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KEYNOTE SPEECH

The Independent Review of Legal Services Regulation: Key issues still to be addressed

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Introduction

Let me start with a confession. When this speech was first booked with the Forum, Theresa May was Prime Minister, we still expected to be leaving the European Union on 29 March 2019, no general election was on the horizon, and I was planning on delivering the final report and recommendations of the Independent Review of Legal Services Regulation in the first half of January. Quite a lot has changed!

So rather than confirming and discussing what you should already have read, this speech will now simply have to anticipate the Review's final report and recommendations. My purpose this morning is to share with you where the Review process has reached, and to set out the key issues that I am still grappling with as I prepare the final report and recommendations.

In terms of process, you will probably know that, because of the General Election, the consultation element of the interim report[1] was extended until late December. I have received more than 40 detailed written responses. During the autumn, I also continued my meetings with interested parties when I spoke to over 100 organisations and individuals, some of whom subsequently submitted written responses. I am extremely grateful for the considerable time and effort contributed by the 330 people that I have spoken with during the course of the Review.

It was never my intention that the substance of any conversations held during the Review would be made public. Nor did I intend that any written submissions made in response to the interim report and consultation would be published. That position, of course, does not prevent any respondent from publishing their submission of their own choice. So far as I am aware, such publication has been made by the Legal Services Consumer Panel[2], The Law Society of England & Wales[3], and jointly by the Chartered Institute of Taxation and the Association of Tax Technicians[4].

1. Available at: https://www.ucl.ac.uk/ethics-law/publications/2018/sep/independent-review-legal-services-regulation.
2. Available at: https://www.legalservicesconsumerpanel.org.uk/wp-content/uploads/2019/12/2019-12-18-Interim-Report-Response-Mayson.pdf.
3. Available at: https://www.lawsociety.org.uk/policy-campaigns/consultation-responses/independent-review-of-legal-services-regulation-response-to-interim-report/.
4. Available at: https://www.tax.org.uk/policy-technical/submissions/independent-review-legal-services-regulation-'findings-proposals-and.

Where am I in the process?

The Review was instigated largely in response to the CMA's market study in 2016[5]. 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 accordingly anticipate a future *beyond*, rather than *within*, the terms of the Legal Services Act 2007.

I have now been able to consider all of the responses submitted to the interim report and consultation paper. It will probably come as no surprise to those of you who follow regulatory matters for me to reveal that the general thrust of the responses falls into two camps.

In the first camp, there are those who are broadly supportive of the intent and nature of the propositions explored in the interim report for a new regulatory settlement. Those propositions include:

- the extension of some form of regulation to currently unregulated and unregulatable providers;
- a shift away from reserved activities and professional titles as the principal foundations of regulation; and
- the adoption of a more overtly risk-based approach.

In some cases, this first camp would wish me to go further and faster in pressing government for change. They see the propositions as a sensible response to the CMA's 'call to action', as well as consistent with the Review's terms of reference.

On the other hand, in the second camp are those who do not wish me to propose change to the current structure either at all, or at least not fundamentally, or not yet. If anything, they would rather see only the continued pushing of the boundaries of the 2007 Act.

Two things surprise me particularly about these responses. The first is that they are inviting me explicitly not to fulfil my terms of reference.

The second is that there is a significant correlation between those who now express no wish to change the current structure and those who fought against it when Sir David Clementi made his recommendations in 2004 and as the Legal Services Bill made its way through Parliament!

Let me summarise the key points expressed by the 'no change' camp:

First, that there is nothing fundamentally wrong with what we have.

Both I and the CMA would beg to differ with that view, and we have each set out the basis for concluding otherwise in our respective reports.

Second, that the government will not be interested in making any legislative changes for the foreseeable future.

This might well be true. But it is not for me (or, I suspect, for anyone else outside government) to second-guess when it might come to a different conclusion. The main purpose of this Review is to present the Ministry of Justice with a carefully considered pathway to reform for whenever the timing is judged to be right. So far, I have been careful not to advocate for any particular timing on reform.

Third, that many of my 'recommendations' require further work and have not been costed.

Let me emphasise that, so far, I have not in fact made *any* recommendations. Instead, I have put forward some ideas and propositions for discussion about a different future. I fully acknowledged in

5. Available at: https://assets.publishing.service.gov.uk/media/5887374d40f0b6593700001a/legal-services-market-study-final-report.pdf.

the interim report that further work would definitely be required, and invited help in developing those ideas that were thought to be worthy of further exploration.

Fourth, that the legal professions have experienced, and continue to face, enough change for further reform to be disruptive and unwelcome.

I have some sympathy with this. But I am not going to offer any encouragement or shelter to the legal professions to sit, Canute-like, denying and resisting what is going on around them. In any event, my mission in this Review is not to look at regulatory reform considering only the perspective or concerns of any group of authorised, protected, privileged providers.

I am far more concerned about the consequences for ordinary citizens of not being able to access or afford regulated legal services. They are increasingly driven into self-representation, or into the world of unregulated and tech-based providers (against the worst of whom they have no meaningful protection or redress).

I am not therefore persuaded that 'no change', or 'no change yet', is an outcome that I can support.

The key issues

This brings me to the key issues on which I still need to reach conclusions in framing my final recommendations. I shall headline them as issues relating to the vulnerable, the dabblers, Buridan's ass, and the Gordian knot.

The vulnerable

In any future regulatory regime that reflects the modern realities of the legal services sector, can we continue to keep those who are currently unregulated out, or should we find a way of extending regulatory protection to under-served and vulnerable citizens?

There is something deeply uncomfortable about the current regulatory approach that says, in effect: "Law is too complex for ordinary citizens, and too important to society, to allow anyone other than a qualified lawyer to be regulated for its provision". Even if we continue to stretch the boundaries of what we might mean by 'lawyer' in this context, it is still ultimately an exclusionary and protectionist position.

Worse still, the corollary is this: "If you cannot afford a regulated lawyer, then we are prepared to leave you to your own devices." At this point, presumably, the law is no longer to be regarded as 'too complex or too important', since we knowingly drive people into doing nothing, or representing themselves, or engaging someone who is not regulated.

To my mind, this is not regulation founded on principle, but on discreditable sophistry. It must surely be addressed. The issue for me is whether I still believe that the propositions in the interim report are the principled way of doing so.

The dabblers

In the interim report, I criticised the current regulatory framework for creating a narrow entry gate to regulation based on the combination of the reserved activities and title-based access to authorisation for those activities.

Throughout this Review, I have genuinely struggled to understand how simultaneous and continuing authorisation for several reserved activities can credibly follow from the award of a professional title. This is particularly true in relation to solicitors, who become authorised in relation to all five of the

reserved activities for which the SRA is a regulator. Even in a supposedly more risk-based structure, the SRA adopts the same approach to the authorisation of ABSs.

The *fact* of formal authorisation remains – irrespective of any other requirements of professional duty that supposedly reduce the risks. And then, of course, the 'imprimatur' of regulation is further extended to any non-reserved activities that a solicitor might wish to carry on. My understanding of credibility is now stretched uncomfortably to incredulity.

Unfortunately, dabbling is prevalent – even in specialist areas of law, and potentially at great risk to vulnerable clients and others. The evidence of lack of competence caused by practitioners acting where they do not have the relevant expertise or experience can be found on a regular basis in the decisions of the Legal Ombudsman, the regulators and the disciplinary tribunals.

The requirements and expectations arising from authorisation, supervision, and professional integrity are shown to be regulatory fig leaves that are simply blown away. Practitioners and professions are left naked and exposed, with their cherished reputations repeatedly tarnished and detriment suffered by unwitting consumers.

In the more complex and specialised world in which we now live and work, authorisation for reserved activities through professional title has become a limiting and outdated approach.

What is interesting, though, is that in many respects we do fundamentally already have an activity-based system. The issue for me is whether we should go further on this.

There are already dominant providers or specialist regulators (or both) for many legal services. These include advocacy and the BSB, conveyancing and the CLC, notarial activities and the Master of the Faculties, immigration and the OISC, intellectual property and IPReg, and costs and the CLSB. Notice that not all of these activities are reserved.

By and large, these specialist regulated activities secure regulation through the recognition of a title, but it is questionable whether such a connection is in fact necessary. With a different approach, for instance, perhaps solicitor-advocates could be regulated by the BSB, all immigration practitioners by the OISC, all conveyancers by the CLC, and so on.

So if, for example, we were to consider extending regulation to all will-writing and estate administration, the answer need not necessarily be to make them reserved activities[6]. Instead, we might nominate (or create) a specialist regulator who could deal with all appropriately qualified practitioners, irrespective of their title or professional background.

Buridan's ass

The paradox of Buridan's ass was popularised by the fourteenth-century philosopher, Jean Buridan.[7] A hungry donkey stands midway between two bales of hay. The donkey would normally choose the closest hay. On this occasion, however, neither bale is closest. Unable to make a choice, the ass starves to death.

Many respondents to the interim report are attracted by a move away from title-based regulation towards risk-based regulation. Others see that as potentially too complex, uncertain or impractical. Like Buridan's ass, future regulatory reform could be paralysed by the failure to make a choice.

6. For my part, I am not convinced that will-writing or estate administration are universally high-risk services that require before-the-event authorisation. To do this could potentially restrict the market to titled providers, without excluding the titled 'dabblers' who present a risk to consumers, and would not lead to the inclusion of non-titled specialists who can provide competent and cost-effective help. Equally, will-writing and estate administration are not low-risk services for which only ATE redress would be appropriate.
7. I am grateful to Michael Blair QC for bringing this paradox to my attention.

We should not fall into the trap of thinking that risk assessment would somehow be inherently new or difficult in the context of legal services regulation. Indemnity insurers and some regulators have been making such judgements for years.

I'll willingly admit that I share the concern that we should not move towards a regulatory approach that required every legal service to be assessed in detail for its risk characteristics. Nor am I attracted to a system that would require fine distinctions between, say, a simple lease or will, and a more complicated one.

I wonder whether a starting point could be found in identifying those legal services that are outliers, either because they carry high risk to the public interest or to consumers or, at the other end of the spectrum, low risk to consumers.

For the highest-risk services, before-the-event authorisation should be required. These would be the equivalent of reserved activities, but perhaps with a different list.[8]

At the other end of the risk spectrum, as explored in the interim report, the lowest-risk services could perhaps then be identified and specified for after-the-event protection and redress.[9]

It might well then be that, as now, most legal services should rightly fall within a 'middle ground' where regulatory requirements need to be flexible enough to impose consistent, risk-based and proportionate requirements across the sector. This might include, say, specialist accreditation for providers of particular legal services or, as now, conditions for handling client money.

As I said earlier, we already have the foundations of activity-based regulation, so I'm not immediately convinced that further moves in this direction would inevitably result in a proliferation of new regulators. I am, however, conscious that Esther Roberton, in the Scottish review of legal services regulation[10], came to a different conclusion.

Since all of these issues are a manifestation of risk, in some form or another, I continue to be drawn to a more overtly risk-based approach to regulation. As I say, though, I understand – and I'm keen to avoid – the sense that such an approach would require too much detail or fine, debatable, distinctions.

The Gordian knot

This allusion to an intricate problem that requires a bold solution to solve it refers in my case to regulatory independence. As with the current structure, activity-based regulation would lead to an inevitable question of a single regulator or several. A move away from title-based regulation would also pose consequences for the locus of regulatory authority, as well as for the current relationship between approved regulators and representative bodies.

And the question of the independence of legal services and their regulation from actual or potential state interference – or even just the perception of it – remains a significant issue.

At this stage, I express no certain views on these matters – except one.

8. This could include rights of audience and the conduct of litigation – though probably not as a universal or generic authorisation. Some elements of advocacy and litigation in tribunals or lower courts could, perhaps, be undertaken by non-titled specialists. BTE authorisation should probably also extend to immigration (perhaps with an exemption for OISC-regulated immigration practitioners) and notarial activities, on the basis that the public interest is significantly at stake.
9. These services could include, say, non-contentious employment matters, uncontested divorce, pre-nuptial agreements, welfare benefit advice, consumer advice (excluding credit arrangements), contract advice, and the preparation of documents relating, for instance, to company formation, or to partnership and shareholder agreements.
10. Available at: https://www2.gov.scot/About/Review/Regulation-Legal-Services.

Crispin Passmore correctly identified in a recent blog on *Legal Futures*[11] that in the interim report I had been "at pains to provide a real role and future for the Law Society". I was initially disappointed that the Society in its published response had seemed not to read the report in the same way. On reflection, perhaps it did.

It is quite clear from the published response that in relation to regulation the Law Society regards its primary role as being to represent the views and interests of its members. I respect that – indeed, I admire and welcome it. I regard it as vital that the professions continue to be represented robustly and fearlessly.

Consequently, they should no longer be constrained in that role by the artifice of approved regulator status or the contortions of the internal governance rules. My certain view, therefore, is that the time has come to cut the Gordian knot between approved regulators and representative bodies.

Closing thoughts

I stand by the conclusion of the interim report that the current regulatory structure "provides an incomplete and limited framework for legal services regulation that will struggle in the near-term and beyond to meet the demands and expectations placed on it".

I am sure that the necessary change cannot be achieved within the framework of the 2007 Act.

I am not looking for the perfect future system of regulation. No regulatory approach can ever be perfect. Nor can it eradicate all risks to the public interest or to consumers. But I am sure that we could do better.

This begs the inevitable question of how much longer reform can wait. I said earlier that I have so far been open-minded on the question of timing. However, as I enter the concluding phase of the Review, I am increasingly convinced that some change is needed sooner rather than later. To the question of whether the necessary reform can be incremental or needs to be radical, perhaps the answer is that we need to contemplate both.

11. See https://www.legalfutures.co.uk/blog/the-law-societys-impoverished-vision-of-the-future.