



INDEPENDENT REVIEW OF LEGAL SERVICES REGULATION

TERMS OF REFERENCE

A. Purpose and timing

The Centre for Ethics & Law in the Faculty of Laws at University College London is undertaking a fundamental review of the current regulatory framework for legal services.

This independent review is intended to explore the longer-term and related issues raised by the Competition and Markets Authority (CMA) market study in 2016 and its recommendations¹, and therefore to assist government in its reflection and assessment of the current regulatory framework.

In the context of the outcome of the EU Referendum and the UK's impending exit from the European Union, it is even more important that the regulatory framework for legal services is fit for the future. The democratic intention that is central to 'taking back control' presumes full confidence in our domestic rule of law and legal institutions, as well as maintaining our performance and competitive position in the global economy. This in turn requires that the supporting regulatory structure for legal services is as robust as it can be – which is in question given the CMA's conclusion that the current regulatory framework is unlikely to be sustainable in the future.

The review will aim to present its conclusions to the Ministry of Justice by the end of 2019, and the final report will be published.

B. Review objectives

The provision of effective and properly regulated legal services is critical to maintaining the rule of law, and the effective and efficient administration of justice. It is also necessary to sustaining the UK's position and reputation as a world-leading jurisdiction for the governing law of international transactions and for the resolution of disputes. The review's objectives will therefore be to consider how the regulatory framework can best:

- promote and preserve the public interest in the rule of law and the administration of justice;
- maintain the attractiveness of the law of England & Wales for the governance of relationships and transactions and of our courts in the resolution of disputes;
- enhance the global competitiveness of our lawyers and other providers of legal services;
- reflect and respond flexibly to fast-changing market conditions being driven by innovation and advances in technology;
- protect and promote consumers' interests, particularly in access to effective, ethical, innovative and affordable legal services and to justice; and

1. Available at: <https://www.gov.uk/cma-cases/legal-services-market-study>.

- lead the world in proportionate, risk-based and cost-effective regulation of legal services, consistent with the better regulation principles.

C. Context

A review of legal services regulation was carried out in 2003-4 by Sir David Clementi. It led to the Legal Services Act 2007 and a new framework for the regulation of legal services (including the introduction of the Legal Services Board (LSB) as an oversight regulator, of the Office for Legal Complaints, of the separation of regulatory and representative activities of professional bodies, and of alternative business structures). In the years since the Clementi Review, the impact of the global financial crisis has been felt, the use of technology has become more extensive and pervasive, and the experience of regulators and of regulation has developed considerably. The world that existed in 2004 does not exist in the same way now, and the inherent tensions in the 2007 Act have become increasingly apparent.

In July 2014, the then Secretary of State for Justice called a Ministerial Summit of legal services regulators, as a result of which the regulators were invited to consolidate their collective strategic view of the difficulties they were experiencing under the Legal Services Act 2007 and related legislation and to identify possible legislative options for creating a regulatory framework that would better support an effective, diverse and healthy legal services sector. Cross-regulator discussions ('the Legislative Options Review') were then chaired by Professor Stephen Mayson of UCL, and the regulators' views were published and submitted to Ministers in July 2015.² The LSB subsequently developed and published its own more detailed views on the options.³

Shortly before the Legislative Options Review report was published, the (new) Secretary of State said in an appearance before the Justice Select Committee that there would be a review of the Legal Services Act within the lifetime of that Parliament. Later that year, in November 2015, HM Treasury announced in its competition plan that the government would consult in spring 2016 on making legal service regulators independent from their representative bodies.

Then in January 2016, the Competition and Markets Authority launched a market study into the supply of legal services in England and Wales. Its work took a year, and its final report was published in December 2016.¹ The principal conclusion from the review was that the legal services sector is not working well for individual consumers and small businesses, largely because those consumers lack the experience and information they need to understand their needs, to make informed choices, and to engage confidently with providers of legal services.

The CMA also concluded that these issues are likely to increase over time and *make the current regulatory framework unsustainable in the long run* (especially since some aspects of that framework do not meet the better regulation principles). The CMA also concluded that "the majority of issues cannot be addressed by tweaking the current framework but would be better addressed through legislative and/or structural changes by the government" (page 213), and therefore recommended that government undertook a review of the current regulatory framework.⁴

2. See:

http://www.legalservicesboard.org.uk/news_publications/LSB_news/PDF/2015/20150727_The_Case_For_Change_Legislative_Options_Beyond_The_Legal_Services_Act_2007.html.

3. See:

http://www.legalservicesboard.org.uk/news_publications/LSB_News/PDF/2016/20160909LSB_Vision_For_Legislative_Reform.pdf.

4. It is important to emphasise that this conclusion was reached in the context of alternatives to a fundamental review of the regulatory framework having been taken into account. The regulators, as part of their work following the Ministerial Summit in 2014, developed a number of proposals for short-term implementation: see http://www.legalservicesboard.org.uk/what_we_do/Ministerial_Summit_2014_Follow_Up.htm). The CMA market study also put forward some short-term recommendations, most of which are also being taken forward. Nevertheless, the

During the period of the CMA market study, and before the government was able to respond to the CMA's recommendations, both the EU Referendum and a General Election took place. As a consequence, the political backdrop changed considerably and, not surprisingly, when the government responded to the CMA in December 2017, it did not feel able to commit to the formal review recommended by the CMA. It did, however, agree that it would "continue to reflect on the potential need for such a review".

D. The Review and its scope

The review will take as its starting point the issues and options identified in the Legislative Options Review, along with the findings of the CMA market study (which also set out the principles that it thought should guide a review, along with its assessment of the current framework against those principles). The review's scope will therefore reflect the objectives and context included in these terms of reference, and will include: regulatory objectives; the scope of regulation and reserved legal activities; regulatory structure, governance and the independence of legal services providers from both government and representative interests; the focus of regulation on one or more of activities, providers, entities or professions; and the extent to which the legitimate interests of government, judges, consumers, professions, and providers should or might be incorporated into the regulatory framework. (Further detail is included in the Annex.)

The review will be led by Professor Stephen Mayson, an honorary professor in the Faculty of Laws, and the chairman of the Legislative Options Review. This project is being undertaken independently and with no external funding, and Professor Mayson has agreed to participate without payment.

Professor Mayson will be supported by an Advisory Panel whose members will advise on the direction of the review and on specific issues, and will help to scrutinise and challenge emerging conclusions and recommendations. The Advisory Panel will include one or more members in each of the following categories: an academic specialist in regulation and professional ethics; a practitioner specialising in legal services regulation; an economist; a retired senior judge; an individual with experience of representing consumers' interests; a representative of the business world; an individual with experience of acting as a regulator; and a Parliamentarian or expert in constitutional governance and accountability.

E. Stakeholder engagement

The review will seek to engage with a wide range of stakeholders, including the Competition & Markets Authority, the Legal Services Board, approved regulators, front-line regulators, representative bodies, consumers, the judiciary, practitioners, and providers of legal education and training.

Contact

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CMA's conclusion was that these various measures would not be sufficient in the longer term to address all of the identified shortcomings in the current framework.

ANNEX: DETAILED SCOPE

The Review will consider and, where appropriate, make recommendations on the following issues identified by the Legislative Options Review 2015:

1. Regulatory objectives

The review will consider the number, nature and presentation of any regulatory objectives. It will examine the case for a different set of objectives, and whether or not there should be an overarching objective or an explicit hierarchy of objectives.

2. Scope of regulation

The review will consider what should fall within the scope of sector-specific regulation, and how that could best be addressed. The rationale for (and of the current) reserved legal activities will be considered as part of a broader consideration of scope, including whether there should be:

- regulation of all 'legal services' and providers
- limited (or no) sector-specific regulation
- regulation targeted by reference to the regulatory objectives
- regulation targeted by reference to the assessed risks of certain activities or providers, or to certain consumers (based, perhaps, on vulnerability, asymmetry of relationship, or the potential consequences of incompetent or inadequate advice or representation).

From the conclusions that emerge, consideration will then be given to the continuing need for, and approach to, reserved legal activities, as well as to how regulation might appropriately be applied before the event (such as authorisation), during the event (such as codes of conduct or indemnity insurance), and after the event (such as complaints and disciplinary processes, and the role of an ombudsman).

The review will also consider how a future framework might best incorporate flexibility to adapt to market changes and emerging perceptions or assessments of risk, including the processes for adding or removing regulation to reflect those changes in circumstances or assessed risk (bearing in mind the importance of an assessment of relative costs and benefits as part of any proposal to add or remove regulation).

3. Focus of regulation

The review will consider whether regulation should primarily be focused on one or other (or both) of the legal activities or the providers (individuals, professions, organisations) who carry them out. As recommended by the CMA, the future role of professions and professional title in regulation will be explored, along with the implications for consumer protection and professional bodies.

4. Regulatory governance and independence

Being mindful of international perceptions and professional concerns, the review will consider how the independence of legal services regulation from both government and representative interests might best be assured. It will explore appropriate forms of governance and independence that should flow as appropriate from the regulatory objectives, and the scope and focus of regulation.

5. Structure

By reference to the conclusions on regulatory objectives, scope, focus and governance, the review will consider the ways in which the regulatory framework for legal services might then best be structured. This will address issues relating to:

- the number of regulatory bodies
- regulatory bodies focused on regulated activities or regulated persons
- the desirability of a single regulator (with or without specialist sub-units to focus on either activities or providers, or a combination)
- the need for or desirability of an oversight regulator.

6. Representation of interests

The review will consider the extent to which the interests of, for example, government, judges, consumers, professions, and providers might appropriately and legitimately be incorporated into a future regulatory framework, either through structural requirements or representation, or through obligations to consult or seek approval.

The review will also bear in mind the key features of any alternative regulatory framework suggested by the CMA in its market study recommendations (at pages 215-217):

- Clear objective: legal services regulation should focus on outcomes for consumers and society as a whole, taking account of the balance between wider public interests and consumer protection and competition.
- Independence: [we believe strongly in the principle and importance of independence of regulators. This is because insufficient independence may compromise their effectiveness in meeting their objectives].
- Flexibility: this could be achieved by replacing (or supplementing) the current reserved legal activities (which are defined in primary legislation and thus require substantial time and resource to be varied) by a provision that allows the regulator to direct regulation at areas which it considers pose the highest risk to consumers.
- Targeted and proportionate regulation: this may have the following implications:
 - (i) Providers that are currently unauthorised would come into the regulatory net, if they undertake activities considered as risky. By contrast, the regulatory burden on solicitors and others might be lower than currently for lower risk activities. This would allow providers to compete on a level playing field and allow lower cost unauthorised providers to compete where the authorisation of titles is not necessary.
 - (ii) Some of the activities that are currently reserved may cease to be reserved. Furthermore, reservation may be replaced with other type of regulation, if this would better match regulation with risk.
 - (iii) Access to redress mechanisms, such as the [Legal Ombudsman], could be extended more widely for the services that fall within the scope of regulation. In other words, access to redress would depend on the risk of detriment faced by the consumer (or the public interest), and not on the professional title of the provider. More targeted access to redress is likely to reduce the 'regulatory gaps' that consumers currently face in certain area of law.
 - (iv) Low-risk activities would not be subject to sector-specific regulation and would not give access to specific forms of redress. However, consumers would be able to rely on private and public enforcement of general consumer law, and alternatives to regulation such as voluntary schemes, where available.
- Fewer regulators: over time, there is a case for consolidation of regulators. A framework with fewer regulators may allow for better prioritisation over risk factors as these risk factors relate more to the

relevant types of consumer, activity and legal services rather than types of provider. However, we also consider that the appropriate structure should ultimately depend on the preferred regulatory approach, rather than structure being something that should be considered in isolation.

- Role of title: we consider that, in a more competitive legal sector, with appropriately scoped risk-based regulation, title might cease to be subject to statutory regulation. Instead, relevant professions could be responsible for the title. However, in the short to medium term, it would be preferable that titles continue to remain subject to regulation. This is because ... professional titles play an important role in the current market: the majority of legal services are provided by authorised legal providers, mainly solicitors.

The CMA also identified a number of practical questions that any review would need to consider (page 217), including:

- (a) Assessing risk: the review needs to identify how to assess and identify risk across many legal services areas, and how to define the scope of regulation on the basis of this risk assessment.
- (b) Implementing flexibility: the review needs to identify what legislative changes should be implemented to achieve flexibility of the regulatory framework.
- (c) Effective prioritisation: the review should ensure that the new framework allows regulators to prioritise effectively regulatory changes.
- (d) Evidentiary standards: the review should set an appropriate evidentiary threshold for making changes to regulation, by ensuring that it strikes the right balance between the need to ensure that changes are made only when there is evidence of a change in the risk factor and the need for flexibility in the framework.
- (e) Impact on the wider market: the review needs to consider how changes to the framework are likely to impact the legal services sector outside of the scope of this market study (i.e. criminal legal services and legal services other than to small businesses and consumers).
- (f) Regulatory structure: the review needs to identify whether the current structure is appropriate under the new framework, particularly in relation to its ability to deliver risk-based regulation.
- (g) Transition costs: the review should determine the most effective way to transition between the current and the new framework models without introducing excessive regulation, creating uncertainty for businesses or chilling current liberalising initiatives.

This review will accordingly also seek to address these questions.