Reform and 'modernisation' of legal services in England and Wales: motivations, impacts and insights for the OECD PMR Indicators

Christopher Decker[1]
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This paper presents an overview of the experience of reform of the legal services sector in England and Wales. It describes the background to the reforms and the factors motivating change, before focussing on four specific policy initiatives directed at intensifying competition and widening consumer access to legal services. These initiatives include: allowing greater non-lawyer involvement in law firms; a shift away from prescription towards a more principles-based regulatory approach; removing restrictions on where and how solicitors can practise; and the introduction of co-regulatory arrangements based around an independent statutory oversight regulator and a series of 'frontline' practitioner self-regulatory bodies. Drawing on the experience of these reforms the paper offers reflections on how they may be relevant to the OECD Product Market Regulation Indicators.

1. Introduction

1. The English legal profession, and the standards and regulations which govern it, has long been held in high regard. However, over the past 15 years, policies have been introduced with the explicit aim of *'reforming and modernising'* the legal services market in England and Wales. An overarching aim of the reform programme has been to remove restrictions that could be impeding competition and innovation and thus limiting consumer access to legal services. The policy reforms have generated considerable interest (and controversy) in other jurisdictions including the USA and Europe.

2. The purpose of this paper is to provide a high-level overview of the experience of the reforms. It describes the rationale for reforms (*why* the need for change?); the major reforms introduced to promote competition and innovation (*how* did policy change?); and the effects of these reforms (*what* happened?). It also offers reflections on how this particular experience of reforming a professional services activity could be relevant to the OECD's Product Market Regulation (PMR) Indicators.

3. While this paper's focus is limited to one professional services sector in one jurisdiction the experience is potentially of wider relevance to other jurisdictions and professional services sectors. This is because, in some ways, the reforms resemble those introduced in the network sectors (such as energy, telecommunications and transport) in the UK and other countries from the 1980s onwards. As in those sectors, the reforms have sought to remove unnecessary barriers and impediments to competition (including regulatory barriers) with the aim of improving consumer access to, and use of, legal services. Among other things, this has involved the creation of a new independent regulator charged with pursuing specific statutory objectives which include the promotion of competition, and the protection of consumers and the public interest. As in the network sectors, much of the work of the regulatory

[1] I have at various times been a member of academic panels of the UK Competition and Markets Authority, the Legal Services Board and the Solicitors Regulation Authority. I have also provided advice on aspects of professional and legal services regulation for the Legal Services Board, the Solicitors Regulation Authority, the Council of Bars and Law Societies of Europe (CCBE) and the European Parliament.

bodies (including competition agencies) has been on addressing specific rules and practices that restrict or impede competition or consumer access to legal services. As described below, this has included introducing changes to allow for legal services to be provided more flexibly through a range of business models or structures, and changes that make it easier for consumers to confidently engage in the market.

4. In short, while the context in which the reforms to legal services have been introduced obviously differs from the network sectors (which generally involved moving from monopoly to a competitive structure) the overarching aims, purposes and institutional changes are broadly similar. For this reason, the experience of England and Wales, and the data on the impacts to date could be of interest to other jurisdictions or professional services.

5. The paper comprises 6 sections. Section 2 provides background information on the market and policy context in which the reforms were introduced. Section 3 describes the main drivers motivating policy change, including demand side, supply side and technological factors. Section 4 describes four major areas of reform including the arguments for and against the reforms, while section 5 presents a summary of the available data on the effects of each of these reforms. Section 6 offers reflections on how the particular experience of reforming a professional services activity could be relevant to the OECD's Product Market Regulation (PMR) Indicators

2. Market and policy context

6. To begin it is useful to situate the reforms in the wider market and policy context. This section describes the main characteristics of those who supply and consume legal services. It then provides an overview of the policy context.

Legal services providers

7. The UK has the largest legal services market in Europe. In 2019 it was estimated that the legal sector was worth over £36.8 billion,[2] and contributed around 1.7% to UK GDP. Over the decade 2010 to 2020, the total turnover of legal activities grew by 45%, while net exports of legal services almost doubled from £3.4 billion in 2009 to £6.6 billion in 2018.[3]

8. Broadly speaking there are three types of provider of 'legal services' in England and Wales. First, there are entities that are authorised and regulated by an approved regulator under the Legal Services Act 2007 (LSA). Second, there are entities that conduct certain legal activities (such as claims management and immigration activities) that are subject to other specialist forms of regulatory oversight.[4] Finally, there are providers that are not subject to any form of legal services regulation. These suppliers are sometimes referred to as 'unauthorised' or 'unregulated' providers.[5]

9. An important distinction is made in England and Wales between two types of legal activities: reserved and unreserved activities, which has implications for the ability of solicitors and firms to

[2] According to the Office of National Statics (2021) barristers turnover was £2.3 billion, solicitors 19.6 billion and patent and copyright agents £14.7.
[3] Legal Services Board (2020b)
[4] These providers are regulated by specific bodies, such as the Office of the Immigration Commissioner (OISC) or the Claims Management Regulator (CMR).
[5] They are of course subject to various regulations (such as consumer protection legislation, competition law, data protection etc) which apply to all businesses in the economy.

practise in different areas. Six specific legal service activities are 'reserved' in statute,[6] and any activity that is not a 'reserved activity' is deemed to be an unreserved activity.[7] Critically, only individuals and firms authorised by one of the approved legal regulators can deliver reserved activities to the public, or a section of the public.

Consumers of legal services

10. The buyers of legal services are heterogeneous and include sophisticated, repeat buyers of legal services (such as large companies and businesses) down to individual consumers who purchase legal services infrequently or may have no prior experience of obtaining legal advice. This also includes consumers who might be classified as 'vulnerable' insofar as they are significantly impaired in their ability to choose or assess the value of legal services being offered because of their particular circumstances.

11. A broad categorisation of the types of consumers of legal services might include: government purchasers, large businesses, small and medium sized enterprises (SMEs), charities, private individuals using their own funds, and individuals who are being funded by legal aid or by other funding mechanisms (e.g. conditional fee arrangements).

12. Appreciating differences in the types of consumers of legal services is critical for assessments of the market, and the need for different types of regulation. This is because, as in other market contexts, consumers with more resources and experience of purchasing legal services are likely to be better able to negotiate services matched to their needs, and better understand any protections available to them in relation to the provision of the services, than consumers who have limited resources and only very infrequently purchase legal services.

Policy context

13. Historically, as in many countries, the primary institutional mechanism for regulatory oversight of the legal profession has been self-regulating professional organisations. Theory and practice suggest that while there can be a number of benefits associated with this form of regulatory structure (e.g. closer to industry issues, greater participation, lower costs etc.) there are also weaknesses, which can be summarised in broad terms by the notion of the potential for the undue influence (i.e.: capture) of the regulatory process by the industry itself (it serves the professional self-interest rather than the public interest). However, questions about the appropriate role of the state in regulating lawyers take on a special complexion in the context of legal services given that lawyers can be involved in directly challenging state power and the decisions of the administrative agencies of the state. To the extent that legal professionals are either intimidated by the state or prone to conflict of interest then this can diminish the independence of the profession.[8]

14. In the UK, interest in the regulation of the legal profession can arguably be traced back 20 years to a 2001 report published by the then UK competition authority (the Office of Fair Trading) on

[6] These include: exercising rights of audience (the right to appear before a court); conducting litigation; probate services; reserved instrument activities (conveyancing); acting as a notary; administering oaths.
[7] Examples of unreserved activities include: general legal advice; housing advice; employment advice; advice on planning disputes; mediation services; will writing; and advice provided by law centres, citizens advice bureau and university legal services on a range of legal issues (such as housing, commercial, family, employment etc.)
[8] There is obvious similarity here with the state's involvement in regulating the media.

Competition in the Professions.[9] Among other things, the report concluded that many of the rules and regulations for the legal profession were (at that time) unduly restrictive, including restrictions on entry, on conduct and on methods of supply, and that these resulted in consumers receiving poor value for money. A subsequent July 2003 report on competition and regulation in the legal services market by the Department for Constitutional Affairs concluded that the existing regulatory framework was '*outdated, inflexible, over-complex and insufficiently accountable or transparent'*.[10]

15. A year later, an influential review of the regulatory framework for legal services in England and Wales (known as the Clementi Review) concluded that the '*current system is flawed',* that there were no clear objectives or principles underlying the regulation of the sector, and that the system '*has insufficient regard to the interests of consumers'*.[11] In addition, the Clementi Review found that despite significant changes in the business *practices* of lawyers, the business *structures* through which legal services were delivered had not changed over a considerable period of time, and that some of the current business structures were restrictive. Following the Clementi Review, the Department of Constitutional Affairs picked up on the theme of consumers, publishing a White Paper titled: '*The Future of Legal Services: Putting Consumers First*', which set out an agenda for reforming the regulation and delivery of legal services.[12]

16. This led to the introduction of the Legal Services Act (2007). The key changes introduced by this Act included:

- A requirement that legal service professional bodies split their regulatory activities/functions from their representative activities/functions, and introduce separate governance arrangements. This led to the creation of bodies like the Solicitors Regulation Authority (SRA) and the Bar Standards Board (BSB) as separate regulatory arms of the Law Society and Bar Council respectively. Under this new architecture, primary responsibility for the regulatory functions rests with these so-called 'front-line' professional regulatory bodies (of which there are currently ten).

- The establishment of a co-regulatory structure comprised of both the professional self-regulation (described above) and public regulation. This involved the creation a new statutory regulator (the Legal Services Board (LSB)) whose task is to provide consistent oversight of all of the profession's frontline regulators.

- The introduction of eight regulatory objectives that all regulators of legal services must promote. These include: protecting and promoting the public interest; supporting the constitutional principle of the rule of law; improving access to justice; protecting and promoting the interests of consumers; promoting competition in unreserved legal services; encouraging a strong, diverse, legal profession; increasing public understanding of citizens legal rights and duties; and promoting and maintaining adherence to professional principles. These objectives therefore encompass economic and competition aspects; education aspects; rights; industry representation; and access to profession.

[9] Office of Fair Trading (2001). See also Office of Fair Trading (1986).
[10] See Department of Constitutional Affairs (2003a) and (2003b).
[11] Clementi (2004).
[12] Department of Constitutional Affairs (2005).

- Changes which enabled new legal structures for providers of legal services (known as Alternative Business Structures, (ABS's)), by removing some of the restrictions on non-lawyers investing in and managing law firms. ABS's can now provide reserved and unreserved legal activities with more than 10% of their ownership, management or control held by non-lawyers.

17. Nine years later, in 2016, the UK competition agency (the Competition and Markets Authority, CMA) undertook a Market Study of legal services and concluded that competition in legal services for individual consumers and small businesses was not working well at that time. In particular, it noted that there was not enough information available on price, quality and service to help those who need legal support to choose the best option. Limited consumer understanding of the sector and the lack of transparency made it more difficult for consumers to compare providers thus weakening competition, and leading some consumers to believe they could not afford legal advice. The CMA also found that there was limited innovation in the provision of legal services. To address these concerns the CMA recommended (among other things) that legal service providers be required to display information on price, service, redress and regulatory status to help potential customers.[13]

18. In 2020, the CMA reviewed the extent to which its recommendations in the 2016 Market Study had been taken forward. It found that all of the regulatory bodies have taken steps to introduce minimum requirements for price and service transparency, and this has resulted in a very substantial increase in the availability of such information. However, while the measures have only been in place for a short time, it noted that the evidence suggested that there had been only a limited impact on the intensity of competition between providers and on sector outcomes (e.g.: no significant change in the level of price dispersion, and there was limited evidence of increased 'shopping around'). While they expected this to change over time, they recommended that regulators should ensure greater compliance with the rules; improve the clarity and comparability of information through better promotion of best practice; develop indicators which allow consumers to assess quality; and finally introduce further measures to enable consumers to engage with the price and quality information online (including expanding the role of intermediaries, such as digital comparison tools).

3. Motivation for reform

19. A number of demand-side, supply-side and technological factors motivated the policy reforms introduced over the past two decades. While some of the reforms have been addressed at perceived enduring problem areas, others have been forward looking, focussed on adapting policy to accommodate future developments.

20. On the demand side, four factors in particular have been important in driving the changes introduced over the past 15 years:

- **Unmet demand:** there has been a longstanding perception of substantial unmet demand for legal services (i.e.: where consumers have a legal need but do not seek to purchase legal services). A 2019 survey found that only 55% of people with a legal issue in the past four

[13] Other recommendations included that comparison sites and other intermediaries be developed to allow customers to compare providers in one place by making data already collected by regulators available, and that the Ministry of Justice looks at whether to extend protection from existing redress schemes to customers using 'unauthorised' providers, and also undertake a review of the regulatory arrangements.

years had received professional help.[14] In 2020, it was estimated that 3.6 million people had an unmet legal need involving a dispute, and half of the small businesses experiencing a legal issue handled it alone. BAME communities, people with disabilities, younger people, and those on lower incomes and with a low level of education frequently appear to be worse off.[15]

- **Affordability and access to justice:** Although there are various reasons why an individual or businesses may not choose to access legal services, a perception that professional legal services are unaffordable is a critical contributing factor. A 2015 survey found that 63% of those surveyed did not believe that professional legal advice was affordable for 'ordinary people',[16] while another study found that only 13% of small business regarded lawyers as cost effective. [17] This concern has obvious implications for access to justice.

- **Consumer satisfaction:** There have at times been concerns about the extent to which legal service providers take account of consumer needs/preferences, and about the service standards offered by some legal service providers.[18] Among the main areas where complaints are received are in relation to poor communication and a lack of clarity around pricing. Research suggests that lawyer perceptions of the quality of service are often higher than that of consumers.[19]

- **Low levels of consumer understanding and engagement:** there have been concerns that consumers are confused in understanding the different offers made to them (in terms of price/quality) and insufficiently engaged and active in seeking out legal service providers. A 2019 survey found that only 21% people shopped around for a legal adviser, and only 33% compared prices.[20] This may reflect difficulties consumers face in differentiating among providers, particularly in terms of quality.[21] Active methods for increasing consumer engagement – such as the use of comparison websites – have traditionally been used relatively infrequently.

21. Supply side factors motivating the reforms include longstanding concerns about the structures in which legal services are provided, but also a perceived need to adapt to changes in how legal services are delivered or provided to consumers. Among these factors:

- **Unduly restrictive rules and practices:** various reviews of legal services over the past two decades have identified rules and practices that were unduly restrictive, including

[14] YouGov (2019).
[15] Legal Services Board (2020a)
[16] Hodge, Jones and Allen (2015). YouGov (2015) found that 21% of adults arranged their own divorce because they could not afford a solicitor. The Law Society (2016) recognised that there is a large group of potential clients that cannot afford to pay for legal services.
[17] Blackburn, Kitching and Sari (2015).
[18] Competition and Markets Authority (2016).
[19] Solicitors Regulation Authority (2016).
[20] YouGov (2019).
[21] YouGov (2015) found that that 60% of consumers agreed/strongly agreed that they are unable to differentiate one high street law firm or solicitor from another. Similarly, the Law Society (2016) observed that there '*remains a great deal of uncertainty amongst consumers about different types of lawyer and legal businesses. It is currently very difficult, even for knowledgeable consumers, to work out which provider is the most appropriate for their particular issue; and on the Internet, most firms look the same'.*

restrictions on entry, on conduct and on methods of supply. We consider some of these rules in more detail in section 3 below.

- **Lack of diversity of profession:** longstanding concerns about a lack of diversity in the legal profession, and an under-representation of certain sectors of society are seen to have potential implications in terms of perceptions of accessibility and the provision of legal services to more marginalised or diverse consumers.

- **Transparency and charging arrangements:** while there has been some innovation in how providers charge for legal services, including a move to fixed fee arrangements for some services,[22] there remain concerns about a lack of transparency in the market, making it difficult for consumers to compare providers.[23]

- **Growth of in-house lawyers:** there has been steady growth in the number of solicitors providing advice to a single client – i.e. in-house lawyers – with some estimates suggesting that around one in five solicitors operate in-house.[24]

- **Unbundling and outsourcing:** some legal services are being unbundled which involves consumers and legal providers sharing the tasks associated with a legal activity between them.[25] There has also been an expansion of the outsourcing of legal activities – such as high volume, repetitive and low risk tasks often undertaken by junior staff in traditional law firms – to third parties.

- **Greater use of paralegals and contract lawyers:** there has been a growing use of paralegals as an alternative to fully qualified solicitors. Some estimates suggest that paralegals can make up around 44% of all fee earners in some solicitors' firms.[26] There is also an increasing use of contract lawyers, who are employed by law firms or other organisations for a specific period of time or task.[27]

- **Online legal advice:** there has been growth in online legal advice services, particularly for will-writing and divorce advice, but also in other areas of law. In part, this reflects the fact that consumers are increasingly interested in the lower cost and increased convenience of services provided online.

- **Growth in self-representation and 'D.I.Y law'**: some consumers are using increased access to information online to 'self-supply' and seek to address and resolve legal problems

[22] Fixed fee charging arrangements are particularly prevalent in the area of consumer law, including will writing, conveyancing, power of attorney, immigration and family law services. In contrast, charging arrangements based on hourly rates, are most common in the areas of probate and employment law.
[23] Competition and Markets Authority (2016) and (2020).
[24] Solicitors Regulation Authority (2016). The Law Society (2016) suggested it was around one-quarter.
[25] Typically a consumer might choose to purchase legal advice at key stages, and combine this with work they do themselves (e.g.: employment, probate and immigration matters).
[26] Law Careers (2015).
[27] Allen & Overy (2014) suggested that at that time up to 70% of UK corporate consumers of legal services had used contract lawyers in the previous two years.

themselves. A 2016 survey found that there was a 30% increase in family court cases where neither side had legal representation.[28]

- **Growth in 'unregulated' providers of some 'legal services'**: there has been a rise in the delivery of unreserved legal activities to the public by providers who are not regulated by any of the legal services regulators.[29] Technology companies are also using a combination of online automated services and paralegals (with, in some cases, arrangements to call on solicitors working in regulated entities on specific issues) to provide services.

22. Finally, the reforms have been motivated by a need to adapt and respond to the rapid innovation and the technological change occurring in the legal services markets. These changes are seen to create both opportunities and challenges for consumers and the legal profession and for the sector more widely. Among the most important changes:

- **Introduction of new, innovative legal service technologies**: technological changes are allowing some legal services providers to innovate in ways that extend their service range, improve quality and the increase the timeliness of advice. Most notably this can be seen in the area of automated legal services/lawtech and some foresee potentially significant disruptive effects if the developments in Artificial Intelligence, such as IBM's cognitive computer ROSS, are further refined and become widespread in application.

- **Changes in how services are provided:** technological change is widely considered to be having a significant impact on how legal activities are conducted, and how services are delivered to consumers. Many legal businesses are introducing technologies to improve their processes and to grow their businesses, and it is expected that some legal providers will continue to invest in information technology.[30]

- **Entry by new types of providers:** there has been new entry by technology-based providers to provide tech-enabled legal services to consumers. This includes providers of services to individuals and the emergence of legal 'exchanges' that can allow for online auctions of legal tasks.

- **Impacts on consumer behaviour:** technological change is also having major impacts on consumer behaviour. As noted above, there has been a steady rise in the growth of online legal services and consumers are increasingly using the Internet to research different options for legal advice, and to research information on specific legal problems.

[28] House of Commons (2016).
[29] These providers include: large professional services firms giving advice on employment matters; accounting firms providing advice on taxation or business structuring; small, single employee firms providing advice on different areas of compliance such as Health and Safety; and niche providers such as will-writing services.
[30] The Law Society (2016) noted that among the ways in which changes in technology are impacting on legal services include: increasing use of software programmes to read contracts and other legal documents; improvements in the efficiency with which providers deliver procedural and commodity work; and new assistance to consumers with decision-making and purchasing behaviours

4. Four important areas of reform

23. Against this background, this section presents an overview of four important policy reforms introduced over the past 15 years. The reforms include: allowing for non-lawyer involvement in legal service businesses; a shift in regulatory strategy towards a principles-based approach; and reforms which allow greater flexibility in how solicitors provide legal services to the public. I also discuss the reforms to the regulatory architecture introduced as part of the Legal Services Act (2007).

Allowing for non-lawyer involvement in law businesses

24. As described above, a long-standing concern has been that the traditional business structures through which legal services were delivered were unduly restrictive, and thus impeded competition and innovation. To address this, the Legal Services Act (2007) provided for the authorization of Alternative Business Structures (ABS's)[31] which are legal businesses owned or managed by non-lawyers.

25. Perhaps not surprisingly, the introduction of an authorization regime for ABS was controversial. Those supporting the introduction of ABS's referred to the potentially adverse impacts that the restrictions on non-lawyer involvement were having on entry, competition and innovation in the supply of legal services. It was also argued that such restrictions increased transaction costs by not allowing law firms to diversify risk across a range of activities, and by not allowing firms to exchange information/knowledge regarding a specific client internally. Finally, it was argued that, by not allowing firms to access external sources of capital and financing, this decreased their ability to innovate and invest above levels that could be achieved through funding by internal sources of capital.

26. However, those who objected to the new regime pointed out that the restrictions on business structures were justified on the basis that they ensured the accountability and independence of the legal profession, and that this maintained consumer confidence in the law. Specifically, it was argued by some that allowing multi-disciplinary partnerships could lead to conflicts of interest arising, and that under the existing arrangements, quality was enhanced by the fact that all of the partners of legal service firms were personally liable should their advice, or the advice provided by their partner colleagues, be found to be negligent. More generally, an argument was made that by allowing for non-lawyer involvement, particularly external capital, there were risks that the 'culture' of law firms and the legal profession may be undermined. Finally, a concern was expressed by some that the changes may have adverse reputational impacts for the profession through the development of so-called 'Tesco law', as a result of the entry by large supermarket and other non-traditional firms, into the provision of legal services.

A shift in regulatory strategy towards principles and outcomes

27. An important change has been a shift in regulatory strategy from a highly-prescriptive 'rules-based' approach to a more 'principles-based' outcomes focussed approach. The new regulatory strategy sought to move away from a 'tick-box' mentality to one where solicitors and firms where required to

[31] The Law Society defines an Alternative Business Structure as *"a regulated organisation which provides legal services and has some form of non-lawyer involvement. This involvement can either be at the management level (eg as a partner, director or member); or as an owner (eg an investor or shareholder)*."

determine, and implement, the right systems and controls to achieve the desired Outcomes having regard to the nature of their practice, the type of clients they serve and type of work undertaken.[32]

28. A new Solicitors Handbook introduced in 2011 was based around ten mandatory Principles (which underpin all regulatory requirements) and a new Code of Conduct built around 'Outcomes Focused Regulation'. Specifically, the Outcomes showed how each of the Principles must be achieved by solicitors in their specific context. The Code provided examples of the kind of behaviour that may establish whether the Outcomes have been achieved and the principles complied with (known as non-mandatory 'indicative behaviours' (IBs)). The shift in approach was accompanied by a corresponding change in supervision and enforcement.[33]

29. Further reforms introduced in 2019 further simplified and restructured the Handbook including the removal of redundant requirements, and the refinement of the outcomes-focussed regulatory strategy. The 2019 reforms reduced the number of principles and introduced separate Codes of Conduct for individuals and for firms. Separating the codes for individuals and firms was expected to ensure a clear distinction between what is expected of an individual and what is expected of a firm. The codes focused on core professional standards and behaviours that apply to all solicitors wherever they work and should be met in all circumstances.

30. Those who favoured the shift in regulatory approach argued that it would make regulatory requirements less complex, more proportionate and accessible. This was expected to: reduce the costs of compliance for those regulated; enhance consumer and public understanding of regulatory protections in ways that build confidence in providers and is market expanding; and allow regulation to keep in step with some of the wider market changes (and therefore not inadvertently impede innovation). It was also seen to complement other proposed policy changes, particularly the changes associated with ABS's and the ability for individual solicitors to practise more flexibly (see below).

31. Those who opposed the change argued that the shift to a less prescriptive approach could potentially create material gaps in coverage and thus ultimately adversely impact on consumers. Specifically, there was a concern that increasing the generality of principles and standards raised the risk of increasing uncertainty among solicitors as to what actions will constitute regulatory compliance, and that such uncertainty could result in over- or under-compliance.[34]

Greater flexibility in how solicitors provide legal services to the public

32. A major reform introduced in 2019 focussed on providing solicitors with more flexibility in how they work with the aim of making it easier for people to access legal services. The reforms allow solicitors to provide unreserved services to the public or a section of the public by practising in an

[32] Thus, while firms were formerly subject to detailed rules on what information they must give to clients, the relevant information obligation is now largely based on the needs of the relevant client and type of work involved. This may require a solicitor to exercise a degree of judgment about the specific needs of an individual client (e.g. a client that may be vulnerable). Similarly, while formerly detailed rules governed conflicts of interest in specific areas of work, firms must now have systems and controls in place to identify and deal with conflicts in all areas of work

[33] Firms are required to notify the regulator of any regulatory failures, and are required to appoint compliance offices for legal practice (COLPs) and compliance officers for finance and administration officers (COFAs).

[34] However, as a general observation, it might be expected that solicitors and regulated legal service entities should be better equipped than other professions and areas of regulation when it comes to dealing with vagueness or uncertainty in legal provisions or regulations.

'unauthorised' entity (i.e.: an entity not authorised or regulated under the Legal Services Act). In addition, individual self-employed solicitors (freelancers) are now able to provide reserved legal services without being authorised as an entity.[35]

33. The rationale for these reforms was to address concerns that the previous rules on where and how solicitors could practise were restricting choice for consumers as well as opportunities for solicitors to choose to work for a range of different providers. By removing these requirements, the aim was to allow solicitors and firms greater flexibility to deliver unreserved activities through a range of different business structures and alternative legal services providers. This was expected to allow solicitors to deliver unreserved activities in ways which are most responsive to customer needs and consistent with their business strategy.

34. These changes were also highly controversial. Those in favour of the reforms argued that allowing solicitors to capitalise on their specific qualifications, skills and expertise in different types of providers could increase competition and provide consumers (including vulnerable consumers) with more choice. It was also argued that the changes could facilitate innovation and new methods of service delivery, which could be market-expanding and potentially address some of the issues associated with unmet demand for legal services. The expansion of choice options for solicitors could also potentially lead to an even more diverse legal market. Finally, removing the restrictions on where solicitors could practise might address the risk that it unnecessarily reduced the availability of lower cost options for consumers (such as charities or specialist legal centres).

35. Those opposing the reforms focused on three issues. First, that certain consumer protections will not be available where services are provided by freelance solicitors or when using a solicitor that works in an unauthorised entity. Second, that consumers may fail to understand relevant distinctions between different types of providers, and therefore not appreciate the differences in consumer protections that apply to them in choosing a provider.[36] Finally, that the reforms risked eroding the trust in the whole legal services market and the title 'solicitor', and might create incentives for some regulated firms to set up separate unauthorised entities.

A new regulatory architecture and a new independent oversight regulator

36. A major conclusion of the 2004 Clementi Review was that the existing regulatory model for legal services, at that time, was flawed and a 'maze'. To address these problems, Clementi proposed an overhaul of the regulatory framework for legal services. Firstly, he proposed that specific statutory objectives be set for the regulation of legal services.[37] Secondly, to address the problems associated with the 'regulatory maze', he set out, and assessed, a number of different 'models' for regulation, known as Models A, B and B+. The different models are instructive as they highlight different possible architectures for legal services regulation. The characteristics of each model were as follows:

[35] This is subject to certain conditions being met.
[36] To address the risks solicitors working in unregulated organisations are required to inform clients before engagement of their insurance and Compensation Fund status. In addition, solicitors working in un regulated organisations remain subject to conduct rules under the Code of Conduct for Solicitors.
[37] In defining these regulatory objectives, Clementi (2004) drew a parallel with the approach that had been adopted by the then financial services regulator, the Financial Services Authority.

- **Model A** involved removing all regulatory functions from the front-line practitioner bodies and transferring them to a new statutory regulator, which would interface directly with the providers of legal services (e.g.: similar to the model in the network sectors).

- **Model B** involved splitting the responsibility for the regulatory functions between the front-line practitioner bodies, and also creating a new statutory regulator, which would be responsible for ensuring the consistent oversight of all of the front-line practitioner bodies.

- **Model B+** also involved the splitting of regulatory functions, but specifically required the professional bodies to split their regulatory arm from their representative/advocacy arms, with separate governance arrangements. This model therefore involved the creation of new front-line regulatory bodies at practitioner level for different areas (barristers, solicitors etc.), all of which would be subject to oversight by a new statutory regulator.

37. After receiving submissions on the advantages and disadvantages of the different Models, Clementi recommended the adoption of Model B+ and the establishment of a co-regulatory arrangement between public and self-regulation involving the creation of a new statutory oversight regulator and a number of 'independent' frontline regulators at the practitioner level. In recommending this model, particular emphasis was placed on the need to build on the strengths of the current regulatory system rather than starting from scratch.[38]

38. The UK government adopted this recommendation (Model B+) in the Legal Services Act (2007). A new statutory regulatory body was created under the Act – the Legal Services Board (LSB) – which was given eight statutory objectives to fulfil, and was also tasked with the supervision and oversight of the work of the frontline regulators (or 'Approved Regulators') which are directly responsible for regulating the lawyers who operate in England and Wales.

5. The effects of the reforms

39. So what have the effects of these reforms been? To address this question, this section presents an overview of various studies and reviews that have looked at the impact of the reforms. This discussion is particularly relevant to understanding which reforms have been effective in promoting competition in these markets and in widening access to legal services.

Allowing for non-lawyer involvement in law businesses

40. As set out above, the introduction of Alternative Business Structures (ABS) was premised on an expectation that it could facilitate entry by new and diverse participants, potentially enhance

[38] Specifically, it was noted that: *"In judging the strength of the arguments between different models, it is clear that a B+ model would build on the current system to a greater extent than Model A. It is true that, if one started from scratch, with no history of professional bodies with strong roots, one might conclude that Model A should be preferred for its clarity and flexibility. But even those who are critical of what they see as the self-serving nature of the current professionally based arrangements would recognise strengths. The current system has produced a strong and independently minded profession, operating in most cases to high standards, able to compete successfully internationally. These strengths would suggest that the failings of the system, identified in the Scoping Study and covered in this Review, should be tackled by reform starting from where we are, rather than from scratch."*

competition and innovation in the supply of legal services, and allow firms to access external capital increasing their ability to innovate and invest above levels that could otherwise be achieved. Have such expectations been met?

41. In terms of entry, although the number of providers registering as ABSs was initially relatively small, it has grown significantly in the past few years.[39] It is estimated that there are now over 1,400 ABS licences issued, accounting for around 1 in 10 entities. The population of ABSs encompasses a range of types of organisations, from small family-owned firms to very large corporate groups and major retail brands to charities, insurers and universities. The diversity in the types of organisations that are registered as ABSs is an indication of the fact that a range of different business strategies and models are being applied. All of the Big 4 accounting firms have been authorised as ABSs, and there is some suggestion that this has had a positive impact on competition.[40] More generally, a 2019 survey found that some ABS's are proving to be a significant threat to traditional law firms, with 22% of traditional law firms say ABS's are a competitive threat.[41]

42. Not-for-profit organisations have also become ABSs including local authorities, charities and universities. According to the Legal Services Board: local governments are using ABSs to share costs and to generate additional sources of revenue from their legal services; universities are using ABSs as a vehicle to provide law students with work experience; while charities have been established as ABSs to facilitate legal services to people who cannot afford to pay for a solicitor but are not eligible for legal aid.[42] All of these entrants have important potential implications for accessibility and provision of services to consumers that might be otherwise difficult to reach.

43. Allowing ABS's was also expected to allow for greater levels of internal and external investment in law firms. One 2017 survey found that over 50% of ABSs had invested in their business, but that external investment was relatively limited at that time. However, according to the Legal Services Board, greater investor appetite has emerged since that time particularly into Lawtech.[43] In terms of financing and operations six ABS law firms are now publicly traded on the London Stock Exchange. Other law firms have obtained private equity financing in order to boost their capital reserves, and to grow their businesses. For example, in 2019 private equity acquired two law firms to create the largest conveyancing business in the country.[44]

44. While there was some concern prior to the introduction of ABSs that quality standards could be reduced through non-lawyer involvement and changes to the 'culture' of a traditional law firm there is no evidence of a higher number of disciplinary proceedings against ABSs as compared to traditional law firms.

[39] In the first couple of years there were problems with the authorization process for ABSs, particularly for those who propose to structure themselves in non-traditional ways. The Legal Services Board (2013) expressed disappointment with the progress of ABSs referring to evidence that at that time the *'conservatism of the legal profession and its regulators*' was making it difficult for new types of providers to enter the market, particularly those which offer truly innovative delivery methods.
[40] Legal Services Board (2020a) refers to a 2018 survey of law firms across the UK, Canada and the US which found 23% of large firms and 21% of midsize firms had lost business to one of the big four in the previous year
[41] Royal Bank of Scotland (2019).
[42] Legal Services Board (2020a).
[43] Legal Services Board (2020a).
[44] Legal Services Board (2020a)

45. Finally, there is evidence that ABSs are more innovative than other regulated legal services organisations in terms of both managerial and organisational changes A 2015 study found that ABSs were at that time 13-15% more likely to introduce new legal services than other law firms.[45] This trend appears to have intensified with a 2020 study finding that ABS were significantly more likely to have introduced service innovation (38%) compared to non-ABS firms (25%).

Effects of the shift in regulatory strategy towards principles and outcomes

46. Recall from the above that the shift in regulatory approach towards a principles-based, outcomes focussed, approach started in 2011 and was adapted and refined in 2019. Taken together these changes were expected to reduce the compliance burden on legal service providers, enhance consumer and public understanding of regulatory protections and allow regulation to keep in step with wider market changes, in particular the increasing diversity of business structures in which legal services are being provided. Ten years on, have these expectations been met?

47. In the first period of reforms (prior to the changes introduced in 2019), there was a perception that the shift in regulatory approach was a *process* that required a shift in the culture of both the regulator and the regulated community. The overall aim was to encourage solicitors to incorporate the objectives into their thinking, such that issues like integrity and their client's best interests are front of mind. The shift in approach was seen as particularly important given the emergence of alternative business structures and innovation in how legal services are provided. In particular, there was a concern that the traditional prescriptive approach would not capture the diversity of business models that emerge, and may, in fact, frustrate product and service innovations.

48. However, in this first period there was a concern that some solicitors were interpreting the non-binding Indicative Behaviours as rules, and therefore not taking advantage of the flexibility associated with the shift in approach. This, was in part, attributed to the culture of some solicitors, whose education and training emphasise compliance with rules. There was also a concern that the flexibility of the approach might have led to over-compliance by some firms and entities – particularly smaller enterprises. In its 2016 review of the sector, the CMA noted that the code was '*long, confusing and complicated*' and that it is still '*detailed and prescriptive and retains a strong focus on traditional models of legal practice*.'[46] It also supported the proposal to remove Indicative Behaviours given that some stakeholders found them confusing and/or interpreted them as rigid requirements.

49. The changes introduced to address these issues in 2019 have only been in place for a short (and unusual) period, and it is therefore too early to assess the impact of the changes. However, in its submission to the CMA's 2020 review, the Law Society observed that Covid-19 had "*tested the new regulations to some extent, and has shown, that the new regulatory framework for solicitors provides sufficient flexibility to adapt to novel situations whilst protecting the public, facilitating regulatory oversight and compliance, and allowing innovation.*"[47] Other submissions noted that the changes "*created a real focus on reducing regulation, focusing on principles and trying to promote competition and support reduced pricing through lower regulatory costs*." [48]

[45] Roper, Love, Rieger and Bourke (2015).
[46] Competition and Markets Authority (2016).
[47] The Law Society (2020).
[48] Association of Consumer Support Organisations (2020).

Effects of greater flexibility in how solicitors provide legal services to the public

50. The ability for solicitors to practise more flexibly – either as freelancers or in unauthorised providers – was expected to expand choice for consumers by allowing them to access the services of a solicitor in different ways and provide more flexibility to solicitors in how they work and facilitate innovation and new methods of service delivery. At the same time, there were concerns that the changes would reduce consumer protection, and that consumers may fail to understand relevant distinctions between different types of providers.

51. These changes have only been in place since 2019, and it is too early to assess the full impact of these changes. That said, a number of recent reviews and reports have discussed the impacts of the changes.

52. In its 2020 review of the market, the CMA observed that some stakeholders told them that the ability for organisations other than authorised law firms to employ solicitors is a benefit given that the title of 'solicitor' is an important brand for legal services in the UK; that the entry and expansion of new legal services firms had partly been as a result of these reforms; and that no evidence of consumer protection concerns were raised in responses it received in relation to allowing solicitors to practise in unauthorised firms.[49] It also noted signs that the unauthorised sector has continued to grow through developments in lawtech and will continue to do so in the future, potentially accelerated by the trend towards greater remote service provision driven by COVID-19. Overall, the CMA concluded that *"[W]hile it may be too early to evaluate the full impact of this change, we consider that these early signs are positive*."

53. In relation to the specific reforms to allow solicitors to work as freelancers, the CMA referred to evidence from the Law Society that there has been an increased interest from the profession in working as freelance solicitors and as consultants. The CMA considered this to allow for greater operational flexibility for solicitors and potentially provide lower cost options to consumers. However, the CMA noted a 'regulatory gap' that created consumer protection risks for users of unauthorised providers which, in its view, is likely to become more urgent over time. It recommended that a mandatory public register of unauthorised providers for certain legal services be established, and that rules be introduced which mandated that these providers offer redress options for consumers.

54. In its response to the CMA study, the Law Society noted that it was too early to assess the full effect of the change to allow solicitors to practise in unauthorised firms, but that in the long-term it might lower operational cost for business, potentially leading to more competition in the market, which could drive costs down for consumers. As regards the introduction of the freelance model, the Law Society noted that it had received a lot of enquiries mainly from sole practitioners, consultants attached to law firms, and semi-retired solicitors, looking to switch to freelancing in order to reduce their insurance cost.

55. In its 2020 assessment of the legal services market, the Legal Services Board (LSB) observed that while the unauthorised sector remained small, there were examples where new entrants had successfully used technology to serve large numbers of consumers. According to the LSB most entry was happening in high volume, low-value areas such as will-writing, employment and divorce related services. However, the LSB noted that the solicitor and barrister 'brands' have an immense influence

[49] Competition and Markets Authority (2020).

on consumer choice which make it difficult for alternative providers to make deep inroads. The LSB referred to research that suggests that unregulated providers tend to be more innovative and cheaper, which it considered to provide significant benefits given challenges around unmet legal need. However, the LSB also referred to survey evidence showing that consumers are more dissatisfied with the service they receive from unregulated providers. Looking ahead the LSB noted that Covid-19 could see unregulated providers grow in influence, and thus gaps in consumer protection widen. In sum, the LSB saw the issue as one of balancing competing tensions of protecting consumers, enabling innovation and increasing the affordability of legal services.

A new regulatory architecture and a new independent oversight regulator

56. As noted above the new regulatory architecture for legal services consciously and deliberately sought to evolve from the existing arrangements rather than starting from scratch. However, only a few years after the new arrangements were introduced, concerns were raised about the effectiveness of this decision

57. A 2013 review by the Ministry of Justice identified a number of problems. First, the wide range of objectives within the Legal Services Board's remit was seen to have created confusion as to how the different objectives should be balanced, particularly the objectives relating to competition and protecting the consumer interest.[50] Second, there was an apparent consensus among the different regulatory bodies that things had not worked out as anticipated, with the new statutorily created regulatory oversight body, the Legal Services Board (LSB), being particularly critical of the new arrangements. The LSB submitted that the system of regulation - comprising over 10 frontline regulators, an oversight regulator and a statutory ombudsman - was *'over-engineered'* and *'exceptionally complex'*, did not satisfy the principles of 'good regulation', and that a new 'blueprint' was needed.[51] The LSB was also critical of what it considered to be a general resistance to the market liberalisation initiatives that had been introduced, which were seen by many in the sector as adding costs, rather than removing burdens. Of particular interest was the claim that the arrangements whereby the front-line regulatory bodies retained ties to the practitioner representative organisations had maintained *'a legacy of over-detailed rules and cultural biases'* in relation to issues such as controls over entry, and regulatory interference in matters which should have been left to commercial entities. The then Chairman of the LSB hypothesized that improvements would best be made by the establishment of a single regulator, created from scratch, and unrelated to any existing regulator (itself included) and given a new rulebook starting from a blank sheet of paper, with no requirement to 'passport in' (i.e.: automatically incorporate) old rules.

58. The two principal front-line regulatory bodies – the Solicitors Regulation Authority (SRA) and the Bar Standards Board (BSB) – were also critical of the regulatory framework in their submissions to the review.[52] The Law Society – the representative body for solicitors –identified a number of problems

[50] The Bar Standards Board (2013) for example noted the following: *"The LSB maintained for some time that the consumer interest was paramount among the regulatory objectives. More recently it has referred to the public interest as well. Either way the BSB is concerned that this is not the right way to approach the eight regulatory objectives when there is no statutory hierarchy among them. The BSB contends that all regulatory objectives need to be taken into account and held in balance."*
[51] Legal Services Board (2013).
[52] The Bars Standards Board (2013) noted that there was an incorrect balance under the regulatory arrangements between the role of the LSB, as oversight regulator, and the discretion of the front-line regulatory bodies. The Solicitors Regulation Authority (2013) submitted that the regulatory settlement provided by the Legal Services Act (2007) was imperfect, however, in its view, and despite significant flaws, the new regulatory system

with the new regulatory arrangements.[53] One important observation made by the SRA – the frontline regulatory body for solicitors – was that, although the Legal Services Act 2007 required the separation between the representative and regulatory functions of the professional associations, in practice, this did not ensure full independence and that '*as long as regulatory bodies remain part of strong representative organisations, there will be additional cost and a lack of flexibility within the system.'*

59. In 2016, the Legal Services Board set out a vision for legal reform in the sector. This vision included replacing the eight regulatory objectives defined in the Act by one overarching objective: "*to safeguard the public interests by protecting customers and assuming legal services deliver outcomes in the interests of society as a whole*". In its view the existing objectives failed to offer a clear focus and there was risk of scope creep as they give too much latitude to regulators in justifying their decisions. A second recommendation was the complete separation of regulation from representative bodies. In its view only full separation would improve consumer confidence, and create the perception that their needs would not be overridden by professional or commercial interests. Finally, it recommended that a single regulator covering the whole sector be established, noting that, at that time, there were currently 15 organisations with a stake in regulation, employing 750 people at an annual cost of £70 million.

60. The Competition and Markets Authority (CMA) also considered the regulatory architecture in its 2016 and 2020 reviews. In its 2016 review it found that whilst the current system worked for the title-based model of regulation, it may not be sustainable in the long term. The main concern was that the title-based model was insufficiently flexible to apply proportionate, risk-based regulation which reflected differences across legal services areas and over time. It also noted that the complex regulatory structure, of multiple regulatory bodies overseen by the LSB, could lead to practical difficulties in coordinating regulatory changes, and that it had residual concerns about the independence of regulation from the representation of the legal professions. The CMA recommended that the Ministry of Justice conduct a review of the regulatory framework, which should among other things consider the case for extending redress to consumers using unauthorised providers and incorporate its planned review of regulatory independence.

61. In its 2020 assessment of the implementation of these proposals, the CMA found there had been little progress with these recommendations, noting that a review of the Legal Services Act 2007 (the Act) has not taken place and the Government had not undertaken its planned review of regulatory independence. However, it noted that the LSB had undertaken work on strengthening the Internal Governance Rules (IGRs) that seek to ensure an adequate split between the practitioner bodies' regulatory and representative functions.

functions better than the arrangements prior to 2007.

[53] In particular, it submitted that the responsibilities and accountabilities for regulation and oversight are unclear; that regulation has become too detached from the profession and too expensive; and that the regulatory arrangements are perceived internationally to have compromised the independence of the legal profession, which, in its view, is impacting on the attractiveness and competitiveness of the legal services markets in England and Wales. See The Law Society (2013).

6. Reflections on the relevance to the OECD's PMR Indicators

62. This final section draws upon the experience of the reform of legal services in England and Wales to offer some wider reflections that may be relevant to how the OECD collects information on professional services when compiling it Product Market Regulation Indicators. The nine reflections are as follows:

- 'Authorised' and 'unauthorised' providers, or individuals, often co-exist in professional services sectors, and thus act as competitive threat to one another.[54] This means that if PMR Indicators only capture the rules that apply to regulated providers of services, it may miss trends in service provision by unauthorised providers/individuals who are not subject to the same rules. The experience of legal services described above shows that while the unauthorised sector in many professions may have been seen as a 'fringe' activity to date this could change in the future as a result of technological or market developments and increase the size and services offer of the unauthorised sector in some professions.

- Changes in rules governing the type of organisational forms in which professionals are permitted to provide services may be relevant for the PMR Indicators. As highlighted above, recent changes in England and Wales have removed restrictions on the ability of solicitors to practise as either freelancers or in unauthorised entities which has led to changes in the nature of the legal service market as well as differences in consumer protections according to the nature of the provider.

- Related to the above, the OECD PMR Indicators might capture the consumer protection rules related to specific professional services, and any differences in these based on the nature of the provider or form of delivery of the service. For example, whether consumers of a particular professional service are protected by sector-specific consumer protections over and above those provided in generic consumer and fair-trading laws. This is relevant not just for the impact on consumers but also on the ability of different providers to compete with one another (i.e.: in terms of asymmetric regulatory burden and costs).

- Separate conduct rules can sometimes apply to firms/entities and to individuals. This distinction has been relevant in the English and Welsh legal service reforms which allow professionals to practise in alternative (non-traditional) entities, where they are individually subject to specific rules, but the entity they work for is not. Recognition of this distinction in the PMR Indicators may be useful in settings where there is a desire to shift away from regulations anchored in traditional supply structures towards a more risk-based approach, where the rules focus on the risks to consumers of the specific professional service and not the title or type of entity that provides the service.

- The shift from a prescriptive, rules-based approach towards a more principles-based approach to regulation in the UK legal services sector is not unique, and can be seen in other professional sectors – such as financial services and accounting – and in other jurisdictions. Such an approach may be well suited to professions undergoing rapid change, because that it

[54] This is consistent with academic work on how professions use knowledge to differentiate themselves from those outside the profession. See Friedson *(*1986) and Abbott *(*1988).

can more easily accommodate new entry, business models and innovation.[55] Capturing distinctions in 'regulatory strategy' for professional services across jurisdictions, and service-types may also be useful in the PMR Indicators.

- Regulatory architecture – in particular the use of state regulation, professional self-regulation or a combination of the two has been a theme of the legal service reforms in England and Wales, and raised important issues around the division of professional organisations' representative and regulatory functions, governance, independence, as well as the efficiency and complexity of multiple regulators, each of which may be factors of relevance to the PMR Indicators.

- The public policy objectives of a profession may differ across different jurisdictions, and the experience in legal services has been one of difficulty agreeing such objectives. The PMR Indicators might usefully capture any regulated objectives for a sector (where they exist), such as whether these focus solely on professional integrity or broad concepts such as 'the public interest', or whether they also encompass objectives relating to competition, innovation and access to a service/affordability.

- Sector wide practices and rules about prices and quality can be critical to competition in professional service sectors; in some circumstances specific practices/rules can have restrictive effects on the supply of such services. While the current PMR Indicators do capture whether fees are regulated or not, the experience of England and Wales suggests that it may be useful to also understand whether there are specific rules/practices relating to fee structures and price transparency. Similarly, given the importance of quality in professional services, understanding more about the nature of any rules about quality standards (e.g.: specific rules about on-going professional development and training requirements) could be instructive.

- A final, more general, observation drawn from the experience of reform of legal services in England and Wales is that changes in culture and established practice can be critical to the effectiveness of regulatory reform efforts in the professions. This means that even where a regulator adopts a new approach, or removes a specific rule, this change will only be effective if the profession actively responds by changing behaviour or by taking advantage of new opportunities.

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[55] See Decker (2018).

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