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Sent by email only to [BRFrameworkReview@beis.gov.uk](mailto:BRFrameworkReview@beis.gov.uk)

1 October 2021

Dear Sir/Madam,

**Re: Reforming the Framework for Better Regulation**

The Legal Services Consumer Panel (Panel) welcomes this review and the opportunity to respond to the Department of Business, Energy and Industrial Strategy's consultation on Reforming the Framework for Better Regulation.

As a general point, the Panel applauds the five principles listed in the Ministerial Foreword, and would like to emphasise the importance we attach to strong, independent regulation as a vital force for good for our economy and our society. We believe that good regulation should be regarded not as a burden on business, but as a support for efficient, innovative and consumer-focused business. We think it is a pity that the document is addressed almost entirely to the business community, with all others (in particular those representing consumers, or safeguarding the environment) grouped together slightly dismissively as "other interested parties".

While this is an extensive consultation on various topics, the Panel has endeavoured to only comment only on areas where it has experience or expertise to offer.

**A common law approach to regulation**

**Question 1: What areas of law (particularly retained EU law) would benefit from reform to adopt a less codified, more common law-focused approach?**

**Question 2: Please provide an explanation for any answers given.**

For the reasons expressed in the TIGRR report, we agree that the common law approach allows for high level rules to be expressed appropriately in terms of outcomes and for detailed regulations to be made in a more agile and proportionate way by regulators. This is in most cases the best way to promote innovation and competition while ensuring effective protection where and when it is needed.

Legal services are regulated via reserved activities and approved regulators which are in turn based on the ways the legal profession functioned and developed historically. A large number of statutory objectives are included in the Legal Services Act 2007. The sector

would benefit from an approach expressed more clearly in terms of an overriding objective, or limited number of objectives, supplemented by issues to which regulators should have regard. We believe this approach is generally appropriate throughout this sector, though there may be some “red lines” where all or most stakeholders agree that clear prescription is desirable to counter unacceptable risks. More generally, though, the common law approach allows for regulation to adapt more readily to emerging technology and methods of providing legal services rather than being tied to historical patterns.

**Question 3: Are there any areas of law where the Government should be cautious about adopting this approach?**

**Question 4: Please provide an explanation for any answers given.**

The Panel has only addressed legal services regulation in this context. While preferring the common law approach in general, we would however point out that some of the EU regulatory frameworks have an appropriate way of addressing consumers as well as businesses. This consumer perspective contributes to more effective regulation that ensures markets work well and meet the needs of all stakeholders. Therefore, while the Panel agrees that providing regulators with a more flexible, agile and outcome focused approach to regulation is an important goal, it may be worthwhile to retain some aspects of EU regulation. When deciding on a course of action for regulation in various sectors, the Government should ensure regulators specifically consider consumers and incorporate consumer protections, such as those provided for in parts of the travel industry, into any new regulatory framework.

**Adopting a proportionality principle**

**Question 5: Should a proportionality principle be mandated at the heart of all UK regulation?**

Proportionality is an important principle of effective regulation. In applying it, though, it is vital to address the proportionality metric not just at the nature of the business but also at the nature of the consumers and others affected by the proposed regulation. Your document focuses on the importance of differentiating between large and small businesses and voluntary organisations. It is equally important to consider the differential impacts on types of users (large businesses, small businesses, charities, individuals). This is highly relevant to legal services, as there is a huge gulf between the protection needed for a large business client of a legal services provider (where the client may well be larger and better informed than the provider) and that needed for a small charity or domestic consumer. Regulation should be adapted accordingly. It is also important to protect the public interest as well as the interests of disadvantaged or vulnerable consumers. In the legal services market, if the interests of these consumers are not met, there will be direct costs to different parts of the economy. These societal effects must also be included in the proportionality calculations.

Notwithstanding the importance of proportionality in regulation, there may be a need for caution before mandating it rather than embedding it into the culture of law-makers and regulators. There may well be some instances where the precautionary principle is more appropriate than proportionality, particularly in some environmental issues where the nature of the risk is uncertain but potentially very large. There should be sufficient flexibility to allow for this.

**Question 6: Should a proportionality principle be designed to 1) ensure that regulations are proportionate with the level of risk being addressed and 2) focus on reaching the right outcome?**

**Question 7: If no, please explain alternative suggestions.**

A proportionality principle tied to the level of risk being addressed may dictate that if a small number of people are at risk of a negative outcome, little to no regulation is required. However, this type of analysis might incorrectly trivialise the need to consider the particular needs of disadvantaged or vulnerable consumers.

A proportionality principle that focuses on a desired outcome may be more effective because it focuses on the reason for regulation. This purposive approach may be more likely to consider consumers, the public interest and the plight of those at risk of negative outcomes rather than making proportionality a quantitative analysis. Nevertheless, a proportionality principle may overstate the position of businesses in relation to consumers if it merely balances the effects on business against the goal of regulation when it may be more appropriate to balance the wider effects on society with that goal.

## **The role of regulators**

**Question 8: Should competition be embedded into existing guidance for regulators or embedded into regulators' statutory objectives?**

- a. Embedded into existing guidance
- b. Embedded into statutory objectives
- c. Creating reporting requirements for regulators
- d. Other (please explain)

**Question 9: Should innovation be embedded into existing guidance for regulators or embedded into regulators' statutory objectives?**

- a. Embedded into existing guidance
- b. Embedded into statutory objectives
- c. Creating reporting requirements for regulators
- d. Other (please explain)

The Panel would urge caution on this point. Competition and innovation are indeed important for markets to work properly and should produce the best outcomes for consumers, though not necessarily if left completely unbound by rules. In any event, both competition and innovation should be seen as important levers to promote better outcomes, rather than as goals in themselves. That is why most network and other network regulators have the overriding objective of promoting the consumer interest, through (wherever appropriate) the promotion of competition and innovation, not the other way round. They are therefore issues for which regulators should have regard, but not serve as statutory objectives (though the need to have regard for them could be incorporated in legislation). A statutory objective would elevate these concepts inappropriately and distract regulators from focusing on the ultimate outcome of their work.

**Question 10: Are there any other factors that should be embedded into framework conditions for regulators?**

This new regulation framework is an opportunity to incorporate a consumer focus into how regulators operate, not just as another factor to consider, but in most cases as the primary objective. Common goals of regulation include ensuring consumers (future as well as present) are informed, served, protected and able to consume freely as well as safeguarding society's interests. Incorporating consumers' interests at the heart of the framework for regulators will inform and improve regulation in any sector. Specifically, consumers should be placed at the heart of regulation from policy inception and design to implementation and evaluation.

Other factors which might be considered as necessary to embed into the regulatory framework include equality, social justice and environmental impact. The list (including competition and innovation as above) is potentially rather long and this reinforces the

benefit of adding these to a list of factors for which regulators should have regard, rather than diluting the importance of the overriding objective of the regulation.

**Question 11: Should the Government delegate greater flexibility to regulators to put the principles of agile regulation into practice, allowing more to be done through decisions, guidance and rules rather than legislation?**

Yes. The Panel believes that greater flexibility would aid regulators in the legal services sector (as in other sectors) to provide more agile regulation that can respond to a rapidly changing market. Varying systems of checks and balances to vet new regulatory directions and schemes may be needed in different sectors. The Panel agrees that regulation must be transparent and reasonably predictable. It may be appropriate in some cases for the Government to prescribe how regulators can draft and publish decisions, guidance and rules, and also how to consult and collect feedback from stakeholders, especially consumers. As the legal services market continues to evolve due to new technologies, methods of providing services and documentation requirements, flexibility is a key factor in a regulator's ability to keep pace with the market.

**Question 12: Which of these options, if any, do you think would increase the number and impact of regulatory sandboxes?**

- a. legislating to give regulators the same powers, subject to safeguarding duties**
- b. regulators given a legal duty**
- c. presumption of sandboxing for businesses**

Sandboxes are only one tool in the armoury of regulators to promote innovation in their sectors, so the Panel does not think it would make sense to mandate or impose a presumption on the use of this particular tool, useful though it is in many cases. In any event, it is not the number of sandboxes that is relevant, but the appropriateness of their use and quality of execution.

The Panel would like to see regulators also charged with safeguarding duties to ensure that where sandboxes are used, these exceptional environments are used responsibly to support innovation and real time learning for regulators and businesses, and that any risks are appropriately mitigated.

**Question 13: Are there alternative options the Government should be considering to increase the number and impact of regulatory sandboxes?**

Different regulators have over time explored many ways to promote innovation, such as the use of financial incentives built into price controls in the energy and water sectors. All such techniques should be used wherever appropriate, not just sandboxes.

**Question 14: If greater flexibility is delegated to regulators, do you agree that they should be more directly accountable to Government and Parliament?**

There is an inverse correlation between the strength and independence of regulators and the powers retained (and how frequently they are used) by Government to intervene or override their decisions. Intervening or overriding the decisions of regulators could be done (or be perceived to be done) for short-term political reasons rather than with a clear focus on the impact over time on present and future consumers, other stakeholders and the environment. It is arguably easier for regulators to make decisions on sensitive issues on the basis of objective evidence about the overall impact of their proposals, than it is for Government, which is why the need for independent regulators arose in the first place.

**Question 15: If you agree, what is the best way to achieve this accountability? If you disagree, please explain why?**

Of course regulators should conduct their business as transparently as possible and should be held to account by Government and by Parliament for their decisions and for their use of resources (theirs and others'). There are already mechanisms to achieve this, through Parliamentary Select Committees, which the Panel believes could be given a greater role here, and through budgetary controls and appointments. The Panel can see no good reason to supplement these controls in any major way.

**Question 16: Should regulators be invited to survey those they regulate regarding options for regulatory reform and changes to the regulator's approach?**

Regulators should be invited to survey those they regulate on regulatory reform, but it is perhaps even more important that they should survey those for whom the regulation is designed (eg consumers, employees etc.) A survey limited to regulatees would give a very unbalanced view. Furthermore, survey evidence on its own is not sufficient to give an objective view of the impact of regulation: objective evidence of problems and outcomes is still required and should also be shared with individuals or groups who are being regulated.

**Question 17: Should there be independent deep dives of individual regulators to understand where change could be introduced to improve processes for the regulated businesses?**

The Panel agrees that this might be a good way to check on the performance of regulators and of the effectiveness of regulation. This should ideally be done by an independent third party, though this could be at the instigation of Government. In the legal services sector, the recent Mayson Review is a good example of a deep dive into this particular regulatory framework.

**Revising the process and requirements of better regulation**

**Question 18: Do you think that the early scrutiny of policy proposals will encourage alternatives to regulation to be considered?**

**Question 19: If no, what would you suggest instead?**

The Panel agrees that the current scrutiny process occurs too late in the policy development cycle. The Panel's experience is that early scrutiny encourages the development of more nuanced and well thought out policy proposals.

**Question 20: Should the consideration of standards as an alternative or complement to regulation be embedded into this early scrutiny process?**

Yes. The consideration of standards as an alternative or possible component of regulation makes sense in this early scrutiny process. While the Panel is more concerned with a policy's effect on consumers generally, increased stakeholder engagement to consider various options at the time of policy development produces better policies.

**Question 21: Do you think that a new streamlined process for assessing regulatory impacts would ensure that enough information on impacts is captured?**

**Question 22: If no, what would you suggest instead?**

**Question 23: Are there any other changes you would suggest to improve impact assessments?**

The Panel would like to see Regulatory Impact assessments much more clearly focused on consumer impact, and more generally to see more widespread use of NPSV embedded in the consideration of new legislation, whether primary or secondary.

**Question 24: What impacts should be captured in the Better Regulation framework?**

**Select all which apply:**

- a. Innovation**
- b. Trade and Investment**
- c. Competition**
- d. Environment**

All of the above are potentially important in a wide range of regulations, but so are other factors such as equality, social justice, health etc. As the list is potentially rather long and may well be added to over time, it is important that the framework should be flexible and proportionate: not all these factors will feature significantly in all regulations, so there should be some flexibility in how they are assessed. A list which requires all legislators and regulators to have regard to all the factors, and perhaps at the minimum to state that they do not believe the proposal will have any material impact on some of the factors, may be the best way forward.

**Question 25: How can these objectives be embedded into the Better Regulation Framework? Can this be achieved via:**

- a. A requirement to consider these impacts**
- b. Ensuring regulatory impacts continue to feature in impact assessments,**
- c. Encouragement and guidance to consider these impacts, but outside of IAs,**
- d. Other? (please explain)**

See above. It is important to recognise that streamlining of the assessment process should not be achieved at the expense of any necessary thoroughness, nor should it incentivise a tick-box approach.

#### **4.5. Scrutiny of regulatory proposals**

**Question 26: The current system requires a mandatory PIR to be completed after 5 years. Do you think an earlier mandated review point, after 2 years, would encourage more effective review practices?**

**Question 27: If no, what would you suggest instead?**

The Panel considers that the trigger for a PIR should not be dependent only on whether there is a significant impact on business, but also on whether there is a significant impact on users, the wider community or the environment. Whether the review point should be 2 or 5 years depends on the context: in some cases two years will not allow sufficient time for the impact to be fully measurable. More important, the review should be repeated periodically to allow for evaluation of the impact of the regulation over time.

**Question 28: Which of the options described in paragraph 3.4.10 would ensure a robust and effective framework for scrutinising regulatory proposals?**

- a. Option 1**
- b. Option 2**
- c. Option 3**
- d. Other (please explain)**

The Panel prefers Option 2. Independent expert advice is critical in providing this evaluation and there will be a need for a different set of experts depending on the issue. Ministers (and most civil servants) cannot be expected to have the degree of expertise required.

#### **Measuring the impact of regulation**

**Question 29: Which of the four options presented under paragraph 3.5.4 would be better to achieve the objective of striking a balance between economic growth and public protections?**

- a. Adjust**
- b. Change**
- c. Replace**
- d. Remove**
- e. Other (please explain)**

The Panel is in favour of the use of scorecards, and would favour Option 3, or at least Option 2, which would allow for more inclusive NPV measures to be used. The fact that not all aspects of NPV are instantly measurable does not mean that it should not be attempted. The less measurable variables could be modelled using proxies and/or plausible ranges, with possible outcomes expressed as scenarios. This is far preferable than omitting important variables altogether. Only with Option 2 or 3 are we able to reach a view on the holistic impact of regulation and take account of multiple government objectives (as expressed in para 3.5.5). The absence of this broad view is a critical fault of existing regulatory approaches.

**Regulatory offsetting: One-in, X-out**

**Question 30: Should the One-in, X-out approach be reintroduced in the UK?**

**Question 31: What do you think are the advantages of this approach?**

**Question 32: What do you think are the disadvantages of this approach?**

**Question 33: How important do you think it is to baseline regulatory burdens in the UK?**

- a. Very important**
- b. Somewhat important**
- c. Somewhat unimportant**
- d. Not very important**

**34: How best can One-in, X-out be delivered?**

As the document sets out, various methods of regulatory offsetting have been tried and have not proved particularly successful. The main problem is that all the designs are very blunt tools. It is very hard to secure the desired momentum for deregulation without incentivising slightly absurd trade-offs and machinations. Such techniques could even reduce the push towards really significant deregulation, for example where the required number of “X-outs” has been achieved. They are more of a diversion or distraction from the task in hand than a sensible tool. Similarly, the idea of baselining the full cost of regulations may sound good in theory, but could be a massive task (if done properly) without necessarily achieving any direct outcome.

#### **4.8. Further comments**

**Question 35: Are there any other matters not mentioned above you would suggest the Government does to improve the UK regulatory framework?**

The Panel would encourage the reform of the Government’s regulation framework to include an explicit assessment of whether regulators are adequately and effectively considering the effects of regulation on consumers. In order to ensure markets function properly and the benefits of regulation accrue to society, it is important to place consumer interests at the heart of any regulatory framework.

It might also be worth considering an institutional change within Government to encourage a more effective cross-government approach to regulation. Different regulatory frameworks have grown up over time, in different Departments, with little regard to those established by other Departments or learning the lessons from them. When a better form of regulation has been devised, there seems to have been no incentive or desire to encourage existing regulatory frameworks to adapt accordingly. A more holistic approach to regulation would optimise regulatory interventions across the gamut of government objectives, rather than maximise the impact of such intervention on one particular metric of immediate interest to a particular Government Department. The Parliamentary scrutiny process could also be modified to take a more integrated view of regulation, and in particular to take a more proactive view of the importance of ongoing monitoring and evaluation, not just focusing on the introduction of new legislation.

The Panel looks forward to your response to this consultation. Should you have any questions pertaining to this response, please do not hesitate to contact Heidi Evelyn, Consumer Panel Associate, ([Heidi.Evelyn@legalservicesconsumerpanel.org.uk](mailto:Heidi.Evelyn@legalservicesconsumerpanel.org.uk)).

Yours sincerely,

A handwritten signature in black ink that reads "S Chambers". The signature is written in a cursive, flowing style.

Sarah Chambers  
Chair  
Legal Services Consumer Panel