

Future Regulation – forward or backward ?

Chris Kenny

Chief Executive, Legal Services Board

Risk Management for Law Firms conference

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The LSB

Agenda

- Where we are now
- How to move forward
- Personal view

Why are we where we are?

- Collapse of confidence in self-regulation
- Perceived anti competitive restrictions
- The ‘regulatory maze’
- Regulatory failure in complaints-handling
- Market developments

Sir David Clementi, in his report, described a regulatory framework that was **outdated, inflexible, over complex** and **insufficiently accountable** or **transparent**.

Where are we?

Legal Services Act 2007

set out a framework

- eight regulatory objectives which should underpin everything that is done in the legal sector
- an oversight regulator (the LSB) tasked with delivering the goals of the Act and vested with regulatory powers which it delegates to the recognised front line regulators
- the creation of the Office for Legal Complaints and Legal Ombudsman, and
- the introduction of alternative business structures and the opening up of the legal sector

LSB's View

Has it worked?

- 250+ ABS
- Greater independence
- Ombudsman working well
- OFR gives flexibility for firms
- ...and LETR opens way for similar education reform
- Beginnings of simplification
- ...and increasingly effective supervision and monitoring.

LSB's view

However...

Despite some real achievements **the current regulatory framework has yet to deliver its real potential because of over-engineering and complexity.**

- ten regulators plus oversight regulator
- a statutory ombudsman scheme but with unreserved activities outside it
- regulators operating inconsistent, lengthy codes of conduct
- only six reserved legal activities actually required to be regulated

LSB's view

There are excessive regulatory burdens and costs, driven by:

- historical foundation of random reserved legal activities plus regulation by professional title
- fragmentation of regulation and links to professions leading to requirement for oversight
- the underpinning legislative authorities for the regulators and their regulatory arrangements

While the continuing lack of full independence of regulators from both the profession and the representative bodies results in:

- lack of focus on growth in the economy and value for money for consumers
- a lack of transparency of the cost of regulation
- inconsistent access to consumer redress

LSB's view

ABS authorisation is too slow and cautious...

- evidence is showing continued difficulties for new provider types to enter the market, especially those with truly innovative delivery models

Benefits of OFR not yet fully visible

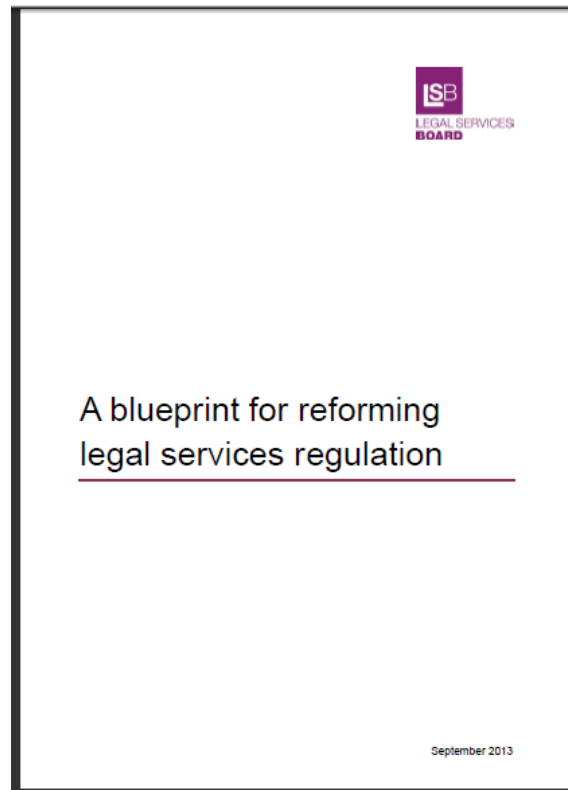
- To some extent, both regulators and firms lack confidence to operate without prescriptive rules

Whilst access and confidence remains low...

- the current level of regulation does not make services **accessible to consumers** or **build confidence** in the legal system

So where to from here?

... a new framework is needed to secure a liberalised market and to support growth and innovation while proportionately tackling major risks.



MoJ review of legal services regulation

- Launched summer 2013
- Aim of the review is to “*consider what could be done to simplify the regulatory framework and reduce unnecessary burdens on the legal sector while ensuring there is still appropriate oversight.*”
- Its remit is to cover “*the full breadth of the legislative framework, covering at least 10 pieces of primary legislation and over 30 statutory instruments*”
- Government response is due next year, also reflecting outcome of Jeffrey review of advocacy.

LSB's response

The LSB' submission to the MoJ review proposes:

- short-term action to significantly simplify the legislative framework over the next 2-3 years
- an independent review testing the single legal services regulator model

and a model of risk based regulation where:

- there is underlying protection for all consumers based on the availability of redress
- legal services specific regulation is targeted at entities for the majority of legal activities
- regulation is applied to individuals only where specific, significant risks warrant it

LSB's response

In more detail...

- removal of much of the sector-specific regulation focused on lower risk activities
- better targeted and more proportionate regulation aimed at reducing the cost and complexity of regulation
- simplify, rather than fundamentally replace, the legislative framework over the next two to three years if a suitable vehicle can be found
- an independent review to develop timetabled and costed proposals for a new framework of regulation that is structurally, legally and culturally independent of both the professions and Government
- the introduction of a single legal services regulator unrelated to any existing regulator, including the LSB

LSB's response

In more detail...

- All sector-specific regulation should be targeted depending on the nature of the risk and effectiveness of tools available – fewer rules, more supervision
- regulation would be directed primarily at entities delivering the service, unless the nature of the risk made additional individual regulation essential

Existing regulators need to better target their regulation on higher risk areas and entities, reduce regulation in lower risk ones and respond to changing risks.

LSB's response

Specific examples...

Lower costs and entry barriers could be achieved by...

- removal of the ability of professional bodies to levy compulsory fees for non-regulatory activities
- a new simple “*fit and proper*” test for alternative business structure (ABS) owners
- permitting market entry to provide most legal service activities unless a regulator has clear evidence of likely potential harm
- fully aligning the reporting rules for infringements for ABS and non-ABS firms
- fewer restrictions on in-house lawyers acting direct for the public, creating more competition and diversity in the market
- removal of the Separate Business rule and reform of the Practice Framework

LSB's response

Specific examples...

Structural simplification could be achieved by...

- a general power for regulators to make the rules that allow regulation to be amended in time with market developments
- a single approval process for the entry of new regulators and licensing authorities
- simplified consultation arrangements - removal of the requirement for the LSB to consult the OFT / CMA, the Legal Services Consumer Panel and the Lord Chief Justice
- faster Parliamentary process for becoming an approved regulator or licensing authority

LSB's response

Meanwhile...

More immediate simplification already starting to happen through:

- SRA Training for Tomorrow
- Review of Compensation Arrangements
- Red Tape Challenge

LSB's response

Long term...

... the real goal of reduced, but more effective, regulation should be most securely built on a *new paradigm*:

- a simplified statutory framework, in a single consolidated Act significantly shorter than the current one
- regulators only have those powers necessary to carry out their functions
- much of the existing sector specific rule books to be removed
- a single smaller cross-cutting regulator (*created from scratch*) with sector specific skills and a deep understanding of the public interest, consumer rights and market efficiency issues (*and its own rule book start from a blank sheet of paper*)

It is not too early to begin to think through its core statutory and institutional ingredients.

Views of other actors...

The Law Society and the Bar Council have their own ideas...

The Law Society

- Law Society should take direct responsibility for training and authorisation
- Investigation and prosecution undertaken at arm's length by operational arm of the Law Society
- There is no evidence' to suggest professional bodies cannot take decisions in the public interest
- Legal Services Consumer Panel should be abolished and the Legal Services Board reformed and Judge-led

Views of other actors...

The Law Society and the Bar Council have their own ideas...

The Bar Council

- the role of oversight regulation should no longer be undertaken by LSB and it should be replaced by a “College of Regulators” which would be led by a judge
- bring day-to-day professional regulatory activity back to the profession
- the regulatory functions of the ARs should be limited to upholding professional discipline, enforcing professional standards and applying disciplinary sanctions
- arrangements for determining admission to the profession should revert to the professional bodies

Views of other actors...

Consumer Panel

- existing regulatory framework does not provide sustainable model in long term to offer consumers best system of consumer protection or support a competitive marketplace
- Panel prefers option of single independent regulator to replace current arrangements
- consumers should have guaranteed access to Legal Ombudsman for resolving disputes about all legal services transactions
- work on a new blueprint should start now to avoid uncertainty about regulation deterring new entrants bring

Personal View

- All the evidence is that self-regulation builds greater cost and complexity, not less
- Focus on economic growth and simplification is here for the long-term
- Getting substance of regulation and professional performance of regulatory functions right is far more important than who does what – that's the agenda for next 2-3 years, rather than worrying about structures
- Risk management of firms by regulators increasingly likely to focus on threats to consumer outcomes and value rather than simply disorderly exit or unethical behaviour caused by financial pressure.
- And there will be continued focus from LSB on removing over-complex regulation as a means of improving access to justice and securing better value.

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Legal Services Board

One Kemble Street

London

WC2B 4AN

Tel: 020 7271 0050

contactus@legalservicesboard.org.uk



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