



# City Research Online

## City, University of London Institutional Repository

---

**Citation:** Boon, A. (2017). Innovation and change in the regulation of legal services. In: Boon, A. (Ed.), *International Perspectives on the Regulation of Lawyers and Legal Services*. (pp. 241-269). Oxford: Hart Publishing. ISBN 9781509905171

This is the accepted version of the paper.

This version of the publication may differ from the final published version.

---

**Permanent repository link:** <https://openaccess.city.ac.uk/id/eprint/18764/>

**Link to published version:**

**Copyright:** City Research Online aims to make research outputs of City, University of London available to a wider audience. Copyright and Moral Rights remain with the author(s) and/or copyright holders. URLs from City Research Online may be freely distributed and linked to.

**Reuse:** Copies of full items can be used for personal research or study, educational, or not-for-profit purposes without prior permission or charge. Provided that the authors, title and full bibliographic details are credited, a hyperlink and/or URL is given for the original metadata page and the content is not changed in any way.

## Chapter 11

# Innovation and Change in the Regulation of Legal Services

Andrew Boon

## I. Introduction

A number of issues face legal services regulation in leading jurisdictions. Among the most salient are the following:

- What are the main contributing factors to regulatory change in the subject jurisdictions and what factors tend to impede change?
- Are there common themes in jurisdictional responses?
- Does the pattern and extent of change represent a paradigmatic shift?
- What are the implications for the future regulation of lawyers and legal services?

The chapter is structured around these themes. It uses the evidence from the countries and jurisdictions that are the subject of this book to explore the forces behind regulatory change, its current direction and emerging practice. The broad conclusion is that various pressures for regulatory reform may cause legal professionalism to finally fail. This may not result from a single change but as a result of an accumulation of regulatory innovations. These may lead to a transition to a different regulatory logic for managing legal services. Strategies that may assist legal professions in avoiding this fate are outlined. Except as otherwise stated, references to authors, countries and jurisdictions in this chapter are references to the material in this book.

## II. Drivers of and Brakes on Regulatory Change

According to Terry et al the pace of change in legal services regulation is being driven by globalisation, developments in technology and the migration of ideas from one country to another.<sup>1</sup> Based on the accounts in this collection, these are among a range of pressures on legal services regulation, often experienced at different degrees of intensity according to jurisdiction. There is a demand for better integration of legal services at both the national and international

---

<sup>1</sup> L Terry, S Mark and T Gordon, 'Trends and Challenges in Lawyer Regulation: The Impact of Globalization and Technology' (2012) 80(6) *Fordham Law Review* 2661.

levels. Pressures at the national level may be generated by the need for more affordable access to law and the availability of online legal services. There is also pressure exerted by new ideas about how legal services might and should be regulated.

In many of the jurisdictions covered regulatory arrangements have been fundamentally altered by recent legislation: New Zealand (Lawyers and Conveyancers Act 2006); England and Wales (Legal Services Act 2007); Eire (Legal Services Regulation Act 2015). In others, there have been significant changes in an area of regulation. In Germany, the Rechtsdienstleistungsgesetz 2008 ('the Legal Services Act') allowed unregulated legal services to operate on the fringes of the market. In Israel, proposed amendments to the Israeli Bar Association (IBA) Act will give the Minister of Justice default powers in the event that the IBA does not perform its functions.

All of the jurisdictions covered have had legal services markets in which professionalism is the dominant logic of regulation. The main brakes on change concern the constitutional arrangements within a country. These include the position of the legal professions within the state, the normative consensus within each jurisdiction, for example, regarding the role of independent legal professions as guarantors of the rule of law and the existence or absence of powerful state institutions with competing agendas.

## A. Drivers of Change

### i. Globalisation

The globalisation agenda generally concerns the creation of safe economic and political environments for capital and trade. Experiences of the worldwide financial crisis beginning in 2007 brought home the interconnectedness of global economies and the importance of effective regulation at all levels of world economies. A high emphasis is placed on the rule of law, low levels of restriction on corporations and competition throughout economies. Infrastructure that supports these aims is essential. The ability of lawyers to operate between jurisdictions facilitates frictionless business. Regulatory barriers restrict the operation of lawyers locally, for example, between states or provinces in a national jurisdiction. Accommodating different expectations of behaviour is becoming more important in international legal practice. It may therefore be considered desirable to seek better integration of the regulatory and normative (ethical) regimes of lawyers working between different jurisdictions.

The contributors to this volume highlight five manifestations of the impact of globalisation on the regulation of national legal professions. The first is where there is a supra-national regulation, such as those imposed by the EU. Therefore, EU requirements for free movement of labour demand that member states allow qualified lawyers from other member states to practice under their home titles. Such supra-national regulation may also affect the character of regulation. As Kilian points out in chapter nine, EU law requires that states do not delegate regulatory powers to professional bodies without either setting out public-interest criteria or retaining the power of final approval over regulations.

The second impact of globalisation is experienced as pressure exerted by international economic institutions. Hosier's contribution (chapter four) demonstrates the belief within global capitalist institutions that traditional legal professionalism is a barrier to 'modernising' markets. When, in 2008, the Irish government sought assistance to avert the collapse of the country's economy, an international 'troika' (the International Monetary Fund (IMF), the European Central Bank (ECB) and the European Commission), demanded regulatory reform of Eire's legal services market as a condition of providing assistance. This example provides a graphic illustration of the pressure on national governments to comply with emerging global competition and market norms for providing legal services.

The third impact of globalisation, illustrated by Chen and Whalen-Bridge (chapter three) is where international markets exert soft pressure to adapt regulation. Singapore was a jurisdiction striving to be a regional economic beacon of globalisation. The influx of overseas lawyers highlighted a problem of conflicting norms. Ethical tensions led to reform, in the shape of a 'unified code' governing all lawyers in the jurisdiction. This shows that jurisdictions aiming to become global trade and financial hubs must provide regulatory environments friendly to overseas practice. One approach is to adopt normative regimes accommodating lawyers from the host jurisdiction and those from other jurisdictions seeking to practise there.

The fourth pressure of globalisation demonstrated is the desire to keep pace, to modernise and to innovate. In this respect it seems likely that countries are influenced by each other in regulatory matters. Zer-Gutman (chapter seven) describes how the Israeli regulatory system has borrowed elements from other jurisdictions. Bartlett and Haller (chapter eight) attribute Australia's introduction of a competition focus into Australia to 'cautiously looking to England and Wales for guidance'. Chen and Whalen-Bridge (chapter three) suggest that the focus of the unified Singapore Code of Conduct, broad principles supplemented by rules, was inspired by the format adopted by the two leading professions in England and Wales. We might

therefore expect some convergence between regulatory regimes as a result of countries using structures and strategies tried and tested by those that have experimented with regulatory change.

## ii. Access to Legal Services

Pressure on government to control the cost of legal services is intensified by increased demand from ordinary consumers for affordable personal economic legal services: financial and small business advice, land transfer and inheritance. A particularly pressing issue is access to justice. In many leading jurisdictions expenditure on civil legal aid peaked decades ago<sup>2</sup> and further decline has exacerbated problems in securing legal representation. These deficiencies may be politically sensitive in states that have traditionally provided generous legal aid, where there are increasing numbers of litigants in person and where there is a failure to support areas such as human rights, criminal defence, divorce and housing rights. Initiatives such as online courts (see below) are probably not suitable to address these specific problems of access. This may lead to wider adoption of inquisitorial systems,<sup>3</sup> necessitating changes to practice regulation, for example codes of conduct, in common law countries.

## iii. Unregulated Practice

In most countries the unlicensed provision of legal services is a criminal offence. There are, however, differences in the areas of legal practice reserved to lawyers and, therefore, regulated. Some jurisdictions specifically reserve a narrow range of legal activity, such as litigation, but include legal advice in this (eg Israel reserves legal consultation and provision of a legal opinion). Others do not regulate provision of legal advice unless it is provided by a regulated lawyer (eg England and Wales) or is provided in the context of handling litigation or an activity

---

<sup>2</sup> RL Abel, 'An Agenda for Research on the Legal Profession and Legal Education: One American's Perspective' in H Sommerlad, S Harris-Short, S Vaughan and R Young, *The Futures of Legal Education and the Legal Profession* (Oxford and Portland, Oregon, Hart Publishing, 2015) 201. The same is not necessarily true of criminal legal aid, which tends to be protected on rule of law grounds and has expanded in many jurisdictions (R Smith, 'Criminal Legal Aid: Some Global Perspectives' (2013) 92 *Criminal Justice Matters* 20).

<sup>3</sup> See eg O Bowcott, 'Inquisitorial system may be better for family and civil cases, says top judge', *The Guardian* (4 March 2014), available at <https://www.theguardian.com/law/2014/mar/04/inquisitorial-system-family-civil-cases-judge-lord-thomas> (last accessed 31/3/2017).

reserved to lawyers by statute (eg New Zealand). Some do not reserve as legal activity work that appears to be legal work, such as drafting wills (eg England and Wales).

The issue of unregulated practice was linked to access to justice issues. The professional project of lawyers is an exercise in controlling supply, creating the possibility of a shortage of lawyers. In many countries the issue became intensely political from the 1960s when the supply of potential lawyers expanded with the growth of tertiary education. In others this occurred later, as in Israel. In continental systems market control has always been much less pronounced. In Germany, for example, professions have never controlled the supply of lawyers; all those who passed the state-run qualification system are entitled to practise without further entry requirements.

A surfeit of potential practitioners increases pressure on professions to expand, possibly by taking on new areas of work. If they do not do so, there may be pressure to reduce the scope of reserved legal activity. Either way, new regulation may be required. If there is more work than the regulated sector can fulfil, there may be demand for unqualified legal assistance. Both a shortage of qualified lawyers and excessive demand can lead to the growth of unregulated legal services. Legal professions have continued a tradition of fighting aggressive campaigns against unregulated providers. The access to justice gap is, however, reducing political and judicial support for such resistance. Many countries appear to be grappling with the issue of how to allow unregulated provision, even in core areas of lawyer activity such as dispute resolution and advocacy.

In Australia, England and Wales and New Zealand there appears to be greater tolerance of unregulated providers than elsewhere. Thus, the 'litigation assistance' provided by so-called MacKenzie friends is morphing into unqualified advocacy in England and Wales. In Germany, the provision of legal services ancillary to other businesses has been an issue since the 1980s. The interventions of the Constitutional Court have resulted in an Act taking a liberal approach to allowing alternative service providers offering unregulated legal services; they may do so provided the legal dimension is incidental to the non-legal aspect of the service provided.

#### iv. Disruptive Technology

Legal technology options, particularly those offered by unregulated providers, disrupt the market by introducing new products or services.<sup>4</sup> This presents a particular challenge to traditional regulators and regulatory models, particularly because technology need not respect national borders. More relaxed attitudes to unqualified legal service provision is allied to growing confidence that unregulated services provided using modern technology can compete with regulated services at acceptable levels of quality. Zer-Gutman (chapter seven) and Semple (chapter five) describe professions successfully combatting unregulated providers in Israel and Canada, respectively. Indeed, in Israel online providers have been suppressed.

Barton and Rhode (chapter two) suggest that the failure to embrace technology presents a serious problem to the profession in the United States. They identify three areas in which technology has disrupted conventional legal services provision: the market for less expensive dispute resolution; the high-end market for corporate legal services; and the lower-end market for consumer legal services. Thus, they argue, there are two paradigms in US legal services regulation; 'bar control of oversight structures for lawyers and a relatively unregulated market for large-scale, non-lawyer providers'. The enforcement power of the US legal profession has not, however, kept up with 'technological and economic forces that have brought a whole new wave of competitors into the market' or their powerful, entrepreneurial champions. One concern for legal professions is that resistance, possibly successful in the short term but probably pointless in the long term, may lead to even wider reform.

In the United States, non-lawyer form-processing services and online platforms like Legal Zoom are credited with a major impact in bringing down the cost of legal services for routine needs, leading to arguments for more liberalisation.<sup>5</sup> Barton and Rhode endorse the view of the Federal Trade Commission that relaxation of US rules on unauthorised practice of law would see more price competition from competent providers. An additional advantage of providing such services is that it might help address the problem of unmet need for legal services. One of the factors contributing to unmet need is the inaccessibility of conventional

---

<sup>4</sup> CM Christensen, SD Anthony and EA Roth, *Seeing What's Next: Using the Theories of Innovation to Predict Industry Change* (Boston MA, Harvard Business School Press, 2004).

<sup>5</sup> DL Rhode, *The Trouble with Lawyers* (Oxford, New York, Oxford University Press, 2015) 49-51.

legal service provision.<sup>6</sup> A proposed online court for smaller claims potentially tackles two of the core problems of unmet need; it offers cheaper dispute resolution and greater accessibility.<sup>7</sup>

Experience in England and Wales suggests that online services offer a viable alternative to provision offered by lawyers at cheaper prices. It is important to note however, that regulation may begin to erode these benefits. Competition from organisations backed by non-lawyer capital, in the form of Alternative Business Structures (ABS), has not yet reduced the cost of legal services significantly, despite suggestions that such organisations are more innovative. The problem may be that regulatory overheads are a significant constraint on price reduction. Awareness that regulation increases cost has increased pressure to allow competition between regulated and unregulated services.<sup>8</sup>

### iii. Ideology

Most contributions reinforce the message that even the technical dimensions of regulation are almost inevitably political;<sup>9</sup> policies on lawyers and regulation are inevitably informed by broader political attitudes. Several accounts attribute the ability of lawyers to resist incursions into their regulatory independence to states' commitment to the rule of law and the role of independent legal professions in checking abuses of government power. In England and Wales, the independence argument has been turned on its head. Government agencies assert that 'independent regulation' involves independence of regulators from the legal professions rather than independence of legal professions from the state.

---

<sup>6</sup> See eg P Pleasance, A Buck, N Balmer, A O'Grady, H Genn, M Smith, *Causes of Action: Civil Law and Social Justice* (London, Stationery Office, 2004) CR: 169598.

<sup>7</sup> It was initially proposed to ban lawyer representation in a proposed 'online court' in England and Wales dealing with claims worth up to £25,000, but it seems more likely that legal costs will now be limited to an extent that will involve lawyers 'unbundling' their services to online court users. J Hyde, "'Minimal assistance' from lawyers in online court" *Law Society Gazette* (27 July 2016), available at <https://www.lawgazette.co.uk/law/briggs-online-court-needs-minimal-assistance-from-lawyers/5056850.article> (last accessed 29/3/2017).

<sup>8</sup> N Semple, 'Access to Justice: Is Legal Services Regulation Blocking the Path?' (2013) 20(3) *International Journal of the Legal Profession* 267.

<sup>9</sup> D Levi-Faur, 'Preface' in *Handbook on the Politics of Regulation* (Cheltenham, UK, Edward Elgar, 2011) xvi.



We are constantly reminded that the rule of law is an extremely malleable idea.<sup>10</sup> Different interpretations and manifestations affect regulatory discourse in different ways. In Israel, for example, the profession rebuffed attempts by the Minister of Justice to wrest the appointment of disciplinary committee members from the profession, despite the fact that these are often blatantly political appointments. Rule of law arguments, pointing to the loss of authority suffered if self-regulation was ended, were effective in this argument. Chen and Whalen-Bridge (chapter three), in contrast, suggest that the predominant rule of law issue for Singapore was lawyer involvement in money-laundering and other illegality. Thus, the discourse of the rule of law was not used to constrain the state but to justify downplaying client interests. Another manifestation of this interpretation of the rule of law gave, they argue, a distinctive ‘enforcement’ orientation to the lawyers’ code of conduct in Singapore.

In Australia and the United Kingdom a key driver of change has been another powerful ideology, competition, which forms part of a much broader consumer agenda. In the EU the emphasis on competition law policy in order to create a common market has driven policy, including on the professions. Germany may be an exception here. Kilian (chapter nine) argues that the liberalisation of the legal profession by the German Constitutional Court has been driven by constitutional law rather than by competition. As his chapter shows, however, a threat to competition is a factor that may cause professional regulation to fail the common interest test applied by the Constitutional Court.

## B. Brakes on Change

As may be expected, change has not occurred at a uniform rate across jurisdictions. A variety of reasons may be offered. Based on contributions to this volume, impediments to change can be grouped under three linked but distinct headings: constitutional, normative and institutional.

### i. Constitutional

In none of the jurisdictions covered are independent, self-regulating legal professions guaranteed in a written constitution. Nor, by and large, do legal professions have an explicit constitutional role. Israel, where the IBA has a statutory role in the selection of judges, is an

---

<sup>10</sup> See generally JJ Heckman, RL Nelson and L Cabatingan (eds), *Global Perspectives on the Rule of Law* (London and NY, Routledge, 2010) (and, in the same volume, the summary in RL Nelson and Lee Cabatingan, ‘A Preface and an Introduction’ 1, 2–3).

exception. The disadvantage of such an arrangement is demonstrated by the fact that the IBA has used its power to political advantage.

In most countries a role in a constitutional separation of powers is implicit. Semple suggests that, in Canada, the Supreme Court treats the independence of the bar as having a 'quasi-constitutional' status. Undermining independence in such circumstances may cause concern about the security of constitutional arrangements and bring the government into conflict with the judiciary. Judicial support may be stronger in jurisdictions where the courts have a central role in lawyer discipline. This is demonstrated by the chapter on the United States, where bar regulation is not subject to legislative control but is claimed by the courts as part of their inherent authority. In Australia, Supreme Courts only hear appeals in lawyer disciplinary cases, but a Supreme Court still rejected an executive proposal that it supervise an independent regulatory body for the state's lawyers.

A constitutional arrangement which may affect regulatory reform is federalism. In the country experiencing the most radical changes in legal services regulation, the United Kingdom, legal system issues are devolved to Scotland and Northern Ireland. The radical legislation described in this volume has applied to only one of the three constituent jurisdictions: England and Wales. Other major common law countries considered (Australia, Canada, United States), have semi-independent state jurisdictions and state bars. This produces multiple potential points of resistance which may be a drag on making single radical changes to national regulatory arrangements. There is also another possibility; that progressive initiatives taking place in some states may spread to others. This effect of the state bar structure on piloting regulatory innovation is clearly illustrated in several chapters of this volume.

In the United States, New York and Washington have taken the lead in creating limited licensing structures for recognising qualified non-lawyers. In Canada, Law Societies are established by provincial legislation, making it difficult to implement country-wide change. Quebec, however, is more tolerant of non-lawyer involvement in legal businesses than other provinces. In Australia, only two States, New South Wales and Victoria, signed up to a projected national agenda for regulatory innovation. It is in these two jurisdictions that most innovation occurs. Although two supra-State bodies have been created, most active regulation still takes place at State level.

In countries where diminishing professional authority would cut across the courts' constitutional authority, strong justification and the support of powerful constitutional

principles at least equal to support for the rule of law would be required. This kind of authority is exemplified by Germany's Constitutional Court, which can refer to the Basic Law as authority for legal services regulatory reform. In most countries the independence of legal professions, and even their defined role, is recognised by government and jealously guarded by the judiciary. Semple, for example, indicates that the Canadian Supreme Court struck down money-laundering legislation requiring lawyers to report clients.

Baldwin et al suggest, of regulation generally, that 'in the world of practice, there has developed a distinct and expanding international and national regulatory community that shares similar languages, concepts and concerns'.<sup>11</sup> There is some evidence that this already applies to legal services regulation. As systems come under pressure to conform to national and global regulatory norms we might expect a move towards greater intra-jurisdictional homogeneity. One effect, coincidentally or not, is a move to regulatory infrastructure with fewer points of resistance. The decision in New Zealand to change from district law societies to a single, national New Zealand Law Society may be a step in that direction.

## ii. Normative

Support for the independence of lawyers may be more fulsome where the rule of law is yet to be fully established or is perceived to be fragile.<sup>12</sup> Israel, according to Zer-Gutman (chapter seven), falls into the second category. Lawyers and judges have an historic alliance dating from the creation of the state, the early years of which were dominated by socialist ideology that placed little emphasis on the rule of law. Today, the Israeli legal profession is imbricated in the machinery of the state. The strong relationship between the legal profession and the judiciary persists, generating strong political support for the IBA's regulatory independence. Government may be more cavalier about the rule of law in a mature democracy. This may be because of a shift in political attitudes, including among the judiciary, because lawyers became less significant politically.<sup>13</sup>

---

<sup>11</sup> R Baldwin, M Cave and M Lodge, *Understanding Regulation: Theory, Strategy and Practice*, 2nd edn (Oxford, New York, Oxford University Press, 2012) 2.

<sup>12</sup> Although there are greater resources in the 'legal complex' to defend the rule of law where it is established. TC Halliday, 'The Fight for Basic Legal Freedoms: Mobilization by the Legal Complex' in Heckman, Nelson and Cabatingan (n 10) 210, 239.

<sup>13</sup> Even 30 years ago it was perceived that lawyers had been relegated from a role as social and political representatives of the ruling class to one of technical specialists. V Olgiati and V

Loss of influence does not seem to be reflected in most of the accounts in this volume. A possible exception may be the United Kingdom, where there has been a marked if somewhat erratic decline in the number of lawyer Members of Parliament since the 1920s<sup>14</sup> and a reduction in the numbers of lawyers in cabinet. Perhaps more importantly, fewer lawyers hold important cabinet positions. The Lord Chancellor, a post responsible for the legal system and held by lawyers for hundreds of years, has, since 2012, been held by three successive non-lawyers. This may be a significant fact in the establishment of counter-narratives to the rule of law as the guiding principle for regulating legal services.

### iii. Institutional

While institutions may be insufficient on their own to support the rule of law, legal professions potentially provide leadership on rule of law issues. Individual lawyers or groups of lawyers may be able to use various forms of capital, whether social, economic, intellectual or political, to build the role of lawyers and the rule of law.<sup>15</sup> They may also be able to use this capital, and appeal to the 'legitimacy of law',<sup>16</sup> to protect their position. It seems likely, however, that legal professions with considerable cultural capital and legitimacy will be more effective in deflecting attacks on their independence.

One of the problems of professionalism is that it can foster an ideology resistant to change. In such circumstances other agencies may force reconsideration of regulatory arrangements. The role of the Constitutional Court has meant that Germany has not had a 'big bang' in deregulation and re-regulation. For better or worse, according to Kilian (chapter nine), the Court's very proactivity has been a barrier to a larger and more coherent reform programme; the government has taken a back seat while the Constitutional Court has steered legal services regulation. Since the late 1980s it has balanced the legal professions' attempts to police the unauthorised practice of law against the constitutional guarantee of an individual's fundamental

---

Pocar, 'The Italian Legal Profession: An Institutional Dilemma' in RL Abel and PSC Lewis (eds), *Lawyers in Society: The Civil Law World* (Berkeley and LA, USA: University of California Press, 1988) 336.

<sup>14</sup> D Howarth, 'Lawyers in the House of Commons' in D Feldman, *Law in Politics, Politics in Law* (Oxford and Portland, Oregon, 2013).

<sup>15</sup> Y Dezalay and BG Garth, 'Conclusion: How to Convert Social Capital into Legal Capital and Transfer Legitimacy Across the Major Practice Divide' in Y Dezalay and BG Garth (eds), *Lawyers and The Rule of Law in an Era of Globalization* (New York, Routledge, 2011) 260.

<sup>16</sup> *Ibid* 264.

right of occupational freedom. In 2016 it opened the door for multi-disciplinary practices between members of the bar, health professionals and pharmacists. In contrast to the situation in Germany, in Israel legislation that also promises occupational freedom has been interpreted more restrictively because of the importance that the Higher Court of Justice attaches to the independence of the bar.

In the absence of institutional vehicles for change, the government may opt to create agencies with competing agendas or to conduct oversight or front-line regulation. The obvious choice of agency to balance the power of legal professions is a competition authority. To be effective they have to be given adequate authority and powers, but not to the extent that rule of law issues are marginalised. Achieving the right balance is potentially difficult. In England and Wales agencies with responsibility for competition policy have been given an increasingly expansive role. In Canada, in contrast, the consumer voice has been muted.

A more drastic response to the institutional issue than the creation of balancing agencies is to create state agencies with direct (front-line) or indirect (oversight) regulatory responsibility. There are several examples of recently created state agencies. In Singapore the Legal Services Regulatory Authority (LSRA) controls regulatory and licensing aspects of both Singapore and foreign law practices. It has extensive powers but over a fairly narrow field, related purely to entities, while the Law Society continues to regulate practitioners. In New Zealand, government regulators have been created to oversee or participate in professional regulation. In Australia, the Competition and Consumer Commission has intervened in legal services regulation to enforce consumer standards. The Legal Services Board in England and Wales has no active 'front-line' responsibility but oversees the activity of front-line regulators. It is influential on policy, approves proposed regulation and sanctions front-line regulators which fail to follow legislative regulatory guidelines.

### III. Evaluating Regulatory Change

#### A. Changes in Legal Services Regulation

Are developments in the various jurisdictions represented in this volume evidence of a decisive regulatory shift? In considering this question it is useful to return to the positions outlined by Semple in chapter five: the four positions representing the 'Professionalist-Independent tradition' (a unitary legal profession; professional self-regulation; insulation of legal practice from non-lawyers; and regulation of individuals) and the four positions representing a 'Competitive-Consumerist mode' (multiple legal professions; state regulation; exposure of legal practice to non-lawyers; and regulation of both firms and individuals. Semple suggests that movement between these positions represents a paradigm shift.

This section considers the evidence for a paradigm shift of the kind suggested. It examines the suggestion that the pattern of regulation in Canada and the United States represents the typical pattern of a Professionalist-Independent tradition while others, such as Australia, England and Wales and New Zealand, form a pattern representing the Competitive-Consumerist mode. It concludes that there is certainly movement towards a new style of regulation, but that this is generally consistent with professionalism. There are, however, signs that a regulatory paradigm shift could take place in some jurisdictions. In my view this would take the form of a change of the dominant regulatory logic from professionalism to perfect competition or corporate bureaucracy.

#### **i. Do Multiple Legal Occupations Represent or Lead to Increased Competition?**

England and Wales had multiple legal occupations before it adopted legislation with regulatory objectives including competition and consumer interests. They had limited impact on competition because their areas of activity were either complementary or the legal occupations were too small to compete effectively with the main professions. Further, evidence that the number of professions is not a significant factor may be found in the fact that some jurisdictions said to be in Competitive-Consumerist mode are merging professions; thereby reducing their number. In Australia, solicitors and barristers are merged at the point of admission and in England and Wales government policy has been to reduce practice differences between the two main legal professions, solicitors and barristers. Only two jurisdictions, England and Wales and New Zealand, have created new occupations – licensed conveyancers in both cases – specifically to compete with existing legal professions. Based on the accounts in this volume, competition with unregulated practice seems to be a more salient issue than competition between professions, or even between regulated businesses.

## ii. Is There a Move Towards Greater State Regulation of Legal Services?

There are several jurisdictions in which the state has recently changed arrangements in one or more of the regulatory phases: admissions, practice and discipline. In both Australia and New Zealand, the other jurisdictions said to be pursuing a Competitive-Consumerist agenda, the current arrangement could be described as the continuation of a co-regulatory tradition. In these jurisdictions, government has intervened in the legal services market in a limited way, sometimes at the instigation of the professions. Where more serious regulatory change has been proposed, notably by the Bazley Report in New Zealand,<sup>17</sup> it has not come close to being adopted. Given that it is only the sphere of practice regulation that affects the character of regulation, it is arguable that the state has not been involved in front-line regulation in any of these countries. Only in England and Wales have professional bodies been divested of regulatory powers in all three regulatory areas, including practice. Even there, although the professional bodies' powers have been vested in front-line regulatory agencies, only one of these is actively pursuing competition/consumer policies.

## iii. Is There Movement Towards Breaking Down Legal Businesses' Insulation from Participation by Non-Lawyers?

Semple defines 'insulation' as regulation preventing non-lawyer investors, managers or partners in law firms. Such an arrangement may or may not be part of a facility for incorporation of legal business, including public listing, as in Australia. The presence of all three factors in one kind of organisation are only found in those entities owned or managed by or with non-lawyers, known in England and Wales as Alternative Business Structures (ABS) and as Multi-Disciplinary Practices (MDPs) in Australia. Semple (chapter five) notes that in Canada only Quebec allows law firms to be quoted on a stock exchange and non-lawyers to hold shares. Although the classical legal partnership arrangement is traditional in many jurisdictions it is not an essential tenet of legal professionalism.

## iv. Are Individuals or Firms and Individuals the Focus of Regulation?

The regulation of firms is not inconsistent with the kinds of regulatory requirements associated with professionalism. The right to intervene in legal practices, for example, has been used in

---

<sup>17</sup> Legal Aid Review, *Transforming the Legal Aid System: Final Report and Recommendations* (Wellington, Ministry of Justice, 2009).

some jurisdictions for many years. Such interventions are, however, different from organisations being the focus of conduct rules or other regulatory requirements, which is the thrust of Semple’s comparison in chapter five. Across jurisdictions there is little evidence of a significant movement towards focusing regulation, whether rules, principles, or outcomes, on entities rather than individuals. In Australia, the legislative requirements for ethical infrastructure applied only to incorporated law firms. In England and Wales, the Legal Services Act 2007 imposed compliance posts on ABS, not law firms; it was the Legal Services Board that required ABS to be regulated by Principles-based or Outcomes Focused Regulation (OFR) and the front-line regulator that decided to impose requirements for both compliance posts and OFR on all firms. This is a precedent that is unlikely to be followed elsewhere.

## B. Old and New Style Regulation

Across a number of jurisdictions there have undoubtedly been adjustments to regulatory philosophy, changes to regulatory arrangements and additions to the armoury of regulatory mechanisms used. Many of these changes have been justified by the desire to make legal services markets more competitive. Change, where it has occurred, has not taken place in a consistent pattern. Nor is the motive always clear. For example, competition and the consumer interest may be the stated rationale of change but particular innovations do not necessarily promote these goals. They could be consistent with a desire to promote a more corporate legal services market and to diminish the power and influence of legal professions.

It is possible to detect movement in a number of areas of regulation. While they are neither necessary nor exhaustive, these areas are consistent with each regime and most obviously affect five areas. As represented in Table 11.1, comparing old style regulation, represented by professionalism, and new style legal services regulation reveals differences in the philosophy of regulation, the identity of the regulator, the identity of the regulated parties, the nature of the rule book and the style of regulation. Listed under each main heading are a number of possible positions. Some of these may only be found in one or two jurisdictions.

Commented [CE1]: Table 11.1

Table 11.1 Features of old style and new style regulatory regimes for lawyers.

Regulatory area	Old	New
PHILOSOPHY		
Justification	Public interest	Consumer interest



Rationale	Legalism	Access
Expression	Expertise	Competition
REGULATOR		
Control	Profession	Independent agency
Authority	Courts	Government agency
Reference group	Professional community	Employers / fellow employees
REGULATED		
Ownership/Management	Lawyers	Non-lawyers
Conduct focus	Individual	Entity
Scope	Regulated providers	All providers
RULE BOOK		
Obligations	Rules	Principles / Outcomes
Authority	Profession – Heterarchy (peer focus)	Organisation – Hierarchy (management focus)
Philosophy	Compliance	Flexibility
REGULATION		
Method	Investigating individuals	Accrediting organisations
Procedure	Disciplinary process	Administrative sanction
Timing	Reactive	Proactive

It is not clear that if these kinds of changes did occur it would represent a paradigm shift. While many of the positions in the table represent reprioritisation, most are consistent with professionalism and co-regulatory regimes. It is suggested that evidence of a paradigm shift would be a change in the dominant regulatory logic.

### C. Evidence of Transition in Regulatory Logics

For present purposes, there are two important issues. The first concerns the steps that mark significant departures away from professionalism as a dominant regulatory logic. The second concerns the point at which perfect competition or corporate bureaucracy becomes the dominant regulatory logic.

### **i. Away from Professionalism**

It can be argued that professionalism survives adjustments to regulatory method. A key requirement, however, is that professional bodies retain a significant degree of regulatory control and that they follow policies consistent with professionalism. As we have seen, the state need not directly manage a regulatory phase in order to control what happens in it. Control of the direction of practice regulation can be achieved by defining regulatory objectives, approving appointment of the leadership of regulatory agencies and policing by government agencies: oversight regulators and competition authorities. Front-line regulators can undermine traditional professional strategies, replacing them with measures that are more consistent with other regulatory logics.

### **ii. Towards Perfect Competition**

Perfect competition delivers a range of choice in terms of quality and price. In the context of legal services markets this choice is currently represented by the three types of competitor organisation to traditional legal practices: regulated organisations owned and/or managed by non-lawyers (ABS/MDPs); unregulated organisations using authorised lawyers and unregulated organisations not using lawyers. In theory, regulated options deliver the highest quality while the other options provide lower prices. Thus, when non-lawyer ownership and management does not produce desired changes in the market, the government may be tempted to encourage unregulated practice. Where this occurs there may be pressure to allow qualified lawyers to work for unregulated organisations while subject to conduct rules, but not compulsory insurance requirements. This direction may lead ultimately to a more conventional competition paradigm, without lawyer-specific regulation and where legal services are simply subject to ordinary consumer legislation. Despite evidence that Australia is interested in a competitive market, it is not pursuing this regulatory strategy as determinedly as the UK government.

### **iii. Towards Corporate Bureaucracy**

One country (Australia) and two jurisdictions (England and Wales and Quebec) share a recent history of encouraging corporations as a vehicle for legal practice. In Australia, mega-law firms dictated this development in order to facilitate cross-border lawyering. In England and Wales it was imposed by the government. The move towards corporate bureaucracy was then a choice made by regulators; a requirement for ABS to have compliance officers for conduct and finance

was applied to all firms and organisations were made the focus of regulatory codes and will be given a more central role in education and training. These moves all point to a process of turning professionalised workers into conventional employees. A significant step in the transition to corporate bureaucracy must therefore be the separation of regulatory and representative functions. By forcing professional bodies into a representative role they are shorn of most of their authority, effectively becoming trade unions within the new regulatory paradigm.

#### D. A Shift in Regulatory Logic?

Although New Zealand came close, England and Wales is the only jurisdiction in which the representative and regulatory functions of professional bodies have been separated. There are various initiatives on the horizon in that jurisdiction suggesting further moves to an alternative regulatory logic: creating a single regulator for the various legal occupations and introducing activity-based education (licensing based on authorisation to conduct specific reserved activities), both of which would weaken professionalism. Creating requirements that all providers publish more information and the introduction of a common, single complaints mechanism for all legal services providers, regulated and unregulated, would further strengthen the regulatory logic of competition. Competition between regulated and unregulated providers would incentivise minimum levels of practice regulation so that regulated lawyers could compete with unregulated providers on price. Market forces would ultimately determine the regulatory boundary for the practice of law.

## IV. Independent Legal Professions and the Rule of Law

### A. The Connection Between Lawyers and the Rule of Law

The social normative dimension of support for the rule of law exists in many countries as a result of constitutional histories, negotiation and ongoing review.<sup>18</sup> Lawyer organisations, for example professional bodies, may not be a necessary pre-condition for the emergence of the rule of law<sup>19</sup> and are only one of the groups in civil society that help to sustain it. They may, however, have functions not performed by other groups: promoting legal reform and the specification of citizens' rights<sup>20</sup> or providing 'principled principals' to institutions required to communicate reasons for observing the rule of law.<sup>21</sup> Whether collective organisation is essential to these processes is not clear or, at least, not fully understood. It may be that educational processes may suffice as a platform for building the necessary networks or that other mechanisms or institutions may promote the essential solidarity between different kinds of lawyer that provides underpinning for the rule of law.<sup>22</sup> As yet, this is a proposition that has not been tested in the jurisdictions considered here.

Current regulatory trends may weaken legal professions, potentially to the point of redundancy, thereby threatening their role in relation to maintaining the rule of law. At present, however, in most of the countries described in this volume the need for independent legal professions, involving a degree of self-regulation and market control, is apparently assumed. Consequently, professional bodies are given some latitude despite, in some accounts, occasional displays of blatant self-interest and sometimes, as in the case of Israel, periods of dysfunctionality. The assumption that lawyer professional independence supports the rule of law, the rationale for this indulgence, is difficult to validate statistically. The most ambitious attempt to measure rule of law issues internationally is conducted by the World Justice Project (WJP)<sup>23</sup> which was described in chapter one. The complex data presented in the Index provides an important context for considering regulatory change.

---

<sup>18</sup> M Levi and B Epperly, 'Principled Principals in the Founding Moments of the Rule of Law' in Heckman, Nelson and Cabatingan (n 10) 192, 208.

<sup>19</sup> BR Weingast, 'Why Developing Countries Prove So Resistant to the Rule of Law' in Heckman, Nelson and Cabatingan (n 10) 28.

<sup>20</sup> *Ibid* 46.

<sup>21</sup> Levi and Epperly (n 18).

<sup>22</sup> A Dieng, 'Role of Judges and Lawyers in Defending the Rule of Law' (1997) 21(2) *Fordham International Law Journal* 550, 553.

<sup>23</sup> World Justice Project, *Rule of Law Index 2015*, available at <https://worldjusticeproject.org/our-work/publications/rule-law-index-reports/wjp-rule-law-index-2015-report> (last accessed 28/4/2017).

## B The World Justice Project Rule of Law Index

### i. Methodology

The Index claims to be the only comprehensive set of indicators on the rule of law based on primary data and measuring the performance of each country in eight categories: (1) Constraints on Government Powers, (2) Absence of Corruption, (3) Open Government, (4) Fundamental Rights, (5) Order and Security, (6) Regulatory Enforcement, (7) Civil Justice, and (8) Criminal Justice. As explained in the 2016 WJP Report:

The theoretical framework linking these outcome indicators draws on two main ideas pertaining to the relationship between the state and the governed: first, that the law imposes limits on the exercise of power by the state and its agents, as well as individuals and private entities. This is measured in factors 1, 2, 3, and 4 of the *Index*. Second, that the state limits the actions of members of society and fulfils its basic duties towards its population, so that the public interest is served, people are protected from violence and members of society have access to mechanisms to settle disputes and redress grievances. This is captured in factors 5, 6, 7, 8, and 9 of the *Index*. Although broad in scope, this framework assumes very little about the functions of the state, and when it does, it incorporates functions that are recognized by practically all societies, such as the provisions of justice or the guarantee of order and security.<sup>24</sup>

While the WJP Annual Report is the most ambitious of its kind, it acknowledges a number of methodological problems.

First, the WJP Report seeks to strike a balance between a

‘... “thin” or minimalist conception of the rule of law that focuses on formal, procedural rules, and a “thick” conception that includes substantive characteristics, such as self-government and various fundamental rights and freedoms. The Index recognizes that a system of positive law that fails to respect core human rights guaranteed under international law is at best “rule by law” and does not deserve to be called a rule of law system’.<sup>25</sup>

Nevertheless, striking a balance between ‘thin’ and ‘thick’ conceptions of the rule of law enables the WJP Index to apply to different types of social and political systems, including those which lack many of the features that characterise democratic nations, while including sufficient substantive characteristics to render the rule of law more than merely a system of rules.

Second, the Index tends to assess countries rather than jurisdictions. This is misleading in the case of federalised countries, such as Australia, Canada and the United States, which contain multiple jurisdictions each with distinctive characteristics. Most notably, the United

---

<sup>24</sup> Ibid 10.

<sup>25</sup> Ibid.

Kingdom is scored as a single entity, whereas each of the three jurisdictions of the UK (ie England and Wales, Scotland and Northern Ireland) have different regulatory systems for legal services. Moreover, while the WJP Report assumes that arrangements for regulating legal services in the United Kingdom are co-regulatory across the jurisdictions, this does not accurately describe the situation in England and Wales.

Third, scores in the WJP Index are comparable only within geographic and income bands. Thus, Canada, the United States, the United Kingdom and Germany are high income countries in the same geographical band (Western Europe and North America) while Australia, Japan, New Zealand and Singapore are high income countries in a different geographical band (East Asia and Pacific). Each jurisdiction score is only strictly comparable with those in the same geographical region. Further, the scores are not comparable over time; the methodology fundamentally changed in 2012 and has varied with subsequent versions of the Index.

Fourth, there are caveats to note in interpreting the Index and then in using it as a basis of comparison between jurisdictions. A general caveat is that the Index is intended to be used in conjunction with other data. One of the specific problems for our purposes is that the Index looks at outcomes rather than institutions; none of the categories explicitly refers to independent legal professions. It does, however, advance principles for the rule of law which emphasise the role of independent representatives and neutrals as a means of delivering formal legality and controlling the state.

## ii. The Data

Table 11.2 sets out the performance of the jurisdictions covered in this book in the 2015 and 2016 WJP Rule of Law Indexes.<sup>26</sup> The table groups the jurisdictions, with the exception of Eire and Israel which are not included in the Index, with comparable jurisdictions. It then provides 13 columns of the most relevant indicators selected from the Index and shows the broader category from which they are drawn.

[Insert] Table 11.2 about here

### C. Connections between regulatory change and performance on rule of law issues

---

<sup>26</sup> In the 2016 *Rule of Law Index* none of the jurisdictions featured registered a statistically significant change in their Index score, except Germany, which improved.

Even bearing in mind the caveats regarding reliability of the Rule of Law Index, comparisons of the scores of different jurisdictions raise questions. In the first group, Western Europe and North America, Germany has the best scores on most of the selected measures, notably the access and affordability of civil justice services and due process in criminal justice. This may be due in no small part to the fact that Germany's courts are generally inquisitorial rather than adversarial, but the relatively weak position of legal professions may also be a factor. On both access and affordability measures the United Kingdom scores more highly than Canada and the United States, but it is unclear whether these results are due to regulation or other factors, such as legal aid provision. Most of the countries score highly on judicial control on government power, but less highly on other forms of control.

The United Kingdom is slightly behind the other countries in its group on civic participation, a factor to be considered when reducing the influence of professions. Among the East Asia and Pacific countries, and overall, New Zealand is comfortably the best on access to and affordability of civil justice, whereas Australia performs poorly on that measure. Singapore performs well on most measures but is relatively poor on civic participation. Most countries score highly on due process measures, but the United States is somewhat behind the others.

The Index offers some support for advocates of regulatory change. For example, high prices and lack of innovation are perceived to be more serious problems in the North American countries than in the United Kingdom and Australasia.<sup>27</sup> Overall, however, there is no clear evidence that years of reform have moved these jurisdictions into a different realm of performance on access compared to jurisdictions in which there has been little or no reform. The evidence of the Index is sometimes counter-intuitive. For example, although the United States is the worst performer on accessibility, Australia, one of the early innovators in legal services reform, is not far behind. New Zealand, which has a relatively conservative reform agenda, has comfortably the best scores across most measures among the common law countries.

## V. Emerging Regulatory Practice

---

<sup>27</sup> N Semple, *Legal Services Regulation at the Crossroads: Justitia's Legions* (Cheltenham and Northampton, Ma, Edward Elgar, 2015) 133.

## A. Self-regulation and Co-regulation

There are different conceptions of what constitutes self-regulation.<sup>28</sup> In this section, self-regulation is defined as significant professional body control of, or involvement in, setting policy for practice regulation, notwithstanding some involvement (such as approval mechanisms) by other agencies. All of the systems examined, except England and Wales, operate systems that are effectively co-regulatory in this respect. Even England and Wales is perceived by the World Justice Project to be co-regulatory. This section is therefore concerned with the evolution of professional strategies of regulation towards more obviously co-regulatory structures.

## B. Nine Principles of Effective Co-Regulation

Legal professions may be increasingly vulnerable to incursions on their powers by the state. It is suggested that active consideration of emerging principles of regulation may assist them in demonstrating effective self-regulation.

### i. Establish Co-regulatory Frameworks

In many jurisdictions new institutions have been created to share the regulatory responsibilities formerly exercised by professions alone. This may help to assuage concern that self-regulation is self-interested. In both New Zealand and Australia, legal professions with a strong degree of independence have collaborated with the state in developing a more co-regulatory structure. In New Zealand, the Minister of Justice must approve practice rules proposed by the Law Society, and can unilaterally amend them following consultation with the Society, but has not yet exercised this power.

Singapore has created a complicated co-regulatory structure, weakening the former control exercised by the courts and Law Society. The Law Society continues to regulate domestic lawyers, but power to make conduct rules and issue practice guidance has been vested in a new regulator, the Professional Conduct Council, comprising various legal stakeholders including the chief justice and President of the Law Society. Eire has created a Legal Services

---

<sup>28</sup> For example, both Mize and Kilian suggest that their domestic legal professions are not self-regulating because their regulatory authority is delegated by the state in statute.



Regulatory Authority with a lay majority and members representing both professional and consumer interests.

An independent legal profession needs a source of income not dependent solely on membership fees. In the past, many have taken a share of practising certificate fees for their public service activities, but this may be politically problematic when public service and representative functions overlap. Australia has avoided this kind of regulatory overhead altogether by using interest on lawyers' client trust accounts to fund ambitious regulatory initiatives.

## ii. Define and Prioritise Regulatory Objectives

One of the notable developments in regulatory practice is the specification of regulatory objectives in legislation. Among various current examples of standards that might provide starting points for debate are the statutory list of functions of the New Zealand Law Society and the regulatory objectives of the Legal Services Act in England and Wales. The definition of the purposes of regulation has several potential benefits; promoting inquiry and reflection among policy makers, providing guidance to the regulatory community and assisting monitoring of performance. Specifying regulatory objectives also provides a means by which the state can delegate regulatory functions without exercising the kind of day-to-day control that might prejudice delicate constitutional mechanisms such as the rule of law. Where the state is steering the legal services market, regulatory objectives may also be a means of holding its agencies to account for what is done.

Experience shows that potentially conflicting regulatory objectives may cancel each other out unless there are hierarchies, orders of priority or prime objectives that trump all others. There is no order of priority to the regulatory objectives of the Legal Services Act, with the result that promoting competition and supporting the constitutional principle of the rule of law are equally valid and potentially balancing considerations for regulators to consider. This seems to be a recipe for stasis in situations of conflict.<sup>29</sup>

---

<sup>29</sup> See eg *R (on the application of Katherine Lumsdon, Rufus Taylor, David Howker QC, Christopher Hewertson) v Legal Services Board v General Council of the Bar (acting by the Bar Standards Board), Solicitors Regulation Authority, ILEX Professional Standards, Law Society of England and Wales* [2014] EWCA Civ 1276, [2014] HRLR 29, per the Master of the Rolls at para 14.

Terry et al argue that any principles governing the regulation of legal services should 'value an independent and strong legal profession so that lawyers can take their proper place in preserving the rule of law in a society'.<sup>30</sup> This assumes that independent and strong legal professions are intrinsic to preserving the rule of law. Stating that the rule of law is a determining objective at least leaves that debate open. Needless to say, prioritising the rule of law among regulatory objectives is not inconsistent with promoting competition or protecting consumer interests.

### iii. Adopt Professional Principles

One of the developments in England and Wales, adopted in Singapore, is the use of broad statements as an adjunct to codes of conduct. The advantage of such high-level standards is that they cover a wide span of behaviour. As in Singapore, this flexibility can be used to bridge differences between the norms of lawyers from different countries. The disadvantage is that, where principles can be used as a basis of disciplinary charges, regulators may be tempted to exploit their inherent vagueness, creating uncertainty and potential unfairness. The problem is potentially exacerbated when regulators also abandon conduct rules and strip detail from supporting codes of conduct. The problem may be resolved by adopting the format used by the Bar Standards Board in England and Wales; using both principles (presented as core duties), rules and guidance.

### iv. Demonstrate Appropriate Sensitivity to Consumer Needs

Co-regulatory bodies can be used to address concerns that the consumer voice is not heard in the professional circles in which policy is influenced. This is particularly true in the United States where, Barton and Rhode (chapter two) argue, the judiciary is central to regulation and shares interests and events with the Bar. The result is that consumers lack information on which to base purchasing choices, or lack remedies or may find that their lawyer was uninsured. The situation may be ameliorated by creation of forums at which the consumer voice can be expressed.

It is relatively easy for legal professions to develop mechanisms for recording the lay or consumer voice or reflecting consumer views and perspectives. In New Zealand, Standards Committees, which investigate complaints and lay charges before the national Disciplinary

---

<sup>30</sup> Terry et al (n 1) 2742.

Tribunal, must have at least one lay member.<sup>31</sup> An independent review of standards committee decisions is provided by a Legal Complaints Review Officer, who must not be a practising lawyer. Nearly half of the Disciplinary Tribunal must be lay members and the balance lawyers. Both the Disciplinary Tribunal and Legal Complaints Review Officer are appointed by a government minister.

It may be appropriate to specify minimum requirements for information and advice provided to general consumers and to clients.<sup>32</sup> Whether it is desirable for providers to publish details of consumer protections may depend on circumstances. In jurisdictions where unregulated practice is permitted such information may include qualifications and insurance arrangements. As Mize demonstrates in her chapter on New Zealand, however, requirements to inform customers of the implications of unregulated status can lead to evasion and confusion. These risks are exacerbated where regulations allow qualified lawyers with current authorisation to practice in unregulated practices, but without the protections required of regulated lawyers.

#### v. Embrace Regulatory Innovation

There is no logical reason that the regulatory strategy of professions should be fixed. They should be willing to embrace regulatory methods that are consistent with their strategic aims. Terry et al propose principles for determining such a strategy: setting clear goals, being evidence based, justifying cost, not distorting markets, promoting innovation, being clear and easy to use and being consistent with other regulation and markets.<sup>33</sup> In an era where regulation may increasingly need to be low cost, economy and efficiency are notable omissions from this list.

The English Legal Services Act suggests a checklist for determining the suitability of regulation: transparency, accountability, proportionality, consistency and targeting only at

---

<sup>31</sup> Lawyers and Conveyancers Act 2006 (LCA) s 129(2). The Act defines a lay person in relation to the Tribunal as a person not currently on the roll of practitioners or the register of conveyancers, and it appears that a similar approach is taken for lay members on Standards Committees: LCA ss 6, 228(c).

<sup>32</sup> Both Australia and England and Wales already set high standards for information provided by lawyers to new clients.

<sup>33</sup> L Terry, S Mark and T Gordon, 'Adopting Regulatory Objectives for the Legal Profession' (2012) 80(6) *Fordham Law Review* (2012) 2685, 2688–92.

cases where action is needed.<sup>34</sup> In this schema notions of economy and efficiency are incorporated through the goals of proportionality and targeting. Incorporating such principles does not necessarily guarantee that regulatory activity will be objectively economic. That largely depends on the regulatory overhead it imposes, which may well add to the cost to the consumer. Thus, it may be sensible to ask, for example, whether extensive requirements on providers to furnish consumer information are justified if the evidence is that it does not influence consumer choice.

#### vi. Strategically Use Proactive (Preventative) Regulatory Methods

Professional strategies have tended to be geared to punishment after the event rather than prevention of consumer harm. New style regulation often claims to incorporate risk-based regulatory strategies, primarily by focusing on the performance of employer organisations. As yet, examples are thin on the ground. England and Wales and Australia require lawyers within the firms to be responsible for compliance and for breaches by the firm. Since 2015, New South Wales and Victoria broadened these requirements, for what Bartlett and Haller (chapter eight) call ‘internal ethical management systems’, which previously applied only to incorporated firms, to all firms. They suggest that Australia has pioneered ‘world leading regulatory approaches to engendering ethical law firm culture’.

A widely praised and innovation in the New South Wales, Australia regulator is self-assessment by firms against 10 specific objectives of good practice. This has apparently been successful in engendering better attitudes to client care, leading to a reduction in complaints. In England and Wales, solicitors’ firms are now required to produce more paperwork touching on risk areas. It has not been claimed that this has improved ethical infrastructure, but failure to comply may invite further investigation. In England and Wales, the solicitors’ regulator has a strategy of working with the larger firms of solicitors, but this has not been rolled out to the profession as a whole.

The adoption of proactive strategies may be effective in avoiding costs. For example, the grant of powers to impose small fines and rebukes on solicitors in England and Wales has deflected many cases from the Solicitors Disciplinary Tribunal. Certain kinds of proactive measures may also increase regulatory cost, particularly when used in conjunction with the existing professional repertoire. There may be a trend against extensive framework

---

<sup>34</sup> LSA s 28(3) These principles were developed by the UK Better Regulation Executive.

requirements, such as those involving vetting and monitoring of entities. There is relatively modest evidence of the effectiveness of such strategies and none that suggests that proactivity is a proportionate regulatory response to risk. Producing evidence of the costs and benefits of proactive regulation is arguably work that professions should undertake in their public service role.

#### **vii. Make Processes as Transparent as Possible**

Making important decisions secretly, failing to publish records, and not publishing aggregated data on performance of key professional roles avoids accountability and invites suspicion about processes. In some jurisdictions (Eire, New Zealand) publication of records of disciplinary cases was not routine. In Israel, the absence of governing criteria for the gatekeepers to entry processes, the secret exercise of discretion barring those ‘unworthy’ of being a lawyer and the variable failure rates in qualifying exams created suspicion that entry procedures to the profession could be corrupted. This has led to the processes and examinations themselves being challenged in court and created the impression that politics, rather than the public interests, dominated bar agendas.

#### **viii. Use Proxy Mechanisms to Set the Regulatory Boundary**

Some legal professions require regulated practices to obtain professional indemnity insurance (PII). As Hosier (chapter seven) and Boon (chapter ten) note, in both Eire and England and Wales many practitioners have been excluded from practice because they have been unable to obtain PII. This is an effective way of excluding marginal (and therefore high risk) practitioners from the market without recourse to disciplinary proceedings. Where, however, lawyers obtain insurance from private insurers rather than under a mutual scheme, it does allow insurers rather than the professions to determine who can and cannot practice.

#### **ix. Be Forceful Advocates for the Rule of Law**

While legal professions often defend their independence on the grounds that it is essential to the rule of law there is not strong evidence that they are routinely advocates in its defence. Indeed, Zer-Gutman (chapter seven) notes that ‘deep-seated reform in the IBA’s status as a statutory autonomous entity’ was not entertained because, despite the Israeli Bar Association’s poor record in defending the rule of law ‘[t]he little it did was to be preserved, while the Bar should be encouraged to more forcefully fulfil its public role’. In Israel, perhaps as a

consequence, the courts have gradually eroded the principle of client loyalty by increasing lawyers' responsibilities to third parties.

Examples of successful rule of law initiatives by legal professions are also thin on the ground. The WJP, which originated in the American Bar Association, is exceptional. The New Zealand Law Society established a Rule of Law Committee in 2007 to monitor rule of law issues. Mize (chapter six), citing legislative compromises made by the New Zealand Law Society, argues that '[t]he ability to stand up to government is an important aspect of the rule of law'. Legal professions need a principled position on such issues if their claims to support the rule of law are to be taken seriously.

The main challenge to the conventional rule of law narrative is that lawyer self-regulation impedes access to justice. The strongest exponents of the view that the main deficit in relation to the rule of law is accessible legal services are Barton and Rhodes (chapter two) who see the attorneys' professional self-regulation as a 'basic structural problem' of lawyer regulation leading to an 'unduly self-interested regulatory framework'. They criticise the American Bar Associations' efforts to suppress unauthorised providers offering technological innovations and urge lawyers to either embrace the challenge of providing affordable services or 'get out of the way' of letting others do it. Lawyers must pay attention to issues of access, such as technology and pro bono legal services, as a price of their historic commitment to legalism.

### C. Alternative Logics

England and Wales is currently exceptional in terms of regulatory developments in the legal services sector. While other governments have allowed incursions into professionalism, this jurisdiction is making a decisive break and laying foundations for a new regulatory approach based on a different regulatory logic. One government agency regulator foresaw breaking 'the symbiotic relationship between regulators and professional bodies' and a form of 'optimum regulation [as] access to an ombudsman with no educational entry barriers'.<sup>35</sup> The preferred practice regulation model is derived from the financial services industry. Based on the concept of supervision, it sought to promote consumer protection and competition by regulating firms

---

<sup>35</sup> A Roy, 'Creating a More Flexible Approach to Education and Training' in Sommerlad et al (n 2), 170, 173 and 176.

according to broad principles. Following the financial crash of 2007 and subsequent recession a new plan for regulating financial services stated that:

regulatory bodies will be created, each with clarity of responsibility, a focused remit, appropriate tools and the flexibility to use them as they see fit. Tick-box compliance with rules has been shown to be of limited use as a model of supervision. Regulators must be empowered to look beyond compliance, to supervise proactively, and to challenge.<sup>36</sup>

While the thrust of the new policy concerned the responsibilities of new regulatory bodies, the priorities of the new regime was signalled by division of the remit of the front-line regulator, the Financial Conduct Authority (FCA), into three broad areas: protecting consumers, enhancing market integrity and promoting competition.

Among the seven main objectives of the FCA are several that are perfectly consistent with lawyers' traditional conduct rules: there is a positive culture of proactively identifying and managing conflicts of interest; firms' business models, activities, controls and behaviour maintain trust in the integrity of markets and do not create or allow market abuse, systemic risk or financial crime; firms, acting as agents on behalf of their clients, put clients' best interests at the heart of their businesses.<sup>37</sup> The key powers of the FCA were standards for authorisation, proactive monitoring and intervention.<sup>38</sup> A proposal for a single government regulator for legal services, similar to that for financial services, has been the air for a while in England and Wales.<sup>39</sup> While this may lead to further convergence of the regulatory logics of professionalism and corporate bureaucracy, the factors discussed in the chapter's opening section may well be impediments to the adoption of such a regime in other jurisdictions.

## V. Conclusion

---

<sup>36</sup> HM Treasury, *A New Approach to Financial Regulation: A Blueprint for Reform* Cmd 8083 (June 2011) para 1.13, available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/81403/consult\\_finreg\\_new\\_approach\\_blueprint.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/81403/consult_finreg_new_approach_blueprint.pdf) (last accessed 29/3/2017).

<sup>37</sup> Financial Conduct Authority, *Enhancing Market Integrity*, published 19/04/2016, available at <https://www.fca.org.uk/about/enhancing-market-integrity> (last accessed 29/3/2017).

<sup>38</sup> *Ibid.*

<sup>39</sup> R Baldwin, M Cave and K Malleson, 'Regulating Legal Services: Time for the Big Bang?' (2004) 67(5) *Modern Law Review* 787.

The case studies presented in this volume suggest that some countries have experienced pressures on the market for legal services from commercial interests, from technology and from changing ideologies. Some have responded by reconfiguring the market and the role of legal professions within it. A guiding principle behind such efforts, either explicitly or implicitly, is the desire to accommodate or to stimulate competition among service providers. Governments pursuing such an agenda are likely to have accepted the proposition that legal professionalism is inconsistent with an efficient market for legal services. The high cost of legal services is potentially an impediment to human rights and economic prosperity. In many jurisdictions experimentation with the possibilities presented by technology seek to provide wider access to legal services and, specifically, wider access to justice.

In jurisdictions trying to change the framework for regulating legal services new regulatory arrangements are taking different forms. At one end of a spectrum of possibilities lies replacement of professional self-regulation by state agencies. Further along the spectrum is a move towards co-regulation, where state agencies are responsible for or contribute to one or more aspects of admissions, practice or discipline regulation. This is the situation in countries such as Australia and New Zealand. A high degree of regulatory change is possible without changing professionalism as the dominant regulatory logic. A number of principles of co-regulatory practice are emerging, concerning the definition and prioritisation of regulatory objectives and professional principles, embracing innovation on regulatory strategy and the adoption of a proactive role by front-line regulators.

Alongside reconsideration of which bodies regulate legal markets, there is a corresponding drive to allow competition between legal professionals and unregulated providers. This is forcing authorities to consider whether there should be minimum regulation of currently regulated markets and whether the regulation of conventional services can be reduced to improve their competitiveness. In England and Wales, a testbed for regulation designed to increase competition, regulators are promoting a range of strategies. These include eliding the distinction between regulated and unregulated services; considering minimal regulation for unregulated services, for example, bringing them within the scope of complaint mechanisms; improving the information provided to consumers on the grounds that they will then be able to choose the quality and price of service they wish to purchase.

Broad definition of legal services imposes regulatory costs across a wide field. Attention is therefore being paid to the two main ways of reducing regulatory costs on legal services: narrowly defining what constitute legal services or cutting the general level of



required regulation. Reducing regulation to a minimum may involve specifying different levels for different activities. A simple default position is a regulatory framework providing mechanisms for handling complaints and banning individuals from practice. Such minimalism presents difficulties. One of these is the scope for consumer confusion between regulated and unregulated providers. Subjecting unregulated services to complaints regimes without other measures, such as compulsory insurance, could leave some consumers with a remedy but no compensation. It might be argued that this is a risk that a well-informed consumer may choose to take, but this position has its own problems.

It is arguable that, while it is for states to decide how legal services are organised and regulated within their jurisdictions, decisions should respect rhetorical commitments to the rule of law. Scaling back the accumulation of professional regulation is forcing critical re-examination of many sacred cows: common and extensive socialisation into the mores of legal practice; demanding entry requirements; practice framework regulation; detailed codes of conduct; and PII. If the experience in England and Wales is a precursor of developments elsewhere there will be a declining role for professional bodies and declining regulatory ambition. This should fuel debates as to whether and in what form professionalism could survive corporate institutionalisation.<sup>40</sup>

Halliday and Karpik proposed the thesis that an increase in executive power would follow the diminished power of legal professions.<sup>41</sup> In the model of government in Western Europe, the North Americas and much of the rest of the world, the control of the executive is a joint responsibility of judges and practitioners. The declining authority of legal professions therefore raises an important question; which institutions will assume their role in supporting a constitutional separation of powers and the rule of law? The issue this raises, whether 'independent legal professions' are, in fact, important in preserving the rule of law, is a question for another day.

---

<sup>40</sup> J Evetts, 'Professionalism, Enterprise and the Market: Contradictory or Complementary?' in Sommerlad et al, *The Futures of Legal Education and the Legal Profession* (n 2).

<sup>41</sup> TC Halliday and L Karpik, 'Politics Matter: A Comparative Theory of Lawyers in the Making of Political Liberalism' in Halliday and Karpik (eds), *Lawyers and the Rise of Western Political Liberalism* (Oxford, Clarendon Press, 1997) 24.

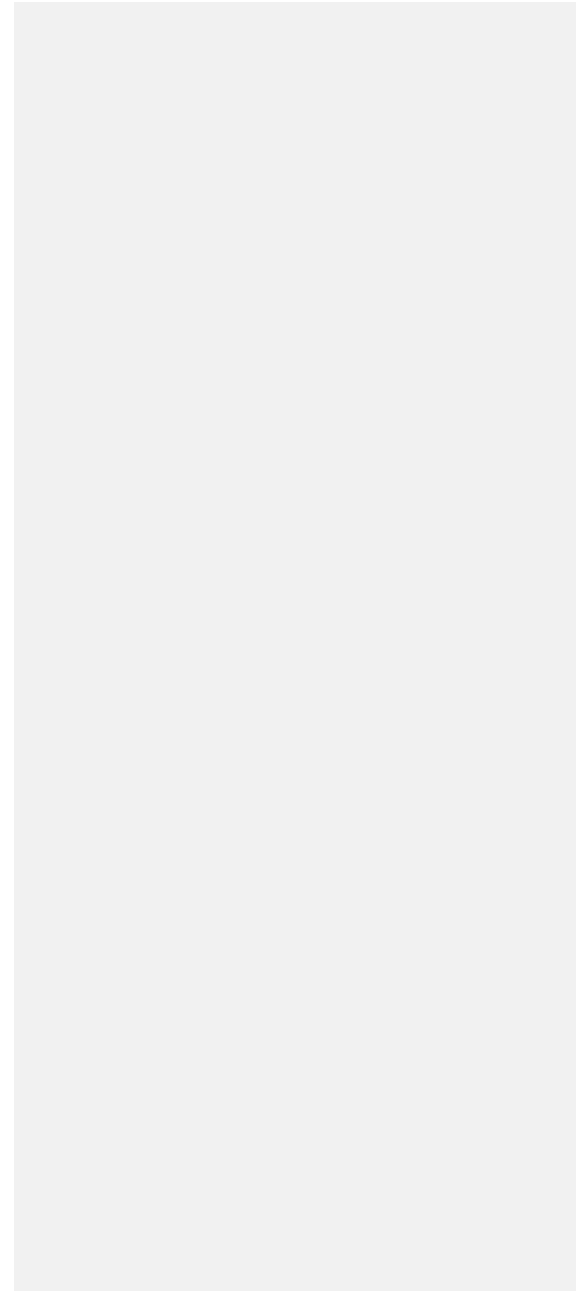


Table 11.2 Selected rule of law indicators by region and jurisdiction 2015 and 2016

Jurisdiction	Civil justice			Constraints on government power			Regulatory enforcement		Fundamental rights	Absence of corruption	Open government	Criminal justice	
	1 Access	2 No improper influence	3 No delay	4 Judiciary	5 Auditing	6 Non-government checks	7 Effective	8 Due process	9 Due process	10 No private gain	11 Civic participation	12 Due process	13 Adjudication
Year	15 16	15 16	15 16	15 16	15 16	15 16	15 16	15 16	15 16	15 16	15 16	15 16	15 16
<b>Western Europe and North America</b>													
Canada	.55 .56	.85 .89	.47 .53	.83 .86	.67 .84	.82 .85	.7 .69	.73 .82	.74 .78	.76 .79	.81 .87	.74 .78	.68 .67
Germany	.68 .73	.88 .92	.75 .86	.88 .87	.7 .79	.91 .87	.69 .75	.77 .89	.83 .83	.79 .81	.85 .88	.83 .83	.69 .75
UK	.58 .56	.84 .88	.73 .75	.83 .85	.59 .84	.82 .85	.72 .73	.77 .85	.82 .79	.81 .82	.79 .86	.82 .79	.79 .76
USA	.47 .41	.77 .75	.59 .61	.8 .83	.56 .81	.82 .84	.67 .69	.79 .75	.68 .70	.73 .71	.8 .83	.68 .70	.68 .74
<b>Eastern Asia and Pacific</b>													
Australia	.5 .57	.84 .90	.59 .64	.87 .83	.68 .77	.84 .83	.78 .73	.73 .85	.8 .80	.8 .80	.8 .82	.8 .8	.76 .76
Japan	.52 .67	.72 .78	.62 .69	.84 .77	.56 .69	.8 .72	.7 .73	.7 .77	.69 .64	.78 .76	.75 .70	.69 .64	.65 .63

**Commented [CE2]:** Is it OK to edit the entries as shown? I think it will make the table easier to understand. Could it possibly be split into two separate tables - even landscape this will be very small when typeset.

New Zealand	.71	.72	.83	.84	.73	.76	.9	.90	.66	.78	.9	.89	.8	.80	.78	.78	.82	.80	.87	.87	.83	.87	.82	.80	.75	.71
Singapore	.66	.63	.84	.80	.93	.95	.82	.79	.65	.71	.59	.51	.8	.83	.92	.98	.74	.77	.92	.93	.55	.57	.74	.77	.85	.90

**Full category titles (2015/16):**

1. People can access and afford civil justice 2. Civil justice is free of improper government influence 3. Civil justice is not subject to unreasonable delay 4. Government powers are effectively limited by the judiciary 5. Government powers are effectively limited by independent auditing and review 6. Government powers are subject to non-governmental checks 7. Government regulations are effectively enforced 8. Due process is respected in administrative proceedings 9. Due process of law and rights of the accused 10. Government officials in the executive branch do not use public office for private gain (became ‘no corruption in executive’ in 2016) 11. Civic participation 12. Due process of law and rights of the accused 13. Criminal adjudication system is timely and effective

**Source:** World Justice Project Rule of Law Index 2015, available at [http://worldjusticeproject.org/sites/default/files/roli\\_2015\\_0.pdf](http://worldjusticeproject.org/sites/default/files/roli_2015_0.pdf) and World Justice Project Rule of Law Index 2016, available at <https://worldjusticeproject.org/our-work/wjp-rule-law-index/wjp-rule-law-index-2016> (last accessed 21/4/2017).