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LEGAL SERVICES REGULATION: TURNING POINT, OR POINT OF NO RETURN?

Professor Stephen Mayson
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Introduction

It is a great honour to be invited from across the Atlantic to commemorate the life and work of Ted Wickwire, just five days short of the 30th anniversary of his premature death. To pay tribute to great men and women is always daunting, but perhaps even more so when they are known for unselfish public service and uncompromising professionalism.

The complex world of 2021 brings a range of challenges to professional responsibility and legal ethics. Many lawyers around the world fear that the ideal of the rule of law itself cannot now always be taken as a given, or that their once-privileged and protected role in the delivery of legal services is secure.

The social, political and economic tension of the 'isms' increasingly looks to pitch populism and consumerism against professionalism. We can see this conflict playing out in debates around the world about regulatory reform – reform that is often expressed as intended to improve access to justice and address the crisis in unmet legal need.

It is this reformist moment and momentum that I want to explore in this Lecture. In doing so, I shall be building on my own recent review of legal services regulation in England & Wales. This was a two-year project that culminated in June 2020 with the submission of my final report[1] and recommendations to the Lord Chancellor.

While I concluded that our own reforms of 2007 should be seen as a staging post on the journey to further regulatory improvement, I do not wish to dwell here on the specific situation of England & Wales. A similar journey is also evident in task forces and working groups in other countries that have been exploring the potential for regulatory change. This could, for instance, introduce entity regulation to legal services, and allow those who are not legally qualified to own, manage or invest in law firms or even offer legal services themselves.

1. See Mayson (2020).

In recent years, we have seen these liberalising moves in Australia, in the UK, in the United States (particularly the western states of Utah and Arizona), as well as in Canada. To lawyers, these initiatives are variously seen either as innovative or a Faustian bargain, as long overdue or the thin end of a wedge to be resisted.

I do not know whether such developments would sit comfortably with Ted Wickwire. Indeed, for him they might well have pointed to an emerging and potentially uncomfortable distinction and tension between professionalism and regulation.

I have set myself the task in my Lecture of exploring this tension between regulation and professionalism. I will declare my own hand immediately by saying that I do not regard professionalism and regulation either as synonymous or as mutually exclusive and incompatible.

Having explored the tension, I shall then seek to resolve it by offering some fundamental principles for legal services regulation that could be taken as a starting point or foundation when considering or evaluating regulatory reform. I also very much hope that these principles could be applied in any jurisdiction, and that they would still find favour with the generation and professional philosophy of Ted Wickwire.

The growing tension between regulation and professionalism

I think that there can be little doubt that the pioneers of what has become modern legal services regulation acted with the best of intentions and high ideals.

But the further and deeper one ventures into the architecture of legal services regulation, the more it becomes apparent that there are no obvious or easy answers to many of its central questions. Indeed, it becomes frustratingly clear that, on almost every issue and choice that needs to be made, there are disparate but equally legitimate views.

For many issues, there is a spectrum of possible positions, often presenting a duality, a see-saw opposition of options, which usually goes one way or the other but might occasionally achieve a state of equilibrium. But in some instances, one can see a triality, more of a triangle in which the alignment of interests could be equal (equilateral), symmetrical (isosceles) or uneven (scalene).

It is in the debate and the resolution of the tussle of these twos and threes that the tension between regulation and professionalism can be seen and felt. As a first step, therefore, I shall try to identify the underlying nature of this tension.

In all cases, the positions or oppositions simply emphasise that regulatory policy questions do not proceed to a neat, predetermined answer. Instead, they must reflect a *balance* of different and sometimes competing interests or views. Choices have to be made to achieve that balance. On some issues, one or other of the options must prevail; on other issues, it is more important to align the differing views rather than to choose between them.

Let me therefore take a closer look at the tensions and choices.

Public interest, consumer interest and professional interest

First, there is a pivotal question about legal services regulation on which all else hangs. It is this: in whose interests should regulation be framed? Here we have to start with the triality of *public interest, consumer interest and professional interest*.

It is tempting to think that regulation should be framed to advance and support equally the interests of all three constituencies, since they are all important to modern, democratic society. But they are not always compatible.

For instance, it might be in the consumer and professional interests for public funding to be available for defending criminal charges, or for pursuing or resisting all civil claims; but that comes at a cost that the public interest might find too difficult to bear.

Increasingly, citizens might wish to see lower-cost and technology-based solutions to their legal needs that do not require lawyers; but the professional interest will usually argue against this consumer interest.

There are many other examples of divergence among these three interests. They cannot carry equal weight since one or other must prevail: the triangle is certainly not equilateral. But giving one or more of them a privileged position in a hierarchy of interests would take regulation down particular paths.

The issue here is not that professionalism has no role in the public interest. Rather, it raises the question of the extent to which professionalism and the views of the legal professions should drive the understanding and implementation of what is in the public interest.

State regulation versus self-regulation

These established features of the rule of law do, though, lead to a duality with challenging implications. The need for the state itself to be subject to the rule of law and not abuse its power is then asserted by lawyers to mean that governments should play no part in the regulation of legal professions.

In that case, independence from the state of lawyers and their regulation is presumed to be a necessary consequence. And so, the argument then runs, the only other repository for regulatory control must lie with the professions themselves. This self-regulation of lawyers, by lawyers, is entrenched in many jurisdictions around the world.[2]

This duality of *state regulation versus self-regulation* unfortunately runs straight into two other dualities, and back to the triality that I started with. The consequential dualities are, first, between *regulation and representation* and, second, between *reality and perception*.

The role of a professional body in both being a regulator *and* representing the interests of its members brings into sharp relief the inherent tension in the triality of public, consumer and professional interests. Even with the usual nod and claim to be regulating in the public interest, it is difficult for professional bodies to accomplish both roles beyond doubt and debate.

2. The foundations are nevertheless questionable, as Cahill (2019) puts it: "The umbilical cord linking self-regulation and public-interest protection seems to fall somewhere between comfortable myth and useful assumption."

Even if it is the reality, the public and consumer perception is all too often that professional bodies look after their own and will always prefer their members' interests over those of clients or the wider public. Independence from state control appears to come at the cost of a perceived lack of independence of professional regulation from representative interests – often described as 'regulatory capture'.

There is a further dimension to perception. Self-regulation is sometimes replaced or supplemented by judicial responsibility for lawyer licensing and regulation. Even though the courts and judges are usually perceived to be independent of the state, the public still tend to see judges as part of the institutional fabric of law.

As such, judges can be seen as likely to be at least unconsciously biased in favour of lawyers rather than their clients or court users. After all, unrepresented court users are often bewildered and panicked by court language and processes, and rarely feel helped by those 'in the know': their experience of George Bernard Shaw's conspiracy against the laity[3] is a strong and negative one.

Judicial control of legal services regulation is often adopted or advanced as an alternative either to state control of lawyer licensing or to self-regulation. But this will not necessarily generate the confidence that is vital to the public acceptance and legitimacy of regulation – and then, ultimately, to the rule of law itself. If judges are perceived as another group of lawyers largely 'looking after their own', public trust and confidence is not likely to follow.

Presenting the locus of regulation as a dichotomous choice between state or profession presents an apparent win-lose outcome. The problem for any profession is that, ultimately, it is the state that will have the right to choose. The problem for the state, though, is that it might not be seen by the public as any more credible and respected as a regulator than the profession.

Setting up a conflict between state regulation and self-regulation could lead to a lose-lose outcome.

Regulation versus professionalism

Which brings me to the duality that lies at the heart of this Lecture. It is between *regulation and professionalism*. This might strike many lawyers as odd because for many of them the two are synonymous rather than distinct. And yet I see this conflation as a direct but unhelpful consequence of self-regulation. I should probably explain myself!

Self-regulation brings an understandable professional preference to wanting to be the best in all circumstances. The highest professional standards should guarantee the standing, competence and performance of practitioners. That must be good for clients, consumers and the public, surely?

And so these standards are written in to the codes of professional conduct and ethics that form the core of self-regulation. In short, the highest standards of professionalism become the requirements of regulation; they become synonymous.

3. See Shaw (1911).

Unfortunately, these high standards come at a high price. Training for them, and the burden of continuing compliance with them, require considerable personal and institutional investment. All of it – barring some pro bono work – tends to be passed on to consumers as higher prices.

Not only is the price high but, as the experience of many clients demonstrates, lawyers often fall disturbingly short of the standards. Professionalism is, in practice, an ideal and too often not the reality.

The problem with a high bar is the answer to the inevitable question: How far below that bar does one need to fall before it becomes a disciplinary matter? It seems to me that not all transgressions are disciplinary issues, still less ones that should lead to the loss of a licence to practise. But if not all, then which and in what circumstances?

To express the point slightly differently: who determines the floor *below* which a practitioner may not go? It seems to me that self-regulation is in considerable difficulty if it claims both to police the floor and set the aspiration. In fact, I think that regulation, however it is conceived and delivered, is in difficulty if it seeks to define the limits of both.

I am entirely comfortable with the professions identifying and maintaining their professional aspirations and ideals. It is in their professional interests to do so. These can legitimately be above any sense of the minimum necessary or acceptable level of competence and performance. The professions and their members are also best-placed to determine what those aspirations, ideals and expectations are.

But is it right to allow self-regulation to combine the regulatory floor and professional aspiration into a single regulatory threshold – especially when that threshold is not then upheld as a professional minimum? Can the profession be the principal, dominant or final arbiter of where the regulatory floor should be in order to promote the public interest and protect consumers?

In this sense, there is a very real tension between regulation and professionalism. In the twenty-first century, can we afford to support the assertion that consumers can only be served and protected by forcing them to choose between high-priced professionalism … and no other regulated alternative? Rather than 'the best in *all* circumstances', should we not also enable 'the best-available in *these* circumstances'?

Turning point or point of no return?

Have we, then, reached a turning point in the need for reform of legal services regulation, and the nature of it? And have we reached a point where the legal professions have resisted reform for so long and so vigorously that they are in danger of excluding themselves from effective debate and determination of the future – the point of no return?

As time goes by, there is evidence of more citizens turning to self-lawyering, unregulated providers, and suppliers of tech-based services and documents. We can now see the world over that the cost of lawyers is often beyond the reach not just of those in poverty or vulnerability but increasingly of the relatively affluent, too.

Seemingly, as the number of qualified lawyers increases, so too does the number of unserved and under-served citizens – variously described as 'unmet need', the 'justice gap', or the 'access to justice crisis'. Those lawyers and firms that would genuinely wish to tackle this crisis often find that they cannot do so easily, effectively or economically. This is because their own professional rules prohibit them from combining with providers of capital or technology, or with those who are not lawyers.

Worse still, we seem to have reached a point where lawyers will say, 'There is work that we don't want or can't afford to do'. And yet in many countries we still support a regulatory structure that also allows those same lawyers to say, 'But we must keep rules that mean that no-one else can do it either'. If this is not protectionism, what is?

Too often, the consequence of self-regulation in many jurisdictions is a profession-imposed ban on alternatives. The permitted choice for most citizens has become access to the highest professional standards … or to nothing.

Of dabblers and charlatans

There are two fallacies in this ultimately self-defeating position. The first is that only qualified lawyers are competent and experienced to help citizens in need. Unfortunately, there are too many instances of qualified and regulated lawyers taking on work that is beyond their expertise and experience – those I call 'the professional dabblers'. They create risks for their clients rather than help in resolving their legal needs.

Sadly, there are also circumstances where lawyers are committing or facilitating wrongdoing: mortgage, investment or tax fraud; illegal immigration; fraudulent claims for financial loss; theft of client money; abusive litigation; direct facilitation of crime; and the like.

The regulation of lawyers and the exclusion of all others from the regulated practice of law is clearly *not* a guarantee of competence, ethicality, integrity, efficiency or protection of clients and the wider public from harm or loss.

The second fallacy is that 'non-lawyers' cannot be trusted to be competent or ethical in the provision of legal services, and must therefore be excluded from practice. It is a fallacy because they are not all charlatans. There are in fact 'unregulated specialists' who are much more competent and experienced than many lawyers in some aspects of advice and representation.

This might be in areas such as social welfare, housing, immigration, and employment. There may well be legal elements to citizens' needs; but this does not mean that only qualified lawyers know the applicable law and can help. Indeed, if qualified lawyers are professional dabblers, they might well do significant harm.

I think it is clear that the solution to the vast amount of unmet need is *not* more lawyers, or more pro bono, or more public funding: there is just not enough of any of them sufficient to close the gap, either alone or in combination.

In fact, there is evidence that the tendency for citizens to turn to self-lawyering, unregulated providers, and suppliers of tech-based services and documents, has been accelerated by the Covid-19 pandemic.

In the face of this clear increase in consumer need and preference for alternative provision in different forms, can it be right that we should knowingly deny them the possibility of alternatively regulated providers? Can that credibly be advanced as a promotion of the public interest?

As lawyers, we can hide behind the pretentious veils of competence, quality, ethics and integrity, of regulation and of the authorised practice of law. But once the public become used to managing without us – because we have effectively forced them to – that perceived neglect or indifference to their needs will garner no sympathy.

So I believe that the legal professions around at least the common law world are at a turning point. And without imminent action – by which, for my purposes today, I mean regulatory reform – they will very soon be at the point of no return.

What do we need for successful and effective regulation?

I recognise that reform will not start with the proverbial blank piece of paper. What we can do, though, is recognise both the benefits and limitations of the history that brings us to our starting point.

Allowing the professions to maintain a tight grip on regulation, and a position of 'we know best', will only confirm public perceptions of self-protectionism. We cannot then gain the potential benefits that arise from true regulatory independence and consumer perspectives.

Judicial oversight of legal services regulation, while offering the benefit of separation from the state and the professions, is likely to reinforce a sense of lawyers looking after their own. It is also likely to bring an emphasis on court-related matters, and perhaps inadequately secure attention to the potential benefits of consumer insight and business efficiencies.

State control of legal services regulation should remove any perception of lawyer exceptionalism and self-protection. But it also runs a significant risk of domestic and international perceptions of undermining the independence of lawyers and of legal advice. Depending on the dominant political policies of the day, it might also bring a focus on market forces and competition at the expense of wider public and societal benefits.

An independent regulator could offer the advantages of separation from state, professions and judiciary. However, the tendency for such bodies to be populated by 'career regulators' runs a risk of mission-driven regulation and insufficient attention being paid to sector-specific differences and experience.

It is also often the case that the principles and practice of economic regulation and market-based consumerism are given precedence over more nuanced issues of the public interest and the often hidden value of professionalism.

The objectives of legal services regulation are varied and important to society. There is no one best way to realise the goal of effective regulation. There is no one viewpoint or structure that simply and effortlessly incorporates all necessary components.

I might confidently suggest that there is no jurisdiction that has yet achieved the required balance. I can less confidently assert that I know for sure how that balance might best be achieved. But I do want in the second part of this Lecture to offer some thoughts about five fundamental principles on which legal services regulation and its reform might more securely be based.

These are derived from the specifics of the proposals and recommendations in my final report[1]. Some of them were explicit in the report; some, perhaps, were not. In any event, here are the consequences of further reflection.

Principle 1. Promote the primacy of the public interest

I take it as a given that the law is for society and citizens, not for lawyers. That is the reason why I believe firmly that the principal objective of legal services regulation and Principle 1 should be the promotion and protection of the public interest. This is the predominant and overriding interest in the pivotal triality.

For me, the notion of 'the public interest' has two dimensions[4]. The first is the *fabric of society* itself – the State, its security and defence, government, environment, economy, and the rule of law. Among other things, the rule of law requires accessibility to fair decision-making in accordance with the law, the application of law equally to citizens and the state, and independence of legal representation and of the judicial process[5].

The purpose of law and legal services regulation here is to create, maintain and protect the public good in this fabric. Without it, there is no framework for stable and reliable institutions or interactions among individuals.

In the interface between the administration of justice and legal services regulation, regulation is needed to assure competence, integrity and independence in those actors who play a significant role in securing the rule of law. The potential risk to the public interest and to public confidence is so high and so important that practitioners need to be licensed and their continuing competence assured.

The second dimension to the public interest is the *legitimate participation of citizens in society*. This too has a number of dimensions, including the right to participate (affected by citizenship and migration), and the ability to do so meaningfully and with dignity (achieved through health, sustenance, housing, and education), as well as exclusion for illegitimate purposes (through conviction for criminality and deportation).

Legitimate participation also depends on personal and institutional relationships (such as employment, family, and commerce). The purpose of law and legal services regulation here is to bring structure, predictability and stability to such relationships.

In addition, legitimate participation requires access to justice. Relationships will not always be smooth, and the mission of law is to offer enforceability through the laws of contract, tort and others that govern relationships. It is also to secure protection from spurious or unfounded claims, as well as against imbalances and abuse of power (perhaps especially by larger institutions and government).

The risks to the public interest in this second dimension are different. Even so, they might still be critical to the individual citizen. Their liberty, family life, home, livelihood, or right to remain could be at stake, as might their personal or family wealth in a house move or the administration of a relative's estate.

4. See Mayson (2020), paragraph 4.2.1.
5. Cf. Bingham (2010).

In these circumstances, there is a particular risk that compensation paid after the event for a legal adviser's incompetence, inexperience or lack of integrity will not be a sufficient or timely remedy. Again, therefore, regulatory assurance and sector-specific remedies can be justified in the public interest.

Principle 2. Pursue minimum necessary intervention through targeted regulation

Although nearly all problems, challenges and opportunities in life or business have a legal dimension, their resolution or advancement does not always need legal expertise. Not all legal services touch the public interest directly or closely; not all legal issues need lawyers.

The scope of regulation is therefore an appropriate question, and it has two elements: to whom and to what should it be applied? In most jurisdictions, the 'to whom' element is answered in a narrow way, and is restricted to qualified lawyers.

The 'to what' element is then variously answered in a broad or narrow way. Perhaps the best example of the broad answer lies in the idea of 'the practice of law'. More so if the practice of law is defined tautologously as 'what lawyers do'. It effectively creates a monopoly for a narrow, protected group over a very broad range of activity or territory.

The fault-line in this broad approach, to my mind, is that some of what lawyers do does not, in the public interest, *need* to be done by lawyers. But, because it is, it often becomes the unauthorised practice of law for anyone else to do it – even if it can be better or more cost-effectively done by other human beings or even by technology.

Equally, though, if the 'to what' element is too narrow, citizens and consumers can be left to fend for themselves against unregulated providers. The current position in England & Wales is, to my mind, too much at this end of the regulatory spectrum. Our 2007 reforms did virtually nothing to change the scope of regulation.

My starting point would be to answer both the 'to whom' and 'to what' questions at the broadest level, with all legal services and all providers of them being included within regulatory scope. This would disconnect legal services from what lawyers do.

Balanced against such broad scope, though, Principle 2 should then be to pursue the *minimum necessary intervention* through targeted regulation in order to achieve the public interest regulatory objectives as cost-efficiently as possible. It should provide the baseline, or floor as I called it earlier, below which no provider may go.

In this sense, regulation should focus on the minimum requirements that need to be attached to various activities, services, circumstances or providers, based on assessed risk to the public good or to consumers. It should apply the same regulatory requirements to whoever is subject to that regulation, whether legally qualified or not.

This requires a proper and evidenced assessment of risk. It emphasises regulatory interventions that are targeted to the identified risks, are proportionate to address them, and are cost-effective in doing so.

With its origins in professional self-regulation, too much legal services regulation is not targeted at the floor or the *minimum necessary* but at the maintenance of the *highest possible* standards. This comes at a cost, to both practitioners and clients. It must be said that this cost is not driving lawyers out of the market. But it is now all too often driving *citizens* out of the market for professional legal services.

We cannot allow a binary approach to regulation to lead us only to professional, high-quality, regulated legal services provided by lawyers, on the one hand or, on the other, to nothing, to do-it-yourself or to unregulated provision. That is not what society deserves. It is not, ultimately, consistent with a belief in the rule of law.

Principle 3. Leave scope and freedom for professions and professionalism

In suggesting a minimum-necessary role for regulation, I realise that I am open to an accusation of seeking to 'dumb down' legal services and reduce the quality and protections available to clients. Nothing could be further from the truth. As a barrister myself, I am all in favour of setting, maintaining and enforcing high professional standards.

My intention instead is to be clear about the proper role of regulation and, in doing so, to preserve – enhance, even – the proper role of professions in aspiring to be the best they can be. As I said earlier, my starting point is that citizens do not always need the services of qualified lawyers offering the very best that professionals can deliver – especially if that comes at a price that those citizens cannot afford.

People need help and support with opportunities or problems in their lives and businesses that have a legal origin or dimension. But other perspectives and experiences can be just as valid in many circumstances in advancing or resolving them. And yes, I dare say it: they might even be better.

I would therefore suggest two goals here for regulation. The first is to allow providers other than members of the legal professions to offer a range of regulated legal services to the public so that clients who want to use those providers might be assured and protected.

The second goal is to free those professions from the perception of bias and 'looking after their own' in pursuing an uncomfortable and ultimately unsustainable purpose of both representing and regulating their members.

My purpose here is not to remove from the professions the mission of excellence in practice or, where they can, from offering something to consumers that is demonstrably better than the services available from other providers. However, we also cannot contemplate as a society having such aspirational excellence as the only regulated option available to those with legal needs.

A system of regulation should (as proposed in Principle 2) ensure that *necessary* regulatory protections exist for the legal services that citizens need irrespective of who provides them. However, a regulator's true role as a gate-keeper and guarantor of minimum necessary standards does not inevitably equip it to be the best judge of what a profession might legitimately aspire to or wish to achieve.

This brings me to Principle 3: that the regulatory framework should leave scope and freedom for professions and professionalism.

I also accept that in certain higher-risk legal activities, there might well be little or no difference between the minimum necessary standards required by a regulator and the high standards that practitioners, their professional bodies, judges or society would expect.

I am therefore in favour of drawing a clear separating line between regulation, in which professional bodies should not be involved, and the setting and maintaining of higher professional standards, in which regulators should not be involved. It must be clear, though, that professional standards cannot override, take precedence over, or be inconsistent with, regulatory requirements.

This in turn leads to Principle 4.

Principle 4. Focus on regulatory capture rather than regulatory independence

In my mind, there can be no doubt about the need for independent legal advice and representation, or about their value. The rule of law and the effective administration of justice depend on it. It follows that lawyers and others who fulfil vital legal services should be independent of possibly overbearing, inappropriate or even malign influences.

I have already referred in Principle 2 to the 'proper role' of regulation as being to set the floor below which providers may not go in their provision of legal services. Either as a matter of reality or perception, there is then a risk that a regulated community of legal professionals will feel that the expected standards of its hard-earned calling are being dumbed down or 'de-professionalised'.

But I have also acknowledged in Principle 3 that this should be distinguished from the goal of a profession (and perhaps legal services providers more generally) to aspire to higher, or even the highest, standards of competence and quality. In short, as I said above, the floor is a matter for regulation in protecting the public interest, while professional aspiration is not.

Regulated communities will understandably expect their representative bodies to resist dumbing down and to press for high standards. Put differently, regulation in the public interest and regulation in the professional interest will start from and arrive at different points.

Taking this as an alternative lens through which to view the issue of regulatory independence, there is an inevitable – and probably irreconcilable – conflict between the regulatory and representative positions.

I wonder whether framing the debate in terms of 'independence' or 'influence' serves to obscure what should be the principal goal. Those with a direct interest in regulation, in its scope and its effects on their daily practice, probably cannot ever be truly independent or not wish to exercise whatever influence they can muster.

It seems to me that the real objective here is less about structural independence and more that the regulator should not be – or be perceived to be – 'captured' by the regulated community. In other words, regulation should not be "directed away from the public interest and toward the interests of the regulated industry, by the intent and action of the industry itself"[6].

6. Carpenter & Moss (2014), page 13.

While almost any system of self-regulation will certainly appear to the public and consumers as being captured, we should now be capable of moving beyond that. It is time for a more developed understanding of capture and how best to avoid it.

There are different roles for representative bodies and regulators to fulfil. Both are important and needed but, in my view, they are mutually incompatible. The same body cannot reasonably carry out both roles simultaneously and meet the legitimate expectations of all stakeholders.

It seems to me that, in relation to regulation, the primary role of a professional or representative body is, as the description suggests, to represent the views and interests of its members. I respect that position – indeed, I regard it as vital that the professions continue to be represented robustly and fearlessly.

Adopting such a representative role distinct from regulation does not, and should not, mean that the representative body is not also concerned with promoting the public interest. Professional interests and the public interest are not mutually exclusive. But they are different, and I have no doubt which is, and properly should be, the primary role and motivation of a professional body.

In short, Principle 4 is not about the *presence* of structural separation and independence of the regulator– though that might indeed be the logical or necessary consequence. Instead, it focuses on the *absence* of capture, recognising and securing the contribution and performance of two vital, but fundamentally different, roles.

Principle 5. Ask 'Why not?' rather than 'Why?'

There too often seems to be an assumption in the debate about potential changes to the regulatory framework that those changes will inevitably lead to unwanted or unforeseen consequences. Historically, the default regulatory position to guard against those unwelcome consequences has been for lawyers to prohibit the activity giving rise to the risk.

However, if review and reform shifts its consideration from risk elimination to risk recognition and management, then prohibition should not be the default option. Removing a prohibition – let us say, on ownership or investment by those who are not lawyers – does not inevitably lead to a free-for-all and dire consequences.

In contrast to an environment in which providers are *prevented* from doing something, a *permissive* regulatory amendment does not mean that suddenly the newly permitted activity, provider or structure will become the dominant mode of practice.

What does seem incontrovertible, though, is that positive innovation for the benefit of clients, the public and society generally cannot possibly take place in an environment where activity is prohibited at the behest of incumbent providers.

Too much of legal services regulation is based on what people may not do, which echoes my previous point about risk elimination and prohibition rather than risk-based managed permission. My view is that all regulation is an intervention in what would otherwise be unrestrained activities. As such, I think that the intervention should be justified.

On that basis, when suggestions are made that a regulatory restriction should be removed, it should not be acceptable for vested professional or other interests to be able to say, 'What is the justification for removal?', or 'Where or what is the evidence that removing the restriction will lead to defined and measurable benefits?'.

On the contrary, if the fundamental proposition is that regulatory intervention must be justified, similarly its retention should need to be justified, too. In short, the starting point in considering reform should no longer be *Why?*, but rather *Why not?* Through Principle 5, we should, as it were, shift the burden of proof.

While innovation and reform will struggle to thrive in a world of barriers and prohibitions, consumer detriment and competitive disadvantage will not.

Finally, on this point, I have noticed an intriguing recent tendency when reform is being floated or discussed – particularly a liberalising proposal. In tandem with the question about the verifiable benefits of a proposal, the threshold test for acceptability or permanent adoption is often now set as demonstrable improvement in access to justice.

Undoubtedly, access to justice is a noble objective – though a rather nebulous and multi-faceted one, with associated difficulties in identifying reliable metrics of improvement. However, to my mind, it is also a set-up-to-fail threshold. (Cynically, of course, that would rather suit the purposes of those who would prefer to resist change.)

Access to justice can mean a number of different things or a collection of things. It can include access to courts, access to judicial or other official determination of a dispute, access to a lawyer, access to legal advice and representation (whether from a lawyer or others), and so on; they are all in the mix. The metrics for each of these would, though, be different.

But identifying metrics is not the real point. Every aspect of access to justice is influenced by a range of factors, including: the location and quality of court estate; the number of court sittings; the number and quality of judges; the decisions of the police, prosecutors and other public agencies; the availability of public funding; the commercial imperatives and preferences of practitioners; the geographical and societal distribution of practitioners; education and support for unrepresented litigants; I could go on.

My point is that so few of these factors have anything directly to do with legal services regulation. In that case, it is simply a false premise to seek to justify *regulatory* reform by reference to improvements in access to justice. The causal link and the evidence to support it are both tenuous and tendentious.

I'm certainly not suggesting that proposals should not be robustly tested and evidence gathered to support their adoption and implementation. My concern is that improved access to justice should not be a *precondition* or *requirement* of legal services regulation – even though it might often be a welcome *consequence* of it.

The success or otherwise of legal services regulation, and of its reform, must be assessed relative to whether or not its public interest objectives are met. Is the public good assured; is the rule of law advanced and protected; is the effective administration of justice achieved; is harm or detriment to clients and citizens avoided or adequately redressed?

When we know that the current structure and approach leaves millions of people without affordable, regulated legal advice and representation, almost anything could improve the situation. Stopping it from becoming worse would be as laudable an objective as trying to make it better. Should we not see, in a controlled way, whether or not it does? 'Why not?', rather than 'Why?'.

Closing thoughts

Reform is often thought of as iconoclastic or subversive of the existing order – throwing everything away and starting again, being radical. Those of a conservative disposition, which allegedly includes most lawyers, will find this idea uncomfortable, if not dangerous.

I prefer to think of it as re-forming, with a hyphen. It need not necessarily or inevitably be radical; it need not mean starting again. Too often, in the context of legal services, reform is assumed to mean only liberalisation and *de*-regulation. The implication is that there will be less regulation, or lower burdens; that activities or people who are currently regulated will no longer be so.

But reform – and even liberalisation – can be achieved through *re*-regulation. In other words, reform can bring within the scope of regulation activities or people who were previously outside it. On the face of it, this might seem to be at odds with liberalising because it extends regulation to activities or providers that were previously prohibited or unregulated.

However, where being beyond the scope of regulation arises from prohibition (such as the unauthorised practice of law), bringing new providers within scope actually liberalises them to start providing services legitimately. It offers protection to those new providers by conferring regulatory permission and oversight rather than confirming the risk of operating illegally. It also offers more choice and protection to those who use them.

This is what in fact happened in England & Wales following the 2007 reforms. Nothing that was previously regulated became part of a new, deregulated free-for-all. Those who were previously excluded from ownership and participation in law firms were allowed *in to the regulatory framework*. This included investors, professional managers, other professionals and business people. It has not led to catastrophe or disaster, the sky has not fallen in, and the market has not been infiltrated by the incompetent, the unethical or the criminal.

It seems to me that the legal professions in many parts of the world are definitely at a turning point. Whatever the regulatory framework, lawyers appear to be losing control and share of the market. No longer does the activity and output of the legal *professions* equate to the legal services *sector* or marketplace.

We already know that increasing volumes and types of legal work are now handled by paralegals and by technology. We already know that frustrated corporate clients either internalise more of their legal needs or outsource them to alternative legal services providers, either domestically, internationally or virtually.

If control and relative share of the market are declining, on what basis can the legal professions make any credible or legitimate claim to retain the major say or final word in how that market should be regulated? To cling on to privilege and protection in the face of market and societal shifts will surely only result in them speeding past the turning point to the point of no return.

Clients, consumers, competitors, governments, legislators or supreme courts will otherwise inevitably rewrite the rules – whether alone or in combination – whatever the professions think and however much they rail against it. It is no surprise that the pressure is mounting to reform or reconfigure the legal services market and its regulation.

It is not yet too late for lawyers and their representative bodies to get on board with regulatory reform … but the train is about to leave the station. I firmly believe that it is a journey worth taking, with potential gains for society, for clients, and for all who provide legal services – including lawyers.

But it is also a journey with critical importance to society, to the rule of law, and to the administration of justice. It is also essential to access by citizens to effective, affordable and assured legal advice and representation. Regulation and professionalism might be in a current state of tension, but they are not incompatible.

It seems that concurrent control of both regulation and professionalism by the same people or organisations is increasingly difficult to justify. In that case, meaningful engagement and collaboration on regulatory reform is likely to be the best way – and possibly the only way – of maintaining any significant influence and authority over professionalism.

Reform, like all change, is a choice. I believe that it is best to engage in it while choices are still open – to take the turning point – rather than to stumble on doggedly or obliviously to the point of no return and no choice.

References

Bingham, T. (2010) *The Rule of Law* (Allen Lane, London)

Cahill, B. (2019) *Professional Autonomy and the Public Interest: The Barristers' Society and Nova Scotia's Lawyers, 1825-2005* (McGill-Queen's University Press, Montreal)

Carpenter, D. & Moss, D.A. (eds) (2014) *Preventing Regulatory Capture: Special Interest Influence and How to Limit It* (Cambridge University Press, New York)

Mayson, S.W. (2020) *Reforming Legal Services: Regulation beyond the Echo Chambers*: available at: https://www.ucl.ac.uk/ethics-law/publications/2018/sep/independent-review-legal-services-regulation and at: https://stephenmayson.com/2020/06/11/legal-services-regulation-the-final-report/

Shaw, G.B. (1911) *The Doctor's Dilemma*