express unreserved confidence in the current structural framework. Indeed, we should do well to remember that this framework itself owes its origins to a *lack of confidence* and trust in the former 'regulatory maze' of self-regulation and underwhelming management of client complaints. Extraordinarily, here we are barely ten years later with the Competition

[3] The origins of reservation are explored in Mayson & Marley (2010) *The regulation of legal services: reserved legal activities – history and rationale*, available at: www.stephenmayson.com/downloads.

and Markets Authority concluding after a year-long study of the market for legal services[4] that the sector is still not working well for consumers, and that the current regulatory framework is not sustainable in the long run.

So the structure we have does not inspire full confidence, and we await the Ministry of Justice's (now overdue) response to the CMA report in the hope that their acceptance of the CMA's recommendations will lead to improved confidence in the overall scope and framework of regulation.

3. Confidence in the people

Second, then, can we have confidence in the people who populate the structure? Going back to the definition of confidence, it is expressed as 'a feeling' 'of trust'. In other words, confidence is a state of mind, which is necessarily influenced and motivated by many things. Consequently, improved confidence is not inevitably the result of a straightforward correlation between action and outcome. And trust in people can only arise from a relationship, and therefore from experience and interaction over time: trust is not simply the product or outcome of structure or mandate.

If, as I believe, the fundamental purpose of regulation is to promote and support the public interest, then *public* confidence in legal services regulation is a paramount test. So too is the ability of consumers to navigate effectively through their experience of seeking legal advice and representation and, if things go wrong, to benefit from the protections they were promised. Again, the CMA's conclusions on these aspects of legal services do not provide a ringing endorsement.

Taking the standpoint of consumers, there are a couple of major impediments to their assessment of those who provide regulated legal services:

- Consumers often find lawyers and legal services relatively difficult to access and afford. As many have pointed out over the years, and as most recently confirmed by the CMA market study, most consumers of legal services are occasional buyers, who often lack experience and information to understand their legal needs, to make informed choices, and to engage confidently with providers of legal services. As a consequence, the opportunities for feelings of confidence and trust to develop are very limited.

- Consumers also have a sense that professionals (and their regulators) naturally 'look after their own'. Countering this requires robust, even-handed, public and cost-effective decisions by regulators.

Against this background, the case for consumer protection to engender confidence in legal services is high – and possibly even errs naturally towards the paternalistic. Regulators often have to stand as a proxy for public confidence. In exercising their role as gate-keepers – in sparing consumers from incompetent and unethical providers –

[4] Competition and Markets Authority (2016) *Legal Services Market Study: Final Report*, available at: https://assets.publishing.service.gov.uk/media/5887374d40f0b6593700001a/legal-services-market-study-final-report.pdf.

regulators often favour caution in keeping the gate closed rather than taking more risks and letting consumers and the market decide. In these senses, legal services regulation imposes a normative judgement that consumers should not be entirely free to make their own choices. For consumers who rely on such guardianship, this is a form of *surrogate* confidence; for those consumers and aspirant competitors who are frustrated by this paternalistic approach, confidence is almost by definition low to non-existent.

Turning next to the confidence in regulators expressed by the regulated, the tension points influencing this assessment stem largely from five factors:

- First, the requirements of the framework that the regulators must have a lay chair and a lay majority lead to the 'easy' accusation from practitioners that the regulators simply do not understand the demands and nuances of practice, and are therefore not truly capable of imposing regulatory obligations or standing in judgement.
- Closely allied to the first is the perception that regulators seek to perpetuate their existence, make work for themselves to do, interfere more and more, and in doing so then 'over-reach' their regulatory remit and simply pass on the increasing costs and burdens to hard-pressed practitioners.
- Third, there can be a perceived difference between the regulatory strategy and principles articulated by the senior leaders of the regulators, and the experience of the regulated in dealing with staff responsible for authorisation, supervision and enforcement.
- Fourth, there are concerns that decisions made in the white heat of professional practice might later be judged negatively by the regulator in the cold light of hindsight.
- Fifth, regulators are often thought to take too long to make decisions. While speed of decision-making, particularly in relation to authorisation and enforcement is undoubtedly important – and often commercially time-sensitive – I confess that I am agnostic on this one because, on the other hand, shortening timescales or imposing absolute limits can also increase the rate of mistakes in regulatory decision-making, which equally will not enhance confidence.

Such perceptions inevitably work to undermine or inhibit trust and confidence in regulators. To the extent that these perceptions are unwelcome to regulators, the remedy can only be to work harder on the relationships that will lead to greater feelings of trust. This requires even more communication, consultation, explanation, and demonstrated understanding. I accept that this requires time and effort – but then, good relationships and trust-building always do.

4. Conclusion

Framing confidence in terms of feelings, trust, and belief is helpful because it reminds us that these are all internal states of mind. It reinforces the proposition that building relationships and trust is therefore as much about psychology, emotion, empathy and culture as it is about structure.

In our context of legal services, the challenges and processes of building confidence are further complicated by a framework that has multiple stakeholders whose interests are not always aligned, and in which there are inherent, inevitable, and possibly even necessary, tensions.

For me, confidence is still not where it could be or should be. Without yet offering definitive conclusions or solutions to the mission of building greater confidence and trust in the market for legal services, I would suggest that the following five issues are at least worth further debate and consideration:

- First, we should reflect: there has been profound change in legal services in recent years, with developments now proceeding at an exponential rate. These have affected organisational structure and staffing, funding and practice economics, and the sources and nature of competition; and these have in turn been influenced by the evolving role of in-house legal departments, and by technological innovation and increasing concerns about cybersecurity. Our regulatory framework reflects the world of 2007 – and, indeed (given that so much was passported into it), of decades and centuries before then. That world no longer exists.
- Second, we should consider revising the regulatory objectives to put front and centre the public interest in the rule of law, in the administration of justice, and in the legitimate participation and protection of citizens within the justice system and legal services sector. Such changes should benefit society, consumers, regulators, and providers.
- Third, we should address the regulatory gap by revising the scope of the reserved activities to reflect a modern, risk-based and proportionate response to public interest and consumer protection needs. A review of this gap would increase confidence that the right activities are being regulated for the right reasons, that low-risk activities are not being regulated for the wrong reasons, and that innovation and new entrants are not compromising consumer protection.
- Fourth, we must review how best to secure the independence of legal services regulation from both government and representative bodies, with the likely consequence that this could also affect regulation of professional titles and the role of current regulators in that. The balance between appropriate regulatory intervention to secure public interest objectives and maintaining the 'gold standard' of an independent market brand is potentially at risk when the roles of government, regulators and professional bodies are tangled.
- Finally, we should allow the regulated community greater scope for behaving like high-quality, ethical adults, with regulatory attention focused on the fundamentals rather than the details, but then be tougher on those who transgress on those fundamentals. This should encourage greater confidence among practitioners that they are not being over-burdened and micro-managed; and it should give consumers greater confidence that enforcement is properly carried out.

The continuing legitimacy of regulation and regulators is to some significant degree founded on confidence. We should not allow the 'excuse' of Brexit to impede or delay the development of more effective legal services regulation.

On the contrary, if we truly believe in the rule of law and in the global advantage of English law as a governing law of choice, if we truly believe in the effective administration of justice and access to it, if we truly value the international standing and economic contribution of our legal services and dispute resolution, and if we truly believe in the need for high-quality, ethical and independent practitioners and judges, then we owe it to ourselves and to future generations to act now to secure both domestic and international confidence in modern, proportionate, cost-effective and accountable regulation of legal services.

Now is the time to act, so that we can build confidence in legal services, and to secure a better future in which the regulatory maze does not morph into a regulatory morass.