Time for change

John Gould applauds Professor Mayson for his attempt to detangle the regulation of title & the regulation of activity

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Professor Stephen Mayson has just published his report 'Reforming Legal Services—Regulation beyond the Echo Chamber'. It is a prodigious piece of work. Professor Mayson has worked long and hard and consulted far and wide, to produce what is probably the most comprehensive and reliable review of legal regulation in England and Wales ever undertaken.

There should be a hunger for reform, but perhaps those responsible to deliver change have no appetite at all to do so. This is not just about other preoccupations, although we are in a time of other preoccupations, it is about believing that making the effort to change and pursuing a long overdue coherent vision for legal services is worth the trouble. Dealing with lawyers is almost always trouble—perhaps because that's their business.

In his report, Professor Mayson is much too generous about the Byzantine structures which have accumulated before and after the Legal Services Act 2007. Personally, I have never seen the 2007 Act as an enlightened economically liberal reform which laid foundations upon which a modern structure of legal services regulation could be built; it's more like a bungalow with Doric columns.

The possible absence of an appetite for reform more than a dozen years after the 2007 changes suggests that those changes took a lot of swallowing or, perhaps, that for regulators, they have represented an eat as much as you like buffet that never ends.

The Mayson report, however, does something very valuable; it offers a clear structure which is both strong and flexible. It does this by cutting the Gordian Knot tangling the regulation of title and the regulation of activity. Title regulation is a good thing; it allows the public, through a title they recognise, to gain assurance as to the holder's likely behaviours and integrity. It encourages professionalism. It allows professions to judge collectively what is needed from their members to maintain confidence in the title and reinforce it as an esteemed and competitive brand.

Activity regulation is rather different. There is a strong public interest in ensuring that state systems, such as the Land Registry, immigration or the courts, are not exposed to practitioners who are incompetent or untrustworthy. If those systems allowed unregulated participation, key functions of the state might fail. Also, for certain activities there are particularly high risks including where legal authority is vested in a service provider as, for example, an executor, or which involve the handling of consumer's money.

For the market to drive higher standards for consumers, those consumers must be able to make informed choices between providers for the type of service they require. A choice between providers whose nature I cannot easily understand, is not an informed choice. If I want a service tailored to my need, who are you to say I must have the standard product you want to sell me.

The answer, as Professor Mayson proposes, is to treat the regulation of title and the regulation of activity differently. Let the professions control their own admission and exclusion, while each legal service which requires regulation may only be provided by an individual licensed by a single statutory body for that activity. Let's call it the 'Licensor' and the activities 'restricted services'.

Licences would be specific to a particular category of restricted service such as 'conveyancing' or 'litigation' and would be awarded to individuals on the basis of minimum standards of specific competence. Obtaining a licence would give no right to use any regulated title other than 'licensed for [ ]'. Licences would need to be renewed and could be removed. Licence holders would have to offer consumer redress but could innovate without risks to confidence in the system of titled professionals. Conversely individuals entitled to use protected titles would not thereby be automatically entitled to a licence for any restricted service. The title may show that they are ethically fit, but maintained competence and experience in the particular restricted service area would also be required.

There is no need for a multiplicity of regulators. The existing holders of titles can, through their representative bodies, determine who may use the title. If well managed, those titles should both provide a competitive advantage to their holders and the benefit to consumers of recognisable established title brands. It is not in the consumer interest to weaken those brands by allowing title regulators to also regulate the activities of those not entitled to use those titles and thereby blur those vital identifiable bases of consumer choice.

It may be said that a licensor would increase the burden of regulation. In fact, many providers of legal services already face dual regulation such as accountants, practices with lawyers with different titles or regulators (there are half a dozen or so, not counting foreign lawyers) or those who offer financial services.

Lawyers and clients have themselves for some years been attempting to invent self-imposed systems of specialist activity regulation applying across professional title holders by way of numerous accreditation schemes. Residential conveyancing is an obvious example. These have become quasi-mandatory in various areas already. The basic point is that lawyers who are total generalists are an anachronism and must be nearing extinction. I wouldn't want a solicitor who had years of experience handling probate to handle my divorce unless they had the right expertise.

Consumer choice is, however, only an important part of what is required. The integrity of public interest systems must be protected. Those systems ensure the maintenance of the rule of law and the proper administration of justice. The greater the importance of each of those systems, the higher the risk to the public interest and the more stringent the licensing requirements should be. It might be argued that it is necessary to constrain the power of the state to approve the providers of legal services because state control over the legal system could erode basic freedoms and rights.

Clearly the state already has significant control over the legal system, who has access to it and who operates within it. Through legal aid, for example, it pays lawyers (albeit very poorly) and imposes detailed contractual control in relation to many of the most vulnerable in society. The state appoints all judges and mostly decides who to prosecute. The state exercises heavy influence over the current legal regulators. It is surely possible to create a system in which licensing is independent of political manipulation.

I welcome Professor Mayson's report. Although there are details for further debate, nothing previously has come close to proposing a structure which can accommodate all of the objectives without imperilling those things which we rightly as a society value most highly. NLJ

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