Stephen Mayson's Chartered Tax Advisers' Address 2020

Thank you for the invitation to deliver the CTA Address 2020. I am very honoured to do so – and I very much hope that it will be both the first and last CTA Address that needs to be delivered virtually!

My subject for the Address is the future regulation of legal services and its possible application to tax advice and advisers. I have recently completed a two-year independent review of legal services regulation and submitted the final report to the Lord Chancellor. The recommendations deal with both long-term and short-term reform.

I knew when I began the Review in 2018 that reform for the longer-term was not likely to take place in the near future. However, the Covid-19 pandemic has further highlighted the difficulties that arise from the present approach. I hope, therefore, that short-term reform might soon be considered.

I shall tackle my theme in three parts: I shall look, first, at the problems of the current framework; second, at the proposals for a new approach; and third, at the potential application of those principles to tax advice and advisers.

The Problems

Let me start, then, by identifying what I believe to be the principal flaws and shortcomings in the current regulatory framework. They derive from the structure of the Legal Services Act 2007. It's a bit of a list, I'm afraid, but here it is:

- inflexibility arising from statutory prescription;
- competing and inappropriate regulatory objectives;
- a pivotal set of reserved legal activities that are anachronistic and distort the approach to activities that ought to be regulated;
- title-based authorisation for reserved activities that leads to additional burdens and cost because some activities are more heavily regulated than they need to be (resulting in higher prices to consumers);
- the unsatisfactory nature of the separation of regulation and representation;
- the existence of unregulated providers who cannot be brought within the current regulatory framework, combined with an expectation that their numbers and activities will increase;
- the emergence and rapid development of lawtech that is capable of offering legal advice and services independently of any human or legally qualified input, at scale, and beyond the reach of the current framework;
- a regulatory gap that exposes consumers to potential harm when some activities are not regulated when they ought to be, and puts legally qualified practitioners at a competitive disadvantage;
- increasing costs of legal advice and representation, reducing further the availability and affordability of legal services for many; this encourages either greater self-

lawyering and litigants-in-person, or nudges increasing numbers of people into the world of unregulated providers or lawtech;

- consumer confusion, caused by the existence of both regulated and unregulated providers for the same legal activities, and a profusion of differently regulated professional titles;
- concerns about variability in the competence and quality of legal services;
- inadequate or incomplete consumer protection, that is not consistent with a widespread expectation that all legal services and those who provide them are subject to some form of regulation and protection; and
- as a result of all of these issues, the risk of falling public confidence in legal services and their regulation.

These concerns led me to the conclusion expressed in the report that the current regulatory structure is "an incomplete and limited framework for legal services regulation that is not able in the near-term and beyond to meet the demands and expectations placed on it".

The Proposals

So, might there be a better way? In formulating the recommendations for a new approach to regulation, I offered the following seven principal proposals:

First, the overriding objective of regulation should be the public interest, whether relating to the public good or to the protection of consumers from harm and detriment. In this context, the public good refers to the rule of law, the administration and quality of our justice system, and the wider interests and fabric of society.

Second, the scope of regulation should be extended to include all 'providers' of 'legal services', including those who are currently unregulatable as well as providers of lawtech. There should be limited exemptions in relation, for instance, to most self-representation, advice from family and friends, and information-only services.

Third, there should be an independent, single, sector-wide regulator of legal services (the Legal Services Regulation Authority or LSRA). It should, though, have the power to delegate the exercise of defined and limited regulatory powers to other designated bodies. The current Legal Services Board, approved regulators and regulatory bodies would be replaced.

Fourth, the LSRA would maintain a public register of providers. It would apply regulatory conditions for before-, during-, and after-the-event regulation as appropriate to the importance and risk of particular legal services or to the relative vulnerability of the clients concerned. These conditions would be applied, monitored and enforced on a sector-wide basis, irrespective of provider.

Fifth, minimum conditions of registration would require common standards and disclosures, access to complaints investigation and redress, and protection through indemnity insurance. A revised and more extensive ombudsman scheme would act as a single point of entry for complainants who are individual consumers or micro-organisations.

Sixth, the current reserved activities should be replaced with a requirement for prior authorisation in order to secure the public interest. Where this is required for public good services (principally the exercise of rights of audience or the conduct of litigation), there would be a dedicated advocacy and litigation regulator as part of the LSRA.

Seventh, professional titles should not be the only route for entry by individuals into legal services regulation. The LSRA would establish the conditions for personal authorisation or accreditation (with or without a professional title). It would also approve the arrangements for the award and removal of legal professional titles, but the professional bodies would actually confer or remove title.

A key part of the proposed scheme is the assessment of risk. This would be done by reference to one or more of the following: protecting the public interest; the complexity of the underlying law; the complexity of the transaction or dispute; the vulnerability of the client; and the nature and extent of any consequences. I expect that tax advice will score significantly on all of these.

For the highest risk, prior authorisation by the regulator would be required before any practitioner would be able to offer his or her services to the public. This would at the very least in my view apply to most advocacy and litigation.

Where there is only low risk, only registration and compliance with minimum conditions would be required, and there need not necessarily be any other entry requirements. While I would not rule out the possibility of some tax advice being only a low-risk service, I do not envisage that this would generally be the case.

For intermediate-risk services – neither the highest nor the lowest risks to the public interest or to consumers – other regulatory conditions would be imposed by the LSRA. These could include a requirement for accreditation under an approved scheme for specialist activities, a specific code of conduct, additional or varied indemnity insurance, requirements for handling client money, and so on.

The difference with the current position is that these intermediate or during-the-event conditions would apply to practitioners only if they undertook the activities to which those conditions applied.

Practitioners would not need prior approval to undertake intermediate-risk services, but if they engaged in activities for which regulatory conditions applied, their registration entry would have to demonstrate compliance. This would need them to declare, for example, which form of approved accreditation they actually held, or which method of holding money on behalf of clients was being used.

The LSRA would decide which authorisations or accreditations could be conferred on individuals by virtue of their professional title. Professional bodies would play a role in education and training, and in forms of specialist accreditation required by the regulator.

In addition, where they wished to, they could promote and enforce professional standards above those required by regulation (though only in accordance with the title arrangements approved by the LSRA).

The Application

Let me now venture some thoughts about how such an approach to regulation might affect tax practitioners. These are obviously my own views, and I'm afraid that I cannot guarantee that any new regulator would agree with me in every respect! In a moment, I shall address separately the position of tax advisers, tax technology, and entities.

But before I look at those details, there are two caveats to what I am about to say.

The first is that the report envisages an exemption for any services, including tax advice, that are "subsidiary but necessary" to the provider's main business. However, there would be no exemption for any legal service for which prior authorisation or personal accreditation is required.

This exemption might apply, for example, to a surveyor offering a view on the tax liability arising from the sale of a property. I am not suggesting that surveyors would not be liable in some way for giving the wrong tax advice, only that they would not need to be registered as a provider of legal services.

The second caveat is that the *principal* purpose of registration is for the information and protection of individual consumers and small organisations. Many law firms and accountancy practices, and similar, provide highly specialist and complex tax advice to extremely wealthy individuals and to large businesses. I do not expect them or their staff to be subject to mandatory accreditation requirements.

This would not, of course, absolve them from the need for authorisation for tax litigation and advocacy. Nor would it prevent them from acquiring voluntary accreditation for their specialisation, or from being subject to the obligations of codes of conduct or their firms' own internal competence and quality assurance processes.

My fundamental point in this section of the Address is that, if the proposals in the final report were to be adopted, I would expect currently regulated professionals to continue to be regulated in pretty much the same way as now.

Personal regulation of tax advisers

I start with the personal regulation of individuals.

Qualified lawyers who are tax advisers would need to be registered and authorised personally if they conducted tax advocacy or litigation. They would also need to be registered and accredited to the extent that the LSRA required accreditation for all or some aspects of tax advice.

Depending on the nature of the advice and any specialisation involved, that accreditation could in my view potentially come from bodies such as the Chartered Institute of Taxation, the Law Society, the Chartered Institute of Legal Executives, and the Society of Trust and Estate Practitioners. Their accreditations should, in my view, be available more widely than their own membership, but that is obviously a matter for them.

Similarly, accountants who are tax advisers would also need to be registered and authorised by the LSRA if they conducted tax advocacy or litigation. Accreditation requirements would also apply to them, and I expect the accountancy professional bodies to be added to those just mentioned as sources of approved accreditation.

The potential difference for accountants in relation to non-contentious tax advice could arise from the LSRA's power to recognise alternative regulatory arrangements. This would allow it, for instance, to approve the ICAEW as a designated body to carry out on its behalf the regulation of legal services provided by chartered accountants.

Those who are chartered tax advisers, tax technicians or similar, but are not qualified as either a lawyer or accountant, would occupy a new position in the proposed regulatory framework.

My view is that, in offering advice or representation on tax matters, they would be a provider of legal services. As such, they would have to be registered, and meet any regulatory conditions for authorisation (for contentious tax work) and accreditation (for non-contentious work).

I imagine that the Chartered Institute of Taxation and the Association of Tax Technicians would wish to provide the appropriate routes to authorisation or accreditation for their members.

Indeed, it would be possible in my view, if they wished, for them to be professional bodies whose rules for the award and retention of their respective titles could be approved by the LSRA. It is also possible, given the highly specialist nature of the work, that designated body status with delegated regulatory powers could be achieved.

That brings me to the potential treatment of recognised tax agents who are not affiliated to any professional body.

I believe that a tax agent should be treated as a provider of legal services – unless they are simply sources of information or the conduit through which information or documents pass, without any advice being offered. As providers, registration and regulation should follow, in order to offer certainty and consistency in regulation to consumers.

Accordingly, though not a member of a professional body, a tax agent would still need to be registered and, for instance, carry a defined minimum level of indemnity insurance.

If the agent is providing services that the LSRA has identified as carrying higher risk, then additional regulatory conditions would also apply to the agent. This might include, for instance, the need for specialist accreditation, or compliance with a specialist code of conduct that applied to all providers (I imagine very similar to, and perhaps even, the PCRT).

It might be that CIOT or the ATT might wish to provide appropriate programmes for accreditation for tax agents. In fact, it might be that the most attractive option for tax agents at this point would be to become a member of either or both of those bodies.

Regulation of tax technology

I now turn briefly to tax technology. The new approach is designed to apply to legal services provided through technology where no other regulated person is involved in provision or referral. It is not, however, intended to capture technology that is simply a source of information.

I realise that this is not as straightforward as it seems, and that the dividing line between information and advice can be blurred. I leave the finer points to those more qualified than I am who will be responsible for drafting the definitions of 'legal services' and 'provider'.

However, a platform that simply sets out tax law and practice, or allows the completion and submission of tax returns and forms, should not fall within the scope of this proposed regulation. Like other aspects of lawtech, tax technology will no doubt develop and extend its reach. I believe that it is important that the regulatory framework should at least be capable of bringing tech within its reach.

As I say, the precise nature of any support and advice that might accompany those things and then bring a service or technology within scope, I leave for further debate and refinement.

Regulation of entities

Finally, the regulation of entities. In addition to personal registration in respect of higher-risk legal services for which prior authorisation or accreditation is required, the registration of a firm or other entity through which tax advice is provided would also be necessary under the core proposals in the report.

Where advice is provided through a law firm, the entity will naturally be registered as a provider of legal services, as will those of its staff who provide tax services for which personal authorisation or accreditation is required – whatever their professional qualifications.

Dedicated tax advisory businesses that are not law or accounting firms would similarly need to be registered as entities. They should then ensure that their staff are appropriately qualified and registered if personal authorisation or accreditation is required.

In the case of multidisciplinary businesses, registration for the provision of legal services would be required, though that requirement for registration need not apply to the *whole* business. For an accounting or business advisory firm for which law-based tax advice is a key component of their offering, I accept that this could be an unwelcome imposition.

The solution offered in the report is for the business to identify and register a discrete 'business unit' that becomes the registered provider of legal services for the purposes of registration and regulation. Like all other registrants that are not individuals, there would also need to be a 'registered manager', an individual responsible to the regulator for compliance.

Unlike the current structure that often requires the creation and regulation of an 'alternative business structure' *as* a separate legal entity, the report proposes the identification and registration of a business unit *as if* it were a separate legal entity.

There would therefore be no requirement for complex legal or structural arrangements with duplicated overheads and compliance functions. The full separation option would remain, though, for those businesses that preferred it.

Some other issues

Before I conclude, there are three other points that I wish to cover.

First, the role of the public interest. I have made this the foundation of my approach to legal services regulation. In doing so, I have drawn a distinction between two aspects of it: the public good, and consumer protection.

Some of the current reserved legal activities, such as those that relate to preparing documents for land registration or probate applications, have an element of protecting the state's interests in the collection of tax – in these cases, stamp duty and inheritance tax.

Although I absolutely accept that the collection of tax that is legally due is a legitimate aspect of the public interest, the *state's* interest in that is not, of itself, for me a sufficient reason for using legal services regulation to secure the protection of tax revenues.

The state and HMRC are well capable of looking after their own interests, and adequate powers already exist in relation to the collection of all taxes. It is not therefore necessary or desirable in my view for specific *regulatory* burdens to be imposed on those who provide legal services.

I do not therefore think or propose that these currently reserved services would meet a revised test for prior authorisation based on the public good – though I accept that this could be debateable! I do, however, think that some elements of tax advice might well satisfy a revised test for prior authorisation based on consumer protection, given the frequent asymmetries of information, resources and representation faced by consumers.

Second, in a similar vein, I have not said anything specifically in the report about the promotion of tax schemes and tax avoidance. That is not because I support them, but because I think dealing with them is a wider matter for tax legislation and enforcement powers, and therefore again not specifically for the regulation of legal services.

That said, the proposed approach would require all providers of tax advice to be registered. The obligations of registration, combined with a code of conduct, could ensure that all registered providers are prohibited from such promotion. Those providing unregistered tax advice or the promotion of objectionable avoidance schemes would then be operating illegally.

Third, I am aware that some members of what might broadly be called the 'tax profession' might hold multiple professional memberships, say, as lawyers, accountants and chartered

tax advisers. I would not want such memberships to present obstacles or complications to the regulatory approach advocated in my final report.

I am assuming, for the time being, that there will be no moves by government to recognise a UK-wide tax profession with its own regulatory structure as there is at the moment, for instance, for immigration. If that were to happen, I would be perfectly content to adopt the same approach for the tax profession as I do in the report for immigration advisers – namely, that it should sit outside the framework for legal services regulation.

In the absence of such a development, my approach under the proposals in the final report would flow from registration. Legal services, including tax advice, would in principle all be regulated by the LSRA, subject to the regulator's ability to delegate specific powers to a designated body.

Accordingly, in those circumstances where an individual or an entity is subject to tax-related regulatory requirements that entail registration, authorisation or accreditation, the relevant register entry would need to identify which regulator (LSRA or designated body) was responsible for the registered person.

Where an individual or entity is a member of more than one professional organisation that is a designated body, the registrant should in my view be able to nominate which of those bodies will be responsible for them in relation to legal services. This nomination would be recorded in the legal services register. It would then be clear to consumers, the ombudsman and other regulators to which body any complaints, conduct or compliance issues should be referred.

Conclusion

To conclude, the common system of registration would allow *any* client of *any* regulated provider of tax advice, whether legally qualified or otherwise, to be assured that the same minimum regulatory requirements are met and that some form of redress will be available if something goes wrong.

Obligations on tax practitioners would be proportionate to the risk and range of the services they were offering, and would build on existing qualifications and accreditations. For those who were not lawyers, although registration at an expected minimal cost would be required, their existing qualifications and regulatory oversight could remain intact.

In my report, I have not sought the perfect future system of legal services regulation. No regulatory approach can ever be perfect. Nor can it eradicate all risks to the public interest or to consumers. But I am sure that we could do better, and I hope that my report is a step on that journey.

Thank you.