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The Scope of Regulation

I am going to ask you, please, to cast your minds back to 2005. Before the global financial crisis, well before the Covid pandemic and, in England and Wales, a generally calmer and more prosperous time. It was then that our Government launched a once in a generation, first principles review of the regulatory framework for legal services.

And so, we gave ourselves the luxury of considering some of the fundamental questions that Brian has outlined about the scope of regulation, but in real life and with real consequences.

Fast forward two years to 2007 and our shiny new Legal Services Act was passed and has shaped our regulatory framework and approach ever since.

And today I'm going to briefly touch on four key themes that really define our overall approach under this framework.

Those are:

1) Independence
2) Purpose
3) Regulation by activity, not title
4) Alternative business structures

1) Independence

So, starting with independence. One of the major drivers for reforming the regulatory framework in England and Wales was a desire to increase the independence of regulation, both from government but also independence from the legal profession. Prior to the Act, we had a model of self-regulation by the bodies that represented solicitors, barristers and the other types of lawyer we have in E&W. The Act put a stop to this. It made these organisations set up separate, independent regulatory bodies, who now have to have Boards with non-lawyer Chairs and with a majority of Board members being non-lawyers.

The Act also established the Legal Services Board, where I work, as an independent oversight regulator of legal services. So we sit above the frontline regulators, making sure they are delivering properly independent regulation that is appropriately focused on the public interest.

So we have a lot of safeguards around independence.

2) Purpose

Moving on to the purpose of regulation. I mentioned the public interest but the Act actually sets out eight different regulatory objectives that need to guide our decision making.

And these objectives make clear that our regulatory framework is not intended to be a reactive one, based purely around maintaining standards and preventing harms.

The regulatory objectives demand some positive action to make the market work better. For example, they expect regulators to be focused on:

- promoting the interests of consumers,
- encouraging a diverse legal profession, and
- improving access to justice.

And to develop one example, improving access to justice has been a huge focus for legal services regulation in England and Wales over recent years. And that is because we know, that at the moment, too few people and too few small businesses who have a legal problem, are getting the help they need.

- For example, we know from our research that every year, around 3 and a half million adults in England and Wales experience a legal problem, and don't get help to resolve it. That's against an adult population of around 45m.

- We also know that **only a quarter** of small businesses get professional help to deal with a legal issue, and **around half** try to handle legal issues alone, or take no action at all.

These high levels of what we call "unmet legal need" are a really important backdrop to our regulatory approach.

3) Regulation by activity not title.

This brings me on to my third area. In England and Wales, we have a system that is primarily based around regulating activities, rather than titles.

So the Act sets out six "reserved legal activities" and you only need to be regulated if you want to provide any of these activities to the public.

These are activities like conducting litigation, conveyancing and exercising rights of audience in a court.

So there are a lot of things that most people would consider to be legal activities that can be provided by non-lawyers, outside of regulation. Things like writing a will, or even general “legal advice”.

So you could perfectly happily set up an office, advertising the provision of “legal advice” from expert advisors, without even touching on regulation.

We estimate that unregulated providers have up to a 10% share of the market in some areas of law, such as will writing. When it comes to advising or representing small businesses, we think it could be as high as **a third**.

Unregulated providers obviously come with risks. No regulatory protections, no guarantee of redress. And the potential for confusion amongst the public about who is and who isn’t regulated, and what that means.

But you also have to look at this in the context of unmet legal need. In theory, allowing these lower risk “legal” activities to be provided outside of regulation means that they can be offered with lower overheads and therefore lower costs, potentially making them more accessible to the public. And our research has shown that unregulated providers are more likely to offer transparent and fixed fees and are more likely to offer innovative services.

There remains lively debate in England and Wales about whether we have the line drawn in the right place which I think this serves to highlight what an important and delicate decision this is.

4) Alternative business structures

Another big call that the Act made on the scope of regulation was to allow the regulation of Alternative Business Structures, or ABS. I gather this is a debate raging through a number of states over here at the moment.

So, what do I mean by ABS? Well, an ABS is a firm/company that provides regulated legal services but can be owned and managed, in part or in full, by non-lawyers.

This in turn, opens up the possibility of these authorised businesses offering non-legal services, alongside legal services, under the same roof. So, for example, we have ABSs offering wills and probate services alongside estate administration and funeral services. We also have firms offering legal work alongside accounting, tax or investment services.

When this idea was debated as the Legal Services Bill worked its way through parliament, it was really quite contentious. There were concerns expressed by some that we'd be handing over legal services to the sharks of the commercial world. Or that we'd be outsourcing justice to the supermarkets.

Well, we've now been regulating ABSs for 11 years. There are over 1,500 in operation in England and Wales, and they make up around one in ten of all regulated firms.

Overall, they have not completely changed our legal services sector. We are not all buying multipack cans of legal services from our local supermarkets alongside our groceries. Nor are our regulators struggling to cope with disciplinary cases against unethical non-lawyer owners of ABSs.

In fact, when we reviewed the evidence from the first 10 years of regulating ABSs, our overall diagnosis was broadly positive. They are more innovative than traditional law firms and many are contributing to greater consumer choice – which is particularly important given the high levels of unmet legal need that I have mentioned. And, their disciplinary records are no worse than for other types of law firms.

So I expect ABSs to continue to play an important role in the legal services sector in years to come. In fact, despite the name, I think we should probably stop thinking of this approach to delivering legal services as alternative. Because when compared to many other services across the economy, it is actually quite normal.

Conclusion

So, in conclusion, I'm not sure there is a right or wrong answer on any of the questions we are posing with this panel. I certainly don't think that we have a perfect framework in England and Wales. But our framework does give us a very clear mandate to drive improvement in how the market works for the public. And this is what gets me out of bed, with a spring in my step, on a Monday morning.