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An independent mind

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THE LEGAL SERVICES ACT 2007:
TEN YEARS ON, AND 'MIND THE GAPS'

1. Introduction

In December 2016, the Competition and Markets Authority completed a year-long study of the market for legal services. Its headline conclusions were that the legal services sector is not working well for consumers, and that the current regulatory framework is not sustainable in the long run. In this paper, I want to explore why these conclusions are both extraordinary and important, and what they might now herald for the regulation of legal services[1].

2. Extraordinary conclusions

The CMA's report[2] and conclusions are extraordinary because we are only just approaching the tenth anniversary of the Legal Services Act 2007, which provides the current framework for the regulation of legal services. The Act itself was in part the outcome of a report in 2001 by the Office of Fair Trading[3] (the CMA's predecessor), and was followed by a comprehensive independent review of legal services regulation[4] in 2003-4 by Sir David Clementi (an accountant by training, and at that time chairman of Prudential Assurance and a deputy governor of the Bank of England).

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[1] This paper is an extended version of a pre-dinner talk I delivered as a Bencher at Lincoln's Inn on 22 May 2017. In that talk, the content was focused more directly on barristers, while this paper has a broader scope. Both the talk and this paper address only the position in England & Wales.

[2] 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.

[3] Office of Fair Trading (2001) *Competition in Professions*, available at: http://webarchive.nationalarchives.gov.uk/20140402142426/http:/www.oft.gov.uk/shared_oft/reports/professional_bodies/oft328.pdf.

[4] Clementi (2004) *Review of the Regulatory Framework for Legal Services in England & Wales*, available at: http://webarchive.nationalarchives.gov.uk/+/http:/www.legal-services-review.org.uk/content/report/index.htm.

It is also extraordinary because the political motivation for implementing the recommended reforms was perhaps best expressed in the title of the White Paper that led to the new legislation: that title was, "Putting Consumers First"[5].

And yet here we are, less than ten years later, where the political intent has apparently not been met, and the CMA judges the reformed regulatory structure already not to be sufficiently fit for future purpose.

In summary, the Legal Services Act created a new framework for the regulation of legal services and those who provide them, and has five major features:

- First, it sets out eight regulatory objectives that regulators must promote. These include objectives that many lawyers would regard as unobjectionable (such as the public interest, the constitutional principle of the rule of law, an independent and strong legal profession), as well as a set of professional principles. It also has some possibly more contentious objectives, such as promoting competition and consumer interests.
- Second, the Act affirmed the six pre-existing reserved legal activities, which are legal services that can only be delivered by those who are appropriately qualified and authorised. These activities include, for instance, exercising rights of audience and rights to conduct litigation, and administering oaths.
- Third, it created the Legal Services Board as an overarching regulator, with a lay chair and a lay majority, to oversee ten front-line regulators[6], along with the Office for Legal Complaints and the Legal Ombudsman to provide a single point of complaint resolution and redress for dissatisfied consumers of legal services.
- Fourth, it enshrined in statute the principle of the independence of the regulation of professionals from the representation of them. In doing so, it led to the creation of the Bar Standards Board and the Solicitors Regulation Authority as the separate regulatory arms of the Bar Council and The Law Society.
- Fifth, the Act allowed the participation in law firms of those who are not legally qualified, whether as owners, managers or investors: these are the so-called 'alternative business structures' (or ABS). This reform led to a very significant shift from a regulatory position before the Act under which law firms had to be wholly owned by qualified lawyers to one where they could be wholly owned by individuals who are not qualified.

[5] Department for Constitutional Affairs (2005) *The Future of Legal Services: Putting Consumers First*, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/272192/6679.pdf.

[6] They are: Solicitors Regulation Authority, Bar Standards Board, Master of the Faculties, CILEx Regulation, Council for Licensed Conveyancers, Intellectual Property Regulation Board, Costs Lawyers Standards Board, Institute of Chartered Accountants in England & Wales, Institute of Chartered Accountants in Scotland, and Association of Chartered Certified Accountants.

3. Falling short

There are a number of ways in which the Act falls short of a modern, fit-for-purpose framework for the regulation of legal services, and these shortcomings support the CMA's conclusions.

First, the Act's eight regulatory objectives are not expressed in any hierarchy or with any overriding objective. Consequently, some of them potentially conflict with each other: for example, it is not always in the public interest, or consistent with the rule of law or the effective administration of justice, that a client's interests (or consumer interests more generally) should prevail.

Equally, some of the objectives are arguably beyond the remit of a regulator's control, influence or accountability, and then should probably not be regulatory objectives at all. For example, improving access to justice depends on many factors, of which regulation is but one. Similarly, increasing the public understanding of a citizen's legal rights and duties is to my mind a responsibility that does not lie easily or appropriately with a regulator funded entirely by practitioners.

Second, the separation between regulation and representation is partial and incomplete. For example, both the Bar Council and The Law Society remain on the face of the Act as the 'approved regulators', even though their regulatory functions are now discharged by the Bar Standards Board and the Solicitors Regulation Authority. However, the relationship between the Law Society and the SRA has never been an entirely happy or comfortable one. Like the BSB, the SRA must effectively 'bid' for funding and resources from its approved regulator, which gives rise from time to time to claims of interference or lack of full independence of the regulators from their representative bodies.

Third, the six reserved legal activities are not the result of any modern, targeted, risk-based and proportionate approach to regulation but are rather historical anachronisms that often emerged from political bartering and expedience in centuries past[7].

4. CMA recommendations

To address these perceived shortcomings, the CMA made some recommendations to the regulators that they can be expected to implement within the terms of the current legislation. But they also made two additional recommendations to the government because they require action beyond the structure and powers of the Legal Services Act. The first recommendation is that the government should "as soon as possible" carry out a review of the independence of regulators both from the professions and from government. Such a review was planned in 2016 but was postponed pending the outcome of the CMA report. The CMA has now made its position clear that a review is indeed needed.

[7] 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.

The CMA's second recommendation is that a longer-term review of the regulatory framework should be carried out to ensure that it becomes more flexible, with regulation being better targeted at higher-risk activities, more proportionate and cost-effective in its approach, and with a shift away from regulation attaching solely to professional titles. Such a review would inevitably affect the professions, in terms of what remains a reserved activity or is otherwise regulated, the approach to regulation then adopted, and implications for the regulatory status and control of professional titles.

5. Important

My second theme is that these conclusions and recommendations are important. This is because the CMA is an independent statutory body, directly accountable to Parliament, and the government is under an obligation to respond to its report, saying either what it proposes to do to implement the CMA's recommendations or to explain why it is not minded to implement them. The General Election interrupted the timetable for the government's response (which should have been made by mid-March), and so we await the response of the new ministerial team at the Ministry of Justice.

The CMA's conclusions and recommendations are also important because they may well lead to a further period of regulatory uncertainty while the full effects of the Legal Services Act of ten years ago are in some respects still being worked through.

As a personal observation, if the proposed review of independence goes ahead, I would regard the formal, structural, legal and financial separation of the Solicitors Regulation Authority from The Law Society to be an inevitable outcome; and it would then be difficult to see on what basis the Bar Council and Bar Standards Board could be treated differently. The consequences of this could be profound, for reasons I shall return to in a moment.

6. Implications for regulation

What, then, might be the outcomes of these developments for regulation? I can see three significant 'gaps' for us to mind.

The first is the 'regulatory gap'. This was identified by Clementi in his review 13 years ago. It arises because Parliament has decided that only six legal activities must be reserved to those who are legally qualified. On one view, this is less of an issue for barristers than it is for solicitors. The exercise of rights of audience is still largely the preserve of the Bar and, on any public interest justification for the regulation of legal services, must surely always remain a reserved activity. However, offering general legal advice – which many barristers, and solicitors, do – is not a reserved activity and does not therefore *have* to be given by those who are legally qualified and regulated.

Nevertheless, if non-reserved activities are carried out by those who are legally qualified and hold a professional title, their regulators *will* regulate those activities even though Parliament does not require it.

This matters because regulation imposes burdens and costs of compliance on practitioners. It matters because about 80% of work done by lawyers in private practice is not reserved. That translates into about £24 billion-worth of legal work every year, which can legally be done by people who are not qualified as English lawyers and, indeed, under the present framework, *cannot* be regulated. They have a cost and compliance advantage over those who are, on the face of it, better placed to deliver competent advice. In a post-Brexit world, one can also only wonder how tempting that potential market might be for lawyers from other jurisdictions.

The second gap is that between activity and title. Although the Act refers to legal services and therefore attaches to certain activities, it nevertheless fundamentally retains regulation by professional title. Those with the titles of 'barrister', 'solicitor', 'notary', 'licensed conveyancer', and so on, are usually authorised as a consequence to conduct one or more of the reserved activities: in other words, activity regulation flows from title regulation.

The CMA suggests that this link might be disconnected. This could lead, for example, to a regulator of advocacy and of all advocates (however they qualified), with the award of professional title no longer being controlled directly by a regulator but rather, in the case of advocates, entirely by the Inns of Court. This would allow regulators to focus on the minimum standards necessary to promote the public interest and to protect consumers. It would accord better with modern regulatory best practice, and allow those who award title to encourage much higher standards of performance than those required by a regulatory minimum.

The third gap relates to the financing of representative activities. This combines the two previous issues of formal separation of regulatory activities from representative ones and the idea of shifting away from regulation through title. Present funding arrangements allow a regulator (such as the BSB and SRA) to collect money from practising certificate fees that is then passed to the representative body (the Bar Council and The Law Society). The money must be spent on what are known as 'the permitted purposes' in section 51 of the Act[8], which largely relate to public interest functions carried out by the representative body. If full independence happens, such a 'pass-through' arrangement is thought by many to be unsustainable.

This compulsory collection by the regulator of non-regulatory income amounts annually to about £3 million for the Bar and £30 million for solicitors. It is not difficult to contemplate that such a loss of income is unlikely to be replaced by voluntary contributions from the professions, and could therefore threaten the future financial viability of the Bar Council and The Law Society. I make no comment about whether this might be welcome or unwelcome; either way, the consequences are undoubtedly significant.

[8] The permitted purposes are something of a mixture: some relate quite clearly to public interest (participation in law reform and the legislative process; promoting the protection by law of human rights and fundamental freedoms; promotion of *pro bono* legal services; promotion of relations with national or international bodies, governments and the legal professions of other jurisdictions), while others include education and training activities, and giving practical support and advice about practice management.

7. Conclusion

In conclusion, we find ourselves at a possible tipping-point in the evolution of legal services regulation. There is now fairly widespread agreement (including among the regulators) that what we have is not, or will not be, sufficiently robust to stand the stresses of current and future developments in the legal sector. The nature of the fundamental flaws and limitations in the Legal Services Act is broadly agreed. However, we do not yet know the extent of any political appetite to amend primary legislation to address these issues – although the Conservative Party's manifesto for the General Election did contain a commitment to "strengthen legal services regulation"[9].

But we do know that the Legal Services Board has, within the scope of its existing powers, launched two formal investigations into the nature of the oversight of, and involvement in, regulation of both the Bar Council (in 2013) and The Law Society (in 2017). The Bar Council was found not to have ensured sufficient independence for the Bar Standards Board. The investigation into The Law Society is still in progress. The Legal Services Board could well choose to tighten its approach to the internal governance rules that apply as between regulatory and representative functions, adding further pressure on the government to consult on more far-reaching changes to regulatory independence.

Taking all of this into account, it seems to me unlikely that the current regulatory arrangements will survive unscathed much beyond the end of 2017. As the future unfolds, 'Mind the gaps'!

[9] This commitment was vague, and its status now uncertain in the light of the Conservative Party falling short of an overall Parliamentary majority.