WESTMINSTER LEGAL POLICY FORUM
KEYNOTE SPEECH

The Independent Review of Legal Services Regulation: Key proposals and reactions so far

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Introduction

Every time I looked at the draft of the final report, I would change something or elaborate on aspects of it. It wasn't that I had changed my mind, but that I was always trying to make my meaning and intention as clear as possible. With the report[1] having been submitted to the Lord Chancellor and published, I am therefore content for now that the report should speak for itself – subject to one caveat that I shall return to later.

Key proposals

The Review was instigated largely in response to the market study undertaken by the Competition and Markets Authority (CMA) in 2016[2]. As you will recall, that study concluded that the current regulatory framework was not sustainable in the long run and that it should be reviewed. I read these conclusions as suggesting that all is not well with our present structure, and as pointing to a clear need for change. The Review's terms of reference therefore explicitly anticipated a future *beyond*, rather than *within*, the terms of the Legal Services Act 2007.

In the final report, I offered a number of principal proposals for longer-term reform. In summary, these are:

First, the overriding objective of regulation should be the public interest, whether relating to the public good or to the protection of consumers from harm and detriment.

Second, the scope of regulation should be extended to include all 'providers of legal services', including those who are currently unregulatable as well as providers of lawtech.

1. Available at: https://www.ucl.ac.uk/ethics-law/publications/2018/sep/independent-review-legal-services-regulation.
2. Available at: https://assets.publishing.service.gov.uk/media/5887374d40f0b6593700001a/legal-services-market-study-final-report.pdf.

Third, there should be an independent, single, sector-wide regulator of legal services (I called it the Legal Services Regulation Authority or LSRA).

Fourth, the LSRA would maintain a public register of all providers. It would apply regulatory conditions for before-, during-, and after-the-event regulation as appropriate to the importance and risk of particular legal services or to the relative vulnerability of the clients concerned.

Fifth, minimum conditions of registration would require common standards and disclosures, access to complaints investigation and redress, and protection through indemnity insurance. A revised and more extensive ombudsman scheme could act as a single point of entry to redress for complainants who are individual consumers or micro-organisations.

Sixth, the current reserved activities should be replaced with a requirement for prior authorisation in order to secure the public interest. Where this is required for public good services relating to the exercise of rights of audience or the conduct of litigation, there would be a dedicated advocacy and litigation regulator as part of the LSRA.

Seventh, professional titles should not be the only route for entry by individuals into legal services regulation. The LSRA would establish the conditions for personal authorisation or accreditation for higher-risk services, whether with or without a professional title.

The report also makes recommendations for short-term change. These are driven by a more pressing need for reform, particularly in the light of pressures on both buyers and providers of legal services arising from Covid-19.

As the pandemic has taken hold, some legal needs for citizens have increased – particularly in relation to domestic abuse, employment issues, wills and probate, and small business needs. Many law firms that could have remained active and worked remotely chose instead to furlough staff and remove them from all possible provision of legal services.

Now, apparently, many High Street firms are in danger of going under. That would be a tragedy for those firms, for their clients and for local communities. But can it really be right that, at the very time when regulated provision is likely to decline further, we should knowingly deny citizens in need of the possibility of alternatively regulated providers to help them? Can that credibly be advanced as a promotion of the public interest?

The short-term recommendations include a 'parallel' regulatory structure for the public registration by the Legal Services Board of currently unregulated providers and for consequential access to the Legal Ombudsman (LeO). I did not make these recommendations because the unregulated *wanted* to be regulated. I made them because in my view the public interest – and particularly the need to protect consumers – should *require* regulation.

I am also conscious that many people will have some doubts about the capacity or even capability of the current Legal Ombudsman to cope with additional demand. I don't seek to disagree with such an assessment – though I do have confidence in the new Chair of the Office for Legal Complaints to rise to the challenge. I look forward to hearing from Elisabeth Davies later this morning.

However, I would make this additional observation about the Ombudsman. I find it fascinating that practitioners complain about the cost of the ombudsman service and the

ability of LeO to cope with the volume of complaints it must investigate. It seems to me that if practitioners were providing a better service in the first place, and offering a more empathetic and consumer-focused response to client complaints in the second place, the volume of complaints to LeO and their associated cost would both fall dramatically.

My head is not in the clouds and the focus in the report is not on an ideal world; it is on a post-pandemic world. We need more regulated legal services for more citizens and businesses. We need to encourage new economic activity and re-growth, innovation and development. For this to happen, consumers and businesses must have confidence in any and all sources of legal advice, documents and representation.

We must ensure that restrictions on the supply of regulated legal services, and on access to redress when providers under-perform, don't stand in the way of that confidence. In the end, my real concerns about the current framework are not so much with what it does or how it does it, but with what it *cannot* do.

Reactions so far

Let me turn to the reactions to the final report so far. Naturally, I did not expect everyone to agree with my proposals and recommendations. Indeed, I made it quite clear throughout the Review that I was not seeking to fulfil my terms of reference by looking at issues only from the standpoint and concerns of those who had a particular interest. Other than the public interest as I defined it, I have sought a balance of several competing – and sometimes conflicting – interests.

In those circumstances, it is probably only possible to arrive at conclusions that almost everyone will, in some respect, disagree with. And I will happily confess that there were specific conclusions that, in an ideal world, I would rather not have reached! But in the interests of an overall coherence and consistency in the proposals, I remain content that I nevertheless arrived in the best place.

The reactions are, therefore, pretty much as expected – though in some respects more positive and supportive than I might have felt able to wish for.

I said earlier that I am happy to let the report speak for itself. I also welcome any challenge to the report's proposals. However, let me at this point address the caveat that I referred to at the beginning. In letting the report speak for itself, I believe that any challenge to it should be based on a reading of the report itself.

Many initial public responses struck me as having been based on the summary press release that announced the publication of the report rather than on the report. Other reactions appear to have been based on someone else's misreading, misrepresentation or misunderstanding of it. Inevitably, then – and disappointingly – the report has been criticised for recommending things that it did not, or for not including things that it did.

I do not believe that I could have been clearer, through the Review process and in the final report, that I did not expect and did not advocate for fundamental substantive change to the framework of the 2007 Act at any point in the near future. And yet some reactions

were still along the lines of 'now is not the time'. That is hardly a response to the report, since it did not say that now *is* the time for fundamental reform.

In relation to the short-term recommendations, I was at pains in the report to ensure that those recommendations would not apply to practitioners who were already regulated under the existing framework of the Act.

Again, therefore, it is difficult to understand the basis for the resistance to those proposals ostensibly on behalf of parts of the regulated community – especially when the resistance is stated to be because of the 'upheaval' and 'added burdens' of proposals that I expressly recommended should *not* apply to them.

I have also been accused of undermining the importance of public legal education. Let me assure you that I would never seek to undermine the case for increased funding of an effective and sustainable justice system or for extended public legal education. But as the Supreme Court of Utah has recently recognised, we cannot spend or volunteer our way out of a crisis of access to legal services.

My point on this is essentially the same: we will never have public or private pockets deep enough for these things, either alone or in combination, sufficient to close the gap between need and provision. We must in future deliver and regulate law in ways that are very different to those that we have used until now.

I am aware that some would like to find suitably long grass into which this report can be kicked. I have two observations about that. My first is that it is four years since the CMA said that the current regulatory framework was not sustainable in the long run.

We are fast reaching the point at which the need for more substantive reform has already spent enough time in the long grass. It will be interesting to see if the CMA comes to the same conclusion when it completes the focused review of the 2016 market study that it announced last week[3].

My second observation is that long grass can also be found growing around the ruins of formerly grand structures. I very much hope that opposition and delay to further regulatory reform does not contribute to the neglect and undermining of our justice system, of the rule of law, and of much-needed legal services for the vulnerable in society.

Closing thoughts

For those who want:

- greater emphasis on the rule of law, the administration of justice, and access to protected legal services,
- more transparency and protection for consumers,
- less statutory prescription,
- more targeting and proportionality of regulatory intervention,
- lower burden and cost of regulation for hard-pressed practitioners,

3. Available at: https://www.gov.uk/cma-cases/review-of-the-legal-services-market-study-in-england-and-wales?=0.

- specialist regulation, and
- more innovation and use of technology in legal services,

then I believe that they will find all of this and more in the report and recommendations.

The NHS could not have provided for the health needs of the population in response to Covid-19 if it had relied only on doctors. In healthcare, fully qualified medical practitioners work alongside nurses and allied health professionals. Why should law be so different? When citizens increasingly turn to regulated 'non-doctors' and medtech for advice and help on everyday health issues, what is so wrong about regulated 'non-lawyers' and lawtech advising and helping on everyday legal needs?

I am aware that proposals designed to extend the scope of regulation, whether in the short term or beyond, might not appear to be in line with a policy of liberalising regulation. However, in the longer term, the main proposals in the report would apply more targeted and proportionate intervention and so liberate practitioners and consumers from the effects of unnecessarily burdensome and costly requirements.

In both the short and longer term, the proposals for registration and access to redress in respect of previously unregulatable providers would also liberate consumers from the lottery of current regulatory scope and protection. They would give *all* consumers of legal services the confidence to instruct providers secure in the knowledge that the incompetent, the shoddy, the dabblers and the charlatans could be rooted out and dealt with, and that sector-specific redress would be available.

So now *is* the time for at least short-term reform. The writing has been on the wall for a while: now is the time to stand close enough to the wall to read it. Now is the time for leadership and innovation. Now is the time for heads to appear above the parapet, not to be buried in the sand. Regulatory reform is not *the* answer to our current challenges; but it is certainly part of the answer.

While my head might not be in the clouds, it is now very firmly over the parapet! But from this vantage point, I can see sunny uplands where regulated legal services are more widely available, and consumers can more confidently access them. I can see more individuals and small businesses being supported through life's opportunities and tribulations.

I can see more providers of legal services, and they are busy. And I can see more legal needs being addressed in line with legal obligations and the rule of law, rather than being left to happenstance and the vagaries of 'going it alone'.

The view from the parapet is promising. Will anyone join me?