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Dear Stephen

Thank you for our meeting last month. I thought it would be helpful to follow up with a letter setting out the Law Society's views on the various issues covered in your review.

Timing

The Law Society welcomes the fact that you recognise that now is not the time to be advocating further reform and that the timing for a major regulatory review needs to be right. Currently the legal sector is going through a period of uncertainty driven by Brexit, and wider market changes.

Recent regulatory reforms such as the introduction of the new SRA handbook last month, the transparency rules last year, the new education and training requirements, and wider regulatory changes (new Money Laundering Directive, GDPR) will bring further change to the sector.

Any further regulatory interventions are likely to put significant and potentially harmful strain on public and business confidence in our legal system and impact on the growth of our legal market both domestically and overseas in the short and long term.

Unmet legal need

There is a distinction between unmet legal need, with some individuals being unable to access legal services, and a latent demand for legal advice or services. It does not follow that by a revision of the regulatory regime individuals will be able to access legal services or change their behaviour to seek actively legal advice.

The significant rise in litigants in person is largely a consequence of the Government's cuts to legal aid and poor understanding of legal rights rather than due to a market failure. These factors can be addressed through means other than changes to regulation. There are indications that some additional funding will be made available. Important work can be done to improve public understanding of legal rights and how to access justice.

Our Legal Needs survey, due to be published early next year, will show that there are many people who do not understand how and when they should take legal advice from a qualified solicitor or other regulated professional. At the recent All Party Parliamentary Groups event

on public legal education (PLE) there was a consensus among regulators and practitioners that PLE could address many of the unmet demand issues by helping individuals, especially those with low legal confidence, to take action when they face a legal problem.

The consequences of an overhaul of regulation

We would not argue that the current regulatory framework is perfect, but we are concerned that the wholesale reforms you are proposing would lead to a massively uncertain and costly system, with firms needing multiple layers of different regulation for individual members, which would need to be regularly re-assessed, with different terms of engagement and levels of insurance.

We fear that such a complex system would lead to increased cost for legal providers and the public, with key suppliers such as high street generalist practices negatively affected. The unintended consequences could well be many small firms leaving the market, the legal sector contracting, and the cost of legal services increasing, leading to further unmet demand. There would also be serious implications for diversity, with many smaller firms having BAME partners, staff and suppliers. In many cases smaller firms deal with a higher proportion of vulnerable clients, who could also be affected.

We are also concerned about potential implications of your proposals on the wider legal ecosystem such as the judiciary, courts and tribunals, and the administration of the justice system. For example, the Law Society heat map¹ indicates a looming crisis in the supply of criminal solicitors, who normally provide all the other solicitor services in addition to advocacy, including police station and magistrates court advice and representation. The prospect of multi-layered regulation is likely to increase the cost for such solicitors and have a negative impact on this already fragile market.

We are concerned that your proposals may be unworkable in practice. You suggest that individuals should only be able to practice in the areas for which they have specific regulation. Clients will often seek advice from a solicitor in relation to a multi-faceted problem, and will rarely be in a position to identify all potential legal issues when they first make contact. In order to best serve clients' needs, solicitors must be able to advise in relation to a client's problem in the round.

The Competition and Markets Authority warned that "*a wholesale reform of the regulatory framework may be risky and that the detail of any model will be important*"². Your report fairly accepts that the costs and other implications of your proposals still remain to be considered. A detailed impact assessment of any proposed reforms on the public, the profession, and the legal sector as a whole would be fundamentally important before any firm proposals can be considered.

Regulatory objectives

Your report proposes to remove the existing eight regulatory objectives and to replace them with one broad definition of public interest. You have recognised that the explicit focus of the strategy of regulators has been the promotion of competition – just one of the existing regulatory objectives. This has undermined other important regulatory objectives, such as the safeguards for consumers, the public interest, and promotion of a strong legal profession.

¹ <https://www.lawsociety.org.uk/policy-campaigns/campaigns/criminal-lawyers/>

² The legal services market study, CMA, December 2016, p. 213.

Parliament had previously expressly decided that while protecting and promoting the public interest should be a regulatory objective, it should not trump all the others. The risk of having only one “public interest” objective is that different organisations take differing views of what the “public interest” means. We fully support the protection of the public interest as a regulatory objective, but other regulatory objectives remain important and need to be applied in a more effective and balanced way, especially where there are tensions between objectives. Furthermore, the accountability of regulators for their adherence to these objectives could be improved by more robust oversight and impact assessments of their work.

Reserved activities

In your report, you advocate for the list of reserved activities to be reviewed and replaced with ‘*before-the-event authorisation*’, with the possibility that such regulation could apply to other high-risk activities in the future.

We are pleased that you recognise that areas of significant risk to the public need to be restricted to only authorised professionals who meet higher regulatory threshold requirements. Our views differ where you propose to open these high-risk areas beyond the current regulated community. The safeguards associated with title give the public confidence in seeking advice and protection in practice.

The fact is that the current regulatory system already allows more stringent regulatory intervention for high-risk activities. If there are additional areas of significant risk to the public, they can be dealt with by extending the list of reserved activities, or by secondary consumer protection regulation. For example, in April claims management companies were brought within the regulatory remit of the Financial Conduct Authority to enhance consumer protections. We have also supported the Legal Services Board’s proposal to the Lord Chancellor to include wills within the scope of reserved activities. A similar consideration should be given to other high-risk areas such as estate administration, lasting powers of attorney and trusts. We have said previously that with an increasingly aging population, these areas call for regulatory attention to ensure that vulnerable people, and in particular those with mental incapacity, are sufficiently protected.

Professional titles

You recognise the importance in the “public good” of titles and “*the continuing value that the courts, judiciary, public at large and other jurisdictions attach to professional titles*”. However, you then propose a number of models which in effect make the acquisition of title voluntary and remove automatic entitlement of title-holders to provide legal services. We do not see how the models proposed would operate in the public interest or offer advantages over the present system.

For example, ‘Options: 1 and 1A and 3: regulator/co-regulator responsible for title do not change substantially the present regulatory regime. The Law Society has already delegated regulation to the SRA, with the latter setting minimum regulatory requirements for the award and retention of title and the Law Society able to set other professional standards on a voluntary basis. On the other hand, the option would separate regulators from professional bodies and threaten the independence of the legal profession as regulation moves closer in reality and perception to the influence of the state. The independence of the legal profession is one of the key safeguards in place to protect the Rule of Law and is vital for the international standing of England and Wales as a jurisdiction of choice.

As for Option 2, the award of title by professional bodies, we have previously acknowledged that leaving title with the professional bodies would need further consideration. Sir David Clementi recognised that it is important that professional standards must have the commitment of the profession and should be as far as possible decided at the practitioner level. We agree. However, we are seriously concerned that your proposal of leaving title with the professional bodies, would apparently involve the loss of statutory protection for title, which in turn would seriously undermine its credibility and attractiveness. It would also undermine the international trade in legal services, which is largely based on title.

It is vital that titles should remain a key feature of our jurisdiction in any future regulatory framework, providing a gateway to authorisation to practise. Any reforms which risk damaging the title of solicitor would prejudice its brand and its export potential internationally.

LawTech

With regard to LawTech, the definition of legal services you suggest is very broad and the test of what presents a risk justifying a particular level of regulation unclear. In the LawTech area we foresee overregulation for those providers that fall within your definition and under regulation for those that fall outside. We consider that it would lead to a confusion and a lack of transparency over what and whom to regulate and at what minimum mandatory standard. The current system enables use of LawTech through structures that require accountability and professional standards

We question how such regulatory regime would effectively protect UK consumers, and how it would be enforced, especially given that LawTech services can be provided globally outside the domestic regulatory reach. Before any regulatory interventions are considered, we strongly recommend a far greater understanding of the emerging technologies, trends and products, to ensure a suitable regulatory approach.

We believe LawTech could help to tackle such issues as unmet demand, public legal education, access to early legal advice, and therefore creating a burdensome regulatory environment for the nascent LawTech industry would become a limiting factor in addressing those issues.

Conclusion

We are concerned that your proposals would lead to a less coherent alternative to the existing regime, creating a costly and complex system, which will lead to greater regulatory cost and uncertainty undermining the UK's attractiveness as a world leading jurisdiction.

The legal system is complex and fragile. Before contemplating reform careful consideration needs to be given to ensure that change does not result in unintended consequences for the whole legal ecosystem, including the judiciary, courts and tribunals, justice system and economy as a whole. Any proposals should be robustly assessed against a set of criteria such as the public interest, regulatory cost, international perception and impact, economic consequences, and demonstrate that any intended benefits would outweigh any potential negative impact.

In the meantime, we consider that the immediate focus should be on:

- i. Running a properly funded, co-ordinated public legal education campaign ensuring that the most disadvantaged in society are aware of the legal services which are already available to them from the regulated profession, that Legal Aid may be available where it was thought not, and how to access services and providers, including education on how to recognise legal issues and identify next steps; and
- ii. Seeking to obtain proper investment in the Legal Aid system, particularly the areas of early advice which can nip in the bud many legal problems before they develop into serious issues involving mental health, loss of employment and homelessness.

Kind regards

Simon Davis

President
Law Society