



Options beyond the Legal Services Act

Westminster Legal Policy Forum

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Sir Michael Pitt

Chairman, Legal Services Board

Good morning. It is a pleasure to be with you all today and an honour to take part in a session chaired by the Rt Hon Lord Falconer. Lord Falconer, of course, has more than a passing interest in regulation given his role in shepherding the 2007 Legal Services Act through parliament. An Act which was right for its time and triggered much needed improvements in the regulation of legal services.

It's almost two years ago to the day since I first spoke to a Westminster Legal Policy Forum event. Much has happened since then, so this is a good time to set out the LSB's thoughts on legal services regulation and its future. I said then and I remain convinced that there is still an important job to be done.

On the one hand the LSB and the regulators continue to implement the provisions within the LSA and to make steady, incremental progress towards improved regulation and better outcomes for consumers. On the other hand, I believe we are now ready for a second big step forward and a new act of parliament... something I will return to later.

Recent developments

Well of course we have a new Prime Minister and Cabinet. I look forward to working with our new Lord Chancellor and her new ministerial team. There will be changes in government policies and priorities. What will not alter is the LSB's commitment to being an agent of

change, doing what we can within the constraints of the existing Act to create a modern, competitive and accessible legal market.

In that respect, there have been positive developments in the last few years. The legal services market has grown substantially with turnover hitting an all-time high of £32bn in 2015. I see no reason why this growth should not continue, although I am of course mindful of the uncertainty following Brexit. England and Wales remain a great place to do business owing to the quality of our judiciary and the integrity of our legal system. English is the international language of business and there are few places in the world that can match the UK's levels of legal professionalism and business infrastructure. Further reform must reinforce and build on these firm foundations.

Over the last twelve months there have been Government proposals to amend legal services regulation.

These proposals stem from recommendations which the LSB, working closely with the legal regulators, identified as opportunities to deregulate and improve efficiency. The first of these proposals will remove barriers to the creation of Alternative Business Structures (ABS) and is already out for consultation; a fact I very much welcome.

Also I remain hopeful that the Government will progress its commitment to consult on delivering the complete separation of regulation from the representative bodies. This would be one of the most important reforms to legal services regulation in England and Wales since the LSA.

Of course the LSB is not the only body that has been looking at the reform of the legal services sector. The Competition and Markets Authority is over half way through its market study. I view this as a significant opportunity for a fresh point of view on how well the legal services market is working for consumers in England and Wales. Quotes from the CMA's initial conclusions include; '*legal services markets are not functioning as well as they might*' and '*a key principle should be to ensure full independence of the regulator from the providers it regulates*'. I agree on both counts and the LSB looks forward to working with the CMA to help shape practical and proportionate remedies. This is an important opportunity to tackle long-standing concerns about both the affordability and quality of legal services on offer, and the fact that a large proportion of the population and small businesses cannot afford such vital services.

It is also interesting that the CMA has acknowledged that '*a lack of transparency of price and service make it harder for consumers to compare providers and identify value for money*'.

The LSB's recent research on the cost of legal services has highlighted the benefits to the relatively small number of consumers who do shop around. When it comes to conveyancing, wills and divorce, for example, there are big savings of up to 40% or more.

But getting hold of prices is not easy and this is a growing area of interest for the Legal Services Consumer Panel and the LSB. More needs to be done to encourage the growth in comparison websites, lawyer matching services and the publication of prices by providers. Exactly how this is to be achieved is under active consideration.

Developments in the legal services sector since 2007

But, what about the LSA? What has it delivered since 2007?

Certainly the disasters, predicted by many at the time, have not come to pass... far from it.

Indeed, the LSA has delivered benefits, including:

- The setting up of both the Legal Ombudsman Service, which currently resolves about 7,600 consumer complaints each year, and the influential Legal Services Consumer Panel, representing the interests of users
- The quality of legal services has improved in most areas, with more complaints being resolved by the provider, a reducing Legal Ombudsman caseload and a smaller number of misconduct cases
- Also under the Act, the LSB approves rule changes, many of which have focused on deregulation, removing restrictions and freeing up providers. Changes to regulation over the past five years have been largely pro-competition – and permit a greater variety of business models and services than ever before. For example, there are now over 1000 ABSs and a growing number of direct access barristers are giving consumers more choice, and
- Surveys show that alternative business structures are more innovative and better at handling complaints than traditional firms. Providers are offering unbundled services and working jointly with other professions, and there has been an increase in the use of fixed fees – up from 38 percent to 46 percent.

This is all to the good. However, improvements in outcomes for consumers are more mixed. For example, last year only 42% of the public said they trusted lawyers to tell the truth, down from 47%, and only 13% of small businesses regarded lawyers as cost effective

The benefits from innovation have mainly come in the form of tailoring services rather than reducing cost and charges to customers. Prices have risen in real terms with one hour of litigation now being charged at almost half the average weekly wage.

Why we need regulatory reform

So, there have been positive changes in the last few years facilitated by the LSA, but the pace of change is slow.

The limitations of the LSA have become more obvious in the nine years since it came into force:

- The Act itself is some 400 pages long and exceptionally complex. Moreover, it is additional to and overlaps other related legislation going back to the Ecclesiastical Licences Act of 1553.
- The split between reserved and unreserved legal activity is illogical and not risk based, and results in too much blanket regulation where it's not needed, and some high-risk activities falling beyond the reach of regulation. Customers who wish to complain may (or may not) have a right of redress to the Legal Ombudsman, and may only discover this inconsistency once a problem has arisen.
- A further problem is the complexity of the regulatory landscape which is cumbersome and expensive.

The former Lord Chancellor, the Rt. Hon. Michael Gove, was committed to a review of the LSA in the lifetime of this parliament. It is to be hoped that this commitment will be carried forward into the new ministerial team.

A vision for legislative reform

In this respect, the LSB is well placed to express an opinion. It holds a unique strategic position and range of responsibilities under the LSA. We have an overview of the legal services market as a whole and extensive experience of working within the current regulatory system. We are independent and we are not motivated by self-interest. I am on record as stating that the LSB's goal is to reach a place where our work will have been done and there should be no need for the LSB or any other oversight regulator.

Our overriding aim is a legal sector:

- Where consumers are better informed and able to choose from a range of affordable legal services
- Where providers are compelled by the market to compete and innovate

- Where there is faster and more effective redress when things go wrong and
- Where there is a simpler, lower cost and more effective regulatory framework that commands the confidence and respect of all concerned.

The LSB believes this can only be achieved through new legislation which builds on the achievements of the LSA and takes a risk-based approach to regulation, focusing on the specific activities undertaken by providers.

With this in mind, approximately 18 months ago the LSB embarked upon an intensive and detailed review of the legal framework, starting from first principles. The review was led by Board Members with strong support from the LSB's Executive and Professor Stephen Mayson of University College London. The Board, comprising lawyers and lay members; has met regularly; looked at the evidence; asked questions; challenged assumptions and stripped bare conventional thinking.

The Board recognised throughout that some, perhaps many, of our proposals would be controversial. We are all too aware of the ferocity with which certain interest groups in the legal sector resist change and lobby very effectively. Nevertheless, the Board has not compromised or adopted half measures.

So today, the LSB is publishing on its website a 46 page document setting out its vision for legislative reform. It is for discussion with government and anyone who is interested in the future of regulation and legal services. It is our contribution to the ongoing debate and we are happy to explain the logic of our arguments and the efficacy of our recommendations.

Six Steps

The future shape of regulation depends on a series of interdependent choices. We have taken, what we believe to be, a logical step by step approach by addressing six fundamental questions. Our responses to the questions build up to a complete and coherent picture¹:

First. The LSB believes that the eight regulatory objectives defined in the LSA should be replaced by one overarching objective.

The LSB's experience of working with the existing set of regulatory objectives is that having eight is problematic. They are presented in the Act as having equal status and fail to offer a clear focus. There is a risk of scope creep and they give too much latitude to regulators in justifying their decisions, resulting in regulatory uncertainty.

¹ See Annex 1.

Our suggested wording for an overriding objective is quite straight forward: '*To safeguard the public interest by protecting consumers and ensuring legal services deliver outcomes in the interests of society as a whole*'.

The first part of this objective addresses the risk of harm to individual consumers and recognises the inherent imbalance in power between consumers and providers. The latter part of the objective encompasses outcomes such as the rule of law, access to justice and the effective administration of justice.

The second step relates to the statutory list of reserved activities which no longer bears close examination and are not the result of any recent, evidence-based assessment of the benefits or risks created by those activities.

The LSB believes, therefore, that there should be an independent review to determine which activities should attract sector-specific regulation on the grounds of risk to the overarching objective as defined in Step One. This would ensure regulation is properly targeted and proportionate to the harm it seeks to remedy. Periodic reviews would follow (perhaps every five years) to ensure the regulated activities remain risk-based and up to date.

Once identified, the minimum necessary regulation should be invoked, bearing in mind that not every risk calls for regulatory action.

Third. What should regulation be focused on? Should it be targeted on 'activity' or on the 'title of the provider' who carries it out?

Currently regulation is based on both 'activity' and 'title', and extends regulation across areas where, based on a risk assessment, it is not needed.

We believe that the main foundation should be *the activity undertaken* such as conveyancing, probate, litigation and advocacy. However, for some exceptionally high-risk activities, such as representing the victims of domestic violence, vulnerable children or asylum seekers, individuals and entities could be required to have specific authorisation.

Fourth. The LSB has consistently advocated the benefits of the complete separation of regulation from the representative bodies. Indeed, as mentioned, the Government has indicated that it would consult the profession and interested parties on the merits of making this change.

The LSB's views have not altered. Concerns about the relationships between the regulators and their representative bodies are frequently reported in my regular discussions with

stakeholders. A great deal of their time and effort is expended on these matters which could be better utilised elsewhere. It is an unhelpful distraction

Full separation would improve consumer confidence, safe in the knowledge that their needs would not be overridden by professional or commercial interests in a context where many consumers struggle to judge for themselves the value or quality of what is being provided.

Complete separation from Government would also encourage providers to grow their businesses without fear that politically-motivated interventions will undermine their investments.

And it would give confidence to society as a whole that regulation, affecting vital public interest outcomes such as the rule of law, is targeted only at cases in which action is needed.

Fifth. The LSB believes there is a continuing case for a strong and effective consumer voice at the heart of regulation. The current arrangement, in which the Legal Services Consumer Panel is embedded within the LSB has ensured that consumer views are fully taken into account. This, or a similar arrangement, is needed for the foreseeable future in conjunction with a general duty on the regulator(s) to consult and engage with consumers. Together this would strengthen a consumer-focused regulatory culture and a market that works in consumers' interests.

And sixth. The LSB has returned to the question of the organisational structure of regulation. It is not the first time the LSB has expressed an opinion on this subject.

Let me be clear. The regulatory architecture is not the sole or even the main reason for reform. Moreover, what is said about the architecture is not in any way critical of the current regulators; all of us are striving hard to improve outcomes for consumers within the constraints of the current structure. The general direction in which frontline regulators are travelling has my support.

The LSB's review asks the simple, but important, question... which structure is most likely to deliver the aspirations set out in steps one to five?

A diagram² showing the various bodies currently engaged in the regulation of legal services speaks for itself. Altogether there are 15 organisations with a stake in regulation (excluding the legal ombudsman and the consumer panel). The regulators employ about 750 people at

² See Annex 2

an annual cost of over £70m. Even to a casual observer this structure is not fit for purpose and is the cause of much confusion and waste.

Regular articles in the trade press indicate how the legal specialisms are converging at an ever increasing rate; some lawyers even seeking advantage by moving between regulators.

The LSB remains convinced that a single regulator covering the whole sector is the best way of delivering the independent and activity focused approach to regulation we are seeking. It would take a strategic view of the legal services market as a whole and reflect a legal sector in which distinctions based on titles and types of provider are becoming increasingly blurred.

It is significant that the LSB recognises that there would be no oversight regulator, thereby marking an end to our own existence.

Conclusion

In the time available, it has only been possible to skim over what is a detailed and closely argued document. I hope as many of you as possible will read it from cover to cover.

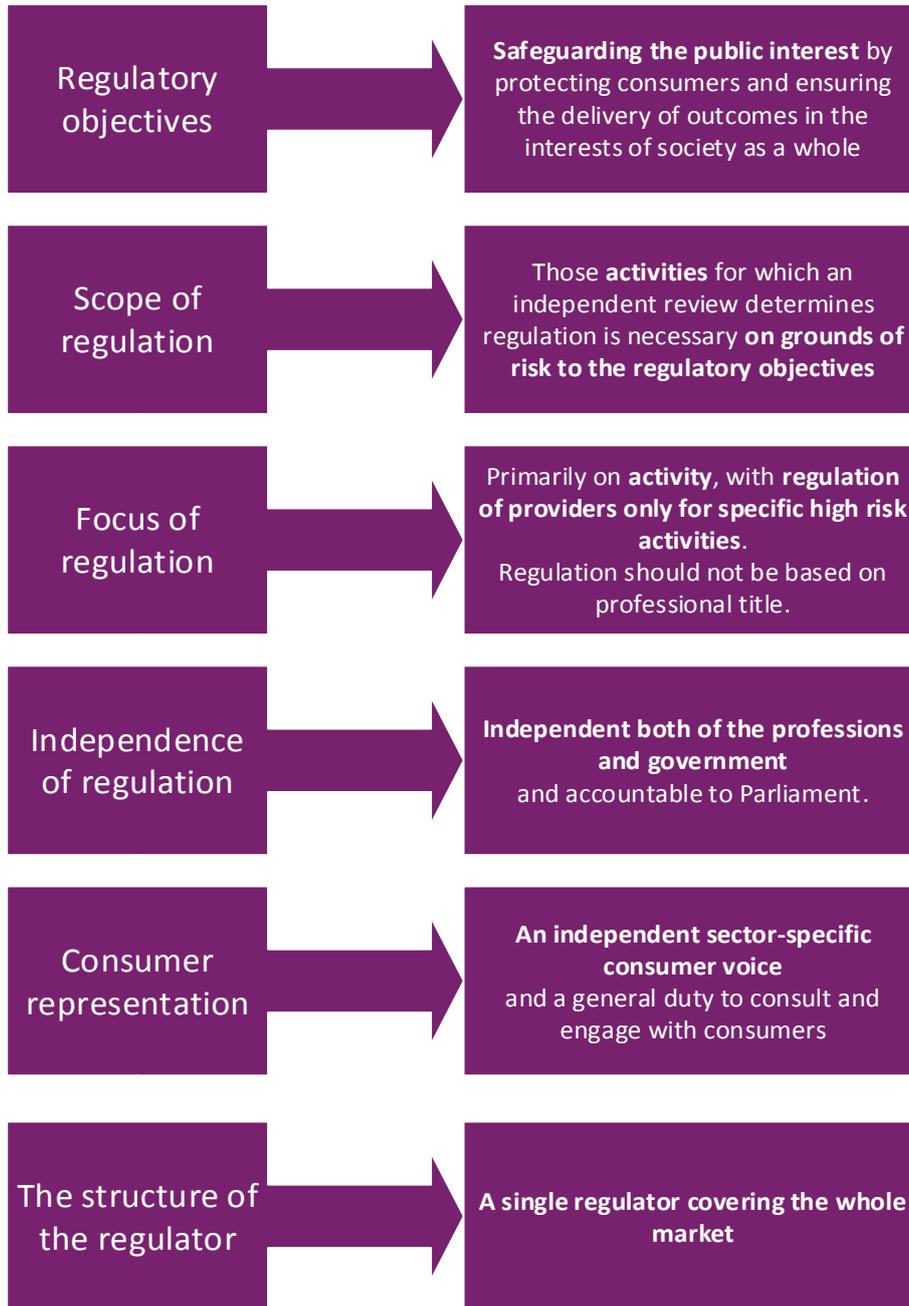
I might add that those with a good memory may remember the LSB's earlier publication known as the 'Blueprint' published some three years ago. I should emphasise that this current document is not old ideas warmed up for a new audience. Where there are similarities it is reassuring. However, as already mentioned, we started from first principles and took a different route to our conclusions. Indeed, the LSB is not the same organisation as it was in 2013 with a new Chair, Board, Chief Executive and Director of Strategy.

Finally, we are all well aware that it may well be some time before the government has the appetite needed to reform the LSA. It will require parliamentary time and a strong political commitment. Nevertheless, groundwork done now will not be wasted and hopefully will add to the groundswell of opinion that something needs to be done

I look forward to some very lively conversations over the coming months... and thank you for listening to me.

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Summary of proposals



Annex 2

— regulatory body

— representative body

— representative & regulatory body

- - - regulatory body (not active)

— profession

