

Fit for the Future? Are Professional Regulators Really Ready for the World that Lies Ahead?

by Darrel Pink – Guest Contributor
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Can a study of legal services regulation in Scotland have relevance for regulators in widely different professions? Should regulators be concerned about approaches and recommendations that are not specific to them? Anyone interested in professional regulation will have noted increasing government interest in this area, including reviews of health professions regulation¹, professional reliance², complaints processes³ and all that has traditionally fallen within the province of self-regulation. Government interest, to the point of abolishing regulators⁴, should cause Canadian regulators to take note.

The most recent and far-reaching review of regulation approaches and content is that of legal services regulation in Scotland, entitled *Fit for the Future: Report of the Independent Review of Legal Services Regulation in Scotland* (“the Report”)⁵. Though focused on one sector, the issues and recommendations are easily transferable across most areas and are worthy of careful consideration by all committed to “public interest” regulation.

The Report invokes the need for regulators to anticipate the dramatic changes happening in their respective industries and professions.

The Report goes much further than the concept of “Right Touch Regulation”. To enable and support high quality professional service delivery, the Report calls for a single “sector-wide” regulator with

responsibility for all (legal) service providers. A unitary body would eliminate varying standards for entry and professional conduct and inconsistent approaches to oversight. One entity would also eliminate many challenges faced by small regulators, which often lack human and technological resources.

There are several key themes in the Report:

Setting Expected Outcomes

The work of a regulator should be premised on meeting required outcomes. Those outcomes should specify the purpose and expected impact of regulation. Most of the proposed outcomes for legal services regulation are of broad application and would require a regulator to:

- enable access to the profession including choice and diversity;
- offer accountability in protecting the public and consumer interest;
- secure the confidence and trust of the public; and
- enable future growth of the profession

A commitment to these outcomes, which are called “regulatory objectives”⁶, has had some uptake in Canada⁷, but is far from the norm.

Risk-based and Principled Regulation

Regulation, in its structures and approaches, should be principled, risk-based and proportionate. Regulation should embody the Better Regulation Principles (familiar to those with an appreciation of approaches in United Kingdom), which add the concepts of consistency, accountability and transparency to the other objectives. To ensure their

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adoption, these requirements should be embodied in governing legislation, while allowing the regulator to articulate the specific details. In discussing proportionality the Report notes:

This would not be a one size fits all model, as clearly the **arrangements for each of the professional areas should be appropriate and proportionate** to the business carried out by those professional groups.

Innovation

Regulators should assume a role in encouraging/enabling innovation by creating and supporting an environment where innovation is encouraged. This is in stark contrast to the present where innovation is often stifled by “the outmoded or necessary limitations of the regulator's structure” (p. 20).

Governance and Independence

Many regulators are grappling with a range of governance issues, including board size, constitution and selection processes.⁸ Related to this is how professional regulation maintains its independence in the face of changing and increasing expectations of the profession and government.

The recommendations in the Report are revolutionary, at least from a Canadian perspective. They advocate for an approach to regulation (with responsibility from entry-to-practise to departure from the profession) that is unquestionably independent from government. To accomplish this complete separation, the Report recommends that the accountability of a regulator would be to the Legislature and the regulator would be subject to audit (by a body similar

to an Auditor-General). To accomplish this several core concepts must be adopted:

- There must be complete separation of regulatory and representative roles;
- The Chair of the Board should come from outside the profession and be appointed by a parliamentary/legislative committee, with a specific term and removal only for cause;
- There should be an equal number of professional and non-professional members of the Board, resulting in a slight plurality of non-professional members;
- The Chair and Board members should have experience in corporate governance;
- There should be a statutory requirement to establish links with the profession and the representative bodies and to work proactively with the profession to improve practice and ethical standards and enhance public trust in the profession.

Complaints and Discipline

The discussion of complaints handling is another area where the proposals should have widespread interest as they describe approaches to addressing public concerns about professional behaviour. Recognizing current complaints processes as “legislative”, i.e. entrenched and not 'fit for purpose' for either consumers or professionals, the recommendation is that complaints handling should be driven by consumer principles with the ability to develop appropriate, flexible and fair sanctions along with fair compensation and a simple process for appeals. The details are obviously complex, but the notion of a process that allows for flexibility is very appealing.

Entity Regulation

One aspect of the Report that will be of significant interest to professions where practice occurs in firms/groups, is the discussion on “entity regulation”. The benefits for both the profession and the public that would derive from regulating an entity delivering professional services are outlined and the benefits of allowing various combinations of services to be provided under one roof are highlighted. The entity would be responsible to the regulator for the quality of services, management, supervision, quality improvements and maintaining an internal complaint system. Regulators would require a “**fitness to be an entity**” test before being allowed to deliver services. Finally, entity regulation would not be in lieu of individual regulation, but would be in addition, to provide better mechanisms to deal with professional behavior.

The details will be of significant interest to regulators in Canada which are at various stages of implementing models of entity regulation.

Conclusion

Because of the practical and principled approaches that are outlined, the Report is worth a careful read with wide distribution among regulators and those interested in professional regulation because of the practical and principled approaches that are outlined in it. No doubt in jurisdictions where deeply entrenched interests will be affected, the Report will be controversial. The government sponsored reviews and actions we have seen to date have already begun to bring on some discomfort among regulators. The Report’s analyses will allow an objective reader and a thoughtful regulator to contemplate and address the need for change, regardless of the regulatory model

and before governments commission their own studies which are likely to come to similar conclusions.

¹ <https://www.mcmasterforum.org/find-evidence/products/project/modernizing-the-oversight-of-the-ontario-health-workforce>

² See Grey Areas No. 228 where Erica Richler discusses ‘The Final Report of the Review of Professional Reliance in Natural Resource Decision-Making’ -

https://engage.gov.bc.ca/app/uploads/sites/272/2018/06/Professional_Reliance_Review_Final_Report.pdf

³ Streamlining the Physician Complaints Process in Ontario, http://www.health.gov.on.ca/en/common/ministry/publications/reports/physician_complaints/docs/physician_complaints_process_en.pdf

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<https://www.thestar.com/news/queenspark/2018/10/26/skilled-trades-and-apprenticeship-system-to-be-modernized-province-says.html>

⁵ <https://www.gov.scot/Resource/0054/00542302.pdf>

⁶ See S. Terry, Laurel & Mark, Steve & Gordon, Tahlia. (2012). Adopting Regulatory Objectives for the Legal Profession. Fordham Law Review. 80.

⁷ See the ROs of the Nova Scotia barristers’ Society at www.nsbs.org.

⁸ See Grey Areas No. 230.