Legal Services Regulation – A Model for Higher Education?

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The Architecture – pre 2007

- Pre 2007, regulation done by professional bodies, albeit with some oversight of rules of education by Government and some rules approved by the Master of the Rolls.
- A separate Legal Complaints Service, as a sub-Committee of the Law Society, handled client complaints. A dissatisfied client could complain to the Legal Services Ombudsman, which tended to review rather than impose.
- The LCS was supervised by a stand alone statutory regulator, the Legal Services Complaints Commissioner.

The Architecture today

- A small (£4.5m, 30 staff) oversight regulator – the Legal Services Board.
- 10 approved regulators – 2 are independent of the profession, the rest have to comply with internal governance rules to ensure complete separation of regulatory and representative functions.
- 2 of the 10 regulators are also licensing authorities, able to approve and supervise Alternative Business Structures.
- A separate statutory Legal Ombudsman, with a board appointed by the LSB, to determine complaints unresolved by firms and chambers.
- Common regulatory objectives for LSB and regulators – and a duty on Legal Ombudsman to contribute to them. And all have duty to follow better regulation principles.

The Regulatory objectives

- Protecting and promoting the public interest
- Supporting the constitutional principles of the rule of law
- Improving access to justice
- Protecting and promoting the interest of consumers
- Promoting competition in the provision of services
- Encouraging an independent, strong, diverse and effective legal profession
- Increasing public understanding of the citizen's legal rights and duties
- Promoting and maintaining adherence (by authorised persons) to the professional principles

Why Change? - Redress

- Despite free standing statutory regulator, complaints handling by solicitors in particular was seen as failing – miners' compensation scheme, long turnaround time, perception of pro-profession bias

- Despite challenge of building a new organisation and some concerns about lower than expected volumes and hence higher unit costs, Legal Ombudsman proving credible in terms of

    - Demonstrable independence and even-handedness
    - Better feedback to the profession
    - This ability to impose solutions apparently acting to encourage earlier settlement by law firms.

- Backed by strong messages to regulators from LSB about the need to raise initial complaints handling standards and ensure effective signposting

Higher Education Implications?

- OIA seems to be achieving many of the same benefits, but
  - Is the fact that private sector providers can stand outside its reach a problem? – absence of a redress mechanism will not be material enough to influence student choice, but it does not seem to pass a “felt fair” test at first sight
  - Does the presence of nominee directors and the fact that it is non-statutory undermine perceptions of its independence – or is the lay majority and fact of Ombudsman Association recognition sufficient?
  - Does it have the resource to enable it to feedback lessons generically – or is publication of individual decisions sufficient?
  - Does there need to be a mechanism within OIA (or separate to it) to improve performance in complaints handling first time around to reduce the level of activity for which the safety net of independent resolution is needed?

Why Change? - Competition

- OFT report on “Competition in the Professions” (2001) criticised ban on external ownership of law firms as anti-competitive
- Clementi Report (2004) argued that the ban created higher prices for consumers and obstructed innovative multi-disciplinary practices offering integrated professional services to business
- Legal Services Act (2007) removed the ban, putting in place arrangement for approval of
    - Legal Disciplinary Partnerships – a transitional route with up to 25% external ownership. Could be approved by existing regulators
    - Alternative Business Structures – up to 100% external ownership. Subject to fitness to own test, administered by Licensing Authorities, approved by LSB and with statutory posts of “Head of Legal Practice” and “Head of Finance and Administration” within each firm

Why change? Competition

- Changes fiercely opposed at all stages by the profession, with fears of
    - criminal ownership
    - Loss of international recognition
    - Adverse impact due to “cherry picking” profitable work
    - Threats to professional privilege
    - “commercial” imperatives undermining professional ethics
- LSB considers change not just desirable, but essential
    - To speed innovation – legal sector notoriously slow to embrace IT, especially in consumer markets
    - To improve access to justice – survey evidence suggests that 30%+ of the population do not pursue legal routes to redress through combination of perceived cost and inaccessibility. Supply side reform essential to tackle this – no plausible way for legal aid to meet this need
    - To boost economic growth – access to legal services as essential as access to bank finance for SMEs, but only 12.5% regard legal advice as a value adding purchase

Why change? Competition

- LSB also considers that risk arises, not from ownership structure, but from individuals, activities and governance/compliance structures. Therefore looks to licensing authorities to ensure

    - Consistent approach to authorisation of new ABS entrants and traditional firms alike – neither sponsorship, not discrimination
    - Degree of intervention – refusal, restriction, level of supervision – to be determined by risk
    - Transparency in their own decision-making criteria, processes and performance

Higher Education Implications – Competition?

- Do student funding reforms mean that supply side action is needed in any event to incentivise efficiency innovation, and social mobility alongside work of OFFA and access agreements?

- Are approval mechanisms sufficiently independent of existing players – both in perception and reality – to give strong enough entry incentives?

- To what extent do apparently cumbersome approval processes for new institutions delay innovation – by new entrants and current players alike? And does this disincentive both public and private funders?

- How can consistency of approach to authorisation and supervision – which may lead to different levels of intervention in practice – be achieved between difficult classes of new entrant: difficult to argue for different ex ante regimes based on ownership alone.

Why Change? – Content of Regulation

- Clear perception of lack of independence of front line regulation, with a focus on protection of professional title, rather than standards in performing specific activities
- Focus primarily on point of entry and discipline issues if identified via complaints – little “market supervision”, “conduct of business” regulation or pursuit of broader policy goals
- “Public interest” goals very loosely defined in reality

Why Change? – Architecture of Regulation

- Architecture of separation of regulation by different types of professional perceived as very confusing
- Separation between different parts of profession inimical to learning and development across the sector as a whole
- Alternative of a large single Legal Services Authority (cf Browne proposal for HEC) not seen as attractive in 2005/6 because of
  - Sheer size and potential inflexibility
  - Danger of capture by either Government or profession
  - Likely level of hostility from all sections of the profession

  Although LSB evidence to Justice Select Committee has floated it as an idea worthy of Parliamentary reconsideration post 2015-election

Why Change? – Architecture of Regulation

- Important to keep key operational regulatory decisions closer to front line, so LSB does not intervene in individual decisions, but does
  - Approve rules
  - Assist in standard setting in regulation and legal education
  - Approve new activities to be regulated
  - Approve changes to activities covered by regulators
  - Approve new regulators wishing to enter
  - Have potential to take a range of disciplinary action against failing regulators

- Last four of these powers subject to Ministerial and Parliamentary approval – but can only be initiated on LSB recommendation.

Higher Education Implications?

- How far does current fragmentation of bodies
  - By function
  - By differing levels of statutory backing
  - By national jurisdiction

  Lead to
  - Functional gaps with poor consumer protection?
  - Overlaps, policy incoherence and avoidable cost?
  - Reality or perception of lack of independence and illegitimate control of entry?
  - Opacity and poor accountability – for regulatory body and institutions alike?
- If current architecture on balance protects independence and aids institutional diversity, are there more imaginative ways of improving its operation than current coordination machinery?

Higher Education Implications?

- If legal services is a possible model
    - Are common regulatory objectives needed across all bodies to underpin specific functions? What would they be?
    - How far is the LSB's regulatory effectiveness model in our assessment of regulators – outcome focussed framework (rather than rules), strong risk identification, supervision against those risks, strong enforcement when that fails – transferrable to Higher Education – either for an oversight body overseeing national bodies and/or for those bodies in their interaction with institutions?
    - Does the same balance of standards and market regulation read across to H.E ie regulators need to incentivise innovation and competition but no formal competition law powers?
- Can HEFCE "lead regulator" role be made to work
    - In absence of clear intervention powers to support and challenge other regulators?
    - While it has direct regulatory functions of its own?
    - Without further bolstering of its independence from <u>both</u> government and institutions?

Regulation – Implication for Higher Education

- Or are the work arounds and coordination mechanisms so complex that it would be better to devote effort to remaking the case for a Higher Education Council post – 2015 election?