

2000, (which coincidentally came into force on the same day as the *Human Rights Act*), the *Terrorism Act 2000* which I have referred to, the *Criminal Justice and Police Act 2001*, and the *Anti-Terrorism, Crime and Security Act 2001*. Trial by jury has been threatened and, following the Auld report, is still under threat.

PROSPECTS FOR CIVIL LIBERTIES

So, to conclude, what are the prospects for civil liberties in the present century? On the positive side there are the *ECHR and the Human Rights Act*. The Act will provide continuing opportunities for challenging the attacks on civil liberties but the deficiencies I have described are likely to remain and there seems no early prospect of a distinct British Bill of Rights which may be the only way of modernising human rights safeguards.

On the negative side is the insecurity of governments, which encourages them to secretive, heavy-handed and repressive use of their power. That insecurity is naturally intensified by the events of 11 September and the widespread belief in a worldwide terrorist network capable of unpredictable and devastating violence. In the face of such fear, faith in civil liberties is weakened among many and to defend them becomes more difficult and more unpopular. We are seeing a distressing illustration in the USA, where civil liberties have the most powerful legal

safeguards. There is mass support there for attempts by the government to circumvent those safeguards by taking prisoners outside the jurisdiction, where they are held without charge or trial, or access to lawyers, and in defiance of the Geneva Conventions. In Britain we have not yet gone down the same road.

In between the state and the individual the judges have a difficult role. Many deserve credit for their fearlessly principled willingness to stand up to government where civil liberties are in jeopardy. There is respectable support for the view that the judges' constitutional role as the protectors of fundamental rights transcend parliamentary sovereignty. I refer to the remarks of Lord Justice Laws in the case of *Witham*, which he has elaborated in lectures. But a battle between the judiciary and Parliament seems unlikely. In the last resort only the people themselves can defend their liberties. Whether they will succeed in doing so remains to be seen. In short, to conclude with a well-worn expression, which, I hope will never become obsolete, the jury is still out.

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The Law Society and the Bar: can they be trade unions, brand managers and public watchdogs at the same time?

by David Lock

The author reflects on the way lawyers are regulated and considers whether, in the long run, it is in the public interest for the present system of regulation by professional bodies to be continued in its present form.

The question as to whether professionals can be trusted to regulate themselves in the public interest has come into sharp focus with the collapse of Enron and the allegations – to date unproved – of collusion by the auditors, Arthur Andersen. Hundreds of millions of dollars have been

spent in the US lobbying the senate over decades to preserve the right of self-regulation for accountants, only to find that the unwise and unauthorised shredding of documents by Andersen's appears to have fundamentally undermined public confidence in the concept of self-regulation.

One senior US business commentator said recently that Enron would have a longer-term impact on western capitalism than ‘nine-eleven’ because the terrible events in New York and Washington and the measured response to them made the US feel good about its society. In contrast, the collapse of Enron left the US public with the feeling that self-regulated capitalism was rotten to the core.

This is all about checks and balances. The public, the government and business rely on professionals to do their job, which includes acting in a predominant way to protect the interests they are supposed to be protecting. The problem with Enron was that the perception that the accountants had been favouring their long-term commercial relationship with the management of Enron over the interests of stockholders. The allegation was that the accountants were more concerned with securing next year’s audit contract and fees for advisory work flowing out of this year’s audit, than protecting the shareholders by exposing the financial mess at the company.

We must be careful about allegation and counter allegation in Enron since everyone involved has an interest to pursue, which may colour their opinion, and support their case in court. But there is a growing feeling of distrust in the United States of professionals who set the rules in which their own members act, and are accountable to no one other than the professionals themselves.

What has this to do with the British legal profession? Lawyers are self-regulating in this country just as accountants are here and in the United States. British lawyers are determined to stay self-regulating, and will argue vociferously that it is in the public interest that they should remain independent and hence self regulating. However, it would be difficult to underestimate the difference between lawyers’ views of themselves and the general view of the legal profession amongst the public and those elected to Parliament. In a recent Mori poll 78 per cent of the public said that nurses were underpaid, 37 per cent said doctors were underpaid, and yet only 1 per cent said lawyers were underpaid.

REGULATION AND INDEPENDENCE

Lawyers want government to stay out of regulating them and to let them get on with their own affairs – they want to retain the independence of the legal profession. My impression from the Houses of Parliament is that the legal world is still seen as a closed shop, with the lawyers running the show, controlling things for their own good and not working in the public interest. Is it heresy – as a lawyer – to ask what lies at the root of the claim to ‘independence’ and the extent to which oversight of that independence can be justified? That’s the topic I want to examine in this article.

The traditional argument is that lawyers must be independent of the state even where there is a democratically elected government. Lawyers conduct their

profession in an adversarial way and quite often – when they represent the poor, the oppressed or the awkward squad – their adversary is the government, or one of its forms. Should our adversary, the lawyers say, regulate us? Should the opposing party to litigation adjudicate the conditions in which we work, our ethical standards and the complaints against us? Should government dictate the way we can attack government – surely that would be the beginnings of police state?

That argument is fine – as far as it goes – but there are a number of buts. First, there is the legal maxim that no man should be judge in his own cause. It is important to realise that a properly functioning legal profession is important in a civilised society. What lawyers do is important and if the legal profession is not effective, the whole basis of a rights based society run according to the rule of law starts to be undermined.

There is a difference between independence and accountability. The claim to independence is entirely appropriate until it becomes a thinly disguised plea that lawyers should not be accountable to anyone other than themselves. What is the difference between being independence and not being accountable?

LORD CHANCELLOR’S DEPARTMENT

The public interest supervision of lawyers is vested in the Lord Chancellor.

Until 1972 the Lord Chancellor had an ‘office’, not a Department. Unusually it was staffed by lawyers rather than civil servants and was led by a Clerk to the Court in Chancery, who also acts as Permanent Secretary. This person was required to be a barrister until 1990 and a lawyer until 1997. (The present Permanent Secretary, Sir Hayden Phillips, is the first non-lawyer to hold the post; until the passing of the *Supreme Court (Offices) Act 1997* the Permanent Secretary, who is also called the Clerk of the Crown in Chancery, was required to be a lawyer. Sir Hayden was previously the Permanent Secretary at the Department for Culture, Media and Sport).

One of the first holders of the post was Lord Muir MacKenzie, who was in charge from 1880 to 1915. He was reported to have no use for modern inventions—such as the typewriter. He is said to have written all his own letters in longhand, directed them himself and refused to keep copies. As a result no one else knew what he had promised or agreed.

The lawyers did not see the dominance of lawyers in the Lord Chancellor’s office as anything usual. However, as Robert Stevens observed in his well researched book, *‘The Independence of the Judiciary’* no one would expect the Department of Health to be solely staffed by doctors or none but service personnel to work at the Ministry of Defence. However the lawyers got away with it and no one seriously challenged them. It was, as Professor Stevens notes ‘a remarkable example of professional self regulation’.

But those are the old days and things are different today. Just as the Ministry of Agriculture, Fisheries & Food used to be the farmers' voice around the cabinet table, so the LCD was the voice of m'learned friends. Now we have the Food Standards Agency, and the LCD is talking more about consumers of legal services and being less focused on the interests of the suppliers.

The present Government (and even the last one) has been taking a critical look at those areas of legal self-regulation which are not working well for the people who matter — the public. However, the whole issue has been dogged by the rejection by lawyers of any role for government in overseeing their profession — on the grounds that they should remain 'independent'. Language is important here. Where does independence end and accountability begin? Who looks after the public interest and ensures the lawyers act and are accountable to the public interest — if the lawyers undertake all the judgments?

ACCOUNTABILITY

If lawyers are to retain their independence from any outside regulator but remain accountable in a real sense, I would like to suggest that the legal profession must operate a system of accountability in which both the government — the ultimate protector of the public interest — and the clients of lawyers have confidence over three matters:

- (1) That the regulatory bodies for lawyers are setting and effectively enforcing high standards for both professional competence and ethical behaviour;
- (2) That complaints against lawyers are being adjudicated in a fair and transparent way that commands the confidence of the complainants; and
- (3) That lawyers are not using their rights to control the way lawyers work to thwart proper economic competition or to prevent the proper development of the system of justice.

Having been the Minister wrestling with these issues in practice, it seems to me that these — or something like them — are the tests which would have to be passed to show that the independence of self-regulation is not being used to avoid accountability.

Lets us use the tests to examine whether the present system of regulation of lawyers by lawyers passes the test of being accountable in the public interest. If the regulatory bodies pass the tests then there is an unanswerable case that they should continue to hold their jurisdiction over the professions. If they fail the tests then it does not follow that independence should be removed. In that case there is justification for the government to step in to protect the public interest since, in the absence of government action, an unsatisfactory state of affairs will continue.

First, there is the test that the regulatory body for lawyers should be setting and effectively enforcing high standards for both professional competence and ethical behaviour. My experience as a lawyer is that ethical standards amongst UK lawyers are amongst the highest in the world. Ethics was drilled into my legal training at an early stage and the need to behave in an ethical way amongst constant temptations to do otherwise is a feature of legal life in Britain. Ethics are one area, which, whilst not being complacent, we can rightly say we lead the world.

COMPETENCE STANDARDS

Competence standards are an entirely different matter. There are entry standards for the Law Society and the Bar, but the legal world is constantly changing. New Acts of Parliament are passed each year and procedural changes like the Woolf reforms change the way the business of law is conducted. How can the public be confident that someone who qualified as a solicitor 20 years ago and holds himself or herself out as a lawyer working in a particular field is competent today to practise in that field? The simple answer is that the fact that the lawyer has the title 'solicitor' or 'barrister' is no guarantee of competence.

Lawyers are not the only profession struggling with this problem. If I may draw an analogy from medicine, in the old days doctors were qualified and then released to the world to practise. Provided they did not end up before the GMC, they were allowed to continue to practise undisturbed until retirement. It was always said that doctors buried their mistakes and that the GMC struck a doctor off for sleeping with a patient but never for killing one. But this is all changing. GPs face compulsory re-validation — a check on their professional competence every few years. Surgeons are moving to have the type of operations they are entitled to conduct carefully controlled by their own Royal Colleges. The result of the Bristol Children's Surgery Inquiry will mean that far greater monitoring will take place of the outcomes of individual surgeons. Thus, in the medical world we can see that the professional regulatory bodies have moved to monitor the quality of their members.

In the legal world the regulators have not seen it as their duty to take this step. Indeed the only effective quality regulation to day is the quality mark imposed by the Legal Services Commission. This is imposed almost exclusively on solicitors and, whilst it is criticised for being excessively bureaucratic, is the only external guarantee that the lawyer doing your work is competent to do so.

REGULATORS AS 'BRAND MANAGERS'

One of the issues raised by this article is the role of regulators as 'brand managers'. Do the Bar Council and the Law Society have a role to promote barristers and

solicitors respectively as a quality 'brand'? The alternative model is that the regulators exist to monitor entry qualifications and deal with complaints – assuming that any lawyer who falls below an acceptable standard will come to the attention of the complaints body or fail in the market.

But there are problems with such an approach. Firstly, it is reactive rather than proactive. Thus, it is not a system, which guarantees quality and upholds the brand, but one that merely responds to problems. Secondly, it assumes that the incompetent will come to the attention of the disciplinary authorities. Lawyers, especially those that deal with the public, know far more about the law than the public; only they have the skills to judge the validity of legal outcomes and know what it is reasonable to charge. In short, they are often not dealing with informed customers. That means that the assumption that an incompetent lawyer will either fail in the market or come to the attention of the regulator is complacent in practice.

Thirdly, even if this approach does eventually identify the incompetent who adversely affect the brand, there will be a trail of victims before the regulator can address the problem. Thus I would have to say that, at present, the legal regulators pass the first part of the first test – the ethical standards test – but fail the second part. And the irony is – for reasons I will develop later in this article – that the victims here are not only the public but also competent lawyers.

What of the second test—whether complaints against lawyers is being adjudicated in a fair and transparent way that commands the confidence of the complainants. I think it is fair to say that the Law Society does not have a good track record of dealing with complaints against its own members, with a litany of complaints both by the members themselves and the complainants. The Solicitors Complaints Bureau was a disaster and abolished, and the record of its replacement, the Office for the Supervision of Solicitors (OSS), has hardly been any better. I was the Minister in charge of this matter for two years and wrestled with varying degrees of commitment by the Law Society to get a grip of the complaints system. There was always a tension between those progressive elements who said that the Law Society had no choice as a modern regulator but to have an effective complaints system, and those backwoodsman who opposed any more of 'their money' going into the OSS, thought that most complaints against lawyers were unjustified in the first place and that having an effective complaints system 'would only encourage them', meaning more complaints and more cost to the profession. This tension was only resolved by the progressive elements pointing to the government and saying: 'If we don't get our house in order, the government will take it over and it will cost the profession far more'.

COMPLAINTS

At present there are about 20,000 complaints received by the Office for the Supervision of Solicitors each year – that's about official one complaint for every five solicitors as opposed to one for every 22 barristers or one in every 215 Legal Executives. The Law Society rules say that firms should have an internal complaints procedure and that complaints should be sorted out in house wherever possible. Thus the OSS is thus the 'Court of Appeal' for complaints.

It is hardly surprising that the lawyers' trade union finds it so difficult to deal with complaints about lawyers from members of the public. Different parts of the same body are trying to be prosecutor, defender and judge all in the same case. Is there not some irony if, within this internal system, the complaint is about a lawyer's failure to recognise a conflict of interest?

To great criticism by the Law Society and the Bar Council, the *Courts and Legal Services Act* 1990 set up the office of the Legal Services Ombudsman. This was said by lawyer peers to be the end of an independent profession. To give you a flavour of the debates, Lord Hutchinson speaking of this and the proposal to widen rights of audience said:

The present Ombudsman, Ann Abrahams, has described her role as follows:

'The Ombudsman will investigate the way that your complaint was dealt with by the lawyer's own professional body'

Was that role justified or were the predictions of the demise of the profession accurate? Well, there are more than 50 per cent more practising barristers today than when the Act was passed and their income rose from £1.4 billion to £1.6 billion last year alone. This is not a profession in crisis as predicted.

Each year the Ombudsman produces a report on the complaints systems. In 2001 her report on the OSS said as follows:

'The Ombudsman was satisfied with the way in which the OSS handled complaints in only 57 per cent of the 1,507 cases she investigated in 2000/2001. The OSS met the target set by the Lord Chancellor to reduce their outstanding caseload to no more than 6,000 by the end of December 2000. Other targets for turn around times, quality of casework and the level of the referrals LSO were not met. The OSS is on course to meet some but not all of its targets for 2001. The Law Society has implemented a radical package of reform of their governance and management structure. However, there has been disappointingly slow progress in the development of their proposed new complaints redress scheme - which was billed as a cornerstone of the Society's plans to become a "model regulator".'

But it is not the case that a self-regulatory body cannot run complaints. The Ombudsman investigated 159

allegations about the Bar Council's handling of complaints in 2000/2001 and found no cause for criticism or recommendation in 94 per cent of cases. For the most part she concluded the Bar Council continue to be *'thorough and focused in their investigations, coherent and consistent in their decision making and administratively efficient'*. She also commended the Bar Council for starting to make use of their new powers to award compensation for poor service, which came into force in May 2000.

Would these changes have come about with government action in the 1990 Act and further reserve powers in the *Access to Justice Act 1999*? I suspect not.

Whilst the OSS still has a long way to go, this example shows that there can be a mix of independent regulation and government supervision without infringing any constitutional rights. What should happen if the OSS fails to deliver a satisfactory service in the future? How many years can go by with stinging criticism from the Legal Services Ombudsman?

There are two choices. Option one is that the LSO is given powers to fine the profession for failing to operate a proper complaints system – the solution inserted into the *Access to Justice Act 1999*. The second option is that a government appointed body – consisting of both lawyers and non-lawyers – takes over the administration and adjudication of complaints. The first option is, in my view, a short-term solution, which will only lead to conflict with the professions, and arguments that the money that should be used to improve complaints is going in fines. If the government wants a solution to this as opposed to a further period of conflict, the second option is the only viable way forward. The Law Society is – to use an overused cliché – drinking in the last chance saloon on complaints. It is their job to get this disorderly house in order, and if it does not happen very soon I would expect their licence to be revoked.

'PROPER' ACCOUNTABILITY

Next, I would like to look at the third 'accountability' test. It must be right to ask whether lawyers are using their ability to control the way lawyers work to thwart proper economic competition or to prevent the proper development of the system of justice. The key word here is 'proper'. The maintenance of professional standards means that lawyers must work to a code of conduct. There is a different code for solicitors and barristers – which is entirely right given the different jobs they do. These restrictions are there to protect the public and the integrity of the system of justice. They ensure that lawyers do not mislead the court or take advantage of their clients.

But what happens if the rules of the Bar or the Law Society prevent lawyers in working in a way that may benefit clients? What if the rules prevent proper economic competition between lawyers or act to entrench the

commercial interests of either barristers or law firms?

This is an area where the Law Society and the Bar Council act both as regulators of the profession and as trade unions for lawyers, combining their roles in an almost schizophrenic way. The present arrangements mean, in the world of lawyers and their clients, it is the lawyers who have judged what is and is not in the client's interest.

In 1978 a group of eight young barristers published a book called *'The Bar on Trial'*. The coversheet said:

'In this book, for the first time, a group of eight barristers have broken a tradition of silence and spoken out against the shortcomings and injustices of their profession.'

One of the complaints was about pupillage, complaining that in 1976 *'family connections continued to be the single most method of arranging pupillage'*. The economic effect of limiting entry to those with family connections was, I suggest, obvious and detrimental. The Bar has come a long way towards being a meritocracy since then but only in the last few weeks has another suggestion in the book – the payment of all pupils – been made compulsory.

However given that the judiciary today are largely chosen from the practising bar that entered the profession at about that time, it could be said that the legacy of bad practices stays with us for a long time. A young barrister called Jonathan Caplan – now a distinguished silk – wrote an incisive chapter on the criminal Bar. He complained that the Bar did not make its voice heard on law reform issues and said:

'individual barristers have done a lot of good work for justice but, so far as the Bar itself is concerned, it is not too cynical to say that in general it only enters the political arena when its own financial interests are threatened.'

Whilst that is no longer exclusively true, as a Minister I found that energetic and determined lobbying by lawyers on matters of principle almost invariably occurred where the assertion of principles followed their own financial interest. We saw this over the Mode of Trial Bill, where they fought a modest proposal that the defendant in a criminal trial should not go forum shopping as being the removal of the right to trial. Removing jury trials over minor shoplifting offences for criminals with a string of existing convictions would have reduced work for lawyers – and was opposed on principle. The principled stance of the Bar and the Law Society was 'leave the issue to Lord Justice Auld'. When he came back with even more radical proposals they were in turn attacked.

I took the Mode of Trial Bill through the House of Commons with my colleague, Charles Clarke. I can honestly say we won the intellectual argument on this – but the misrepresentation of the proposals in public was legion. We have seen this again recently. In a careful speech Sir John Stevens, speaking on behalf of ACPO, said:

'There have been no less than four Royal Commissions and Criminal Justice Reviews that have sought to change the system in the last 20 years (Philips, Roskill, Runciman and Auld). But each time, the entrenched interests of others have ensured that changes that are recommended and promised by successive governments are never carried through and the game continues and expands.

The very fact that the criminal trial process is seen as a game is in itself debilitating to the notion of honesty, morality and getting at the truth. And the impact is not only on the victims, the witnesses and local communities but also on offenders themselves.'

He continued:

'In his Criminal Courts Review last year, Lord Justice Auld said, "A criminal trial is not a game under which the guilty defendant should be provided with a sporting chance. It is a search for the truth. The right of silence is to protect the innocent from wrongly incriminating themselves, not to enable the guilty, by fouling up the criminal process to make it as procedurally difficult as possible for the prosecution to prove their guilt regardless of the cost and disruption to others involved.'

I believe Auld has got it absolutely right. But then so did Runciman in 1993 when he said, "Justice is made a mockery when a guilty person walks free because technical loop holes have been exploited, prosecution witnesses wrongly discredited, jurors improperly influenced or victims intimidated." Roskill said much the same thing in 1986, and Philips before him in 1981 in the report of the Royal Commission on Criminal Procedure.

'Time and time again, report after report, tells us that the criminal justice system is in dire need of sweeping reform. Just as the police service is, we are at the leading edge, we are not frightened of reform.'

Responding, David Bean, Chairman of the Bar Council said:

'We've heard some extreme claims from the police in recent days. It's time to inject some balance into the debate. None of us want a police state, where the knee-jerk response to a crime is to "round up the usual suspects", as in the film Casablanca. We've seen too many miscarriages of justice for that. But if we did unbalance the scales of justice we would, before long, be on the slippery slope to a police state.'

If that was a response from a trade union, it might be forgivable. One can understand why a trade union's only interest is to protect the interests of its members. But the response from a regulatory body should be different. It is no answer to the serious issues raised by the police to say 'none of us want a police state'. That is not the point in a democracy and David Bean. The complaint from the police was that the reports of Royal Commissions and independent judges were blocked by the sectional interest of lawyers, which coincided with their financial interests. It's no answer to attack the police – what Sir Humphrey

would have called a 'playing the man not the ball'. The response from the Bar Council failed to address the serious issues raised by the police and – I speak as a barrister – was embarrassingly naive.

I am no longer a government minister and do not speak on behalf of the government, but this shows if lawyers want to be taken seriously by government, they might like to stop acting like old fashioned trade unionists. This intemperate outburst was a modern example of the tendency identified so long ago by Jonathan Caplan – only speaking when lawyers' financial interests were threatened.

Even before Enron there was some nervousness amongst the Law Society and Bar that, as the legal regulators of the way lawyers could work, they were coming under fire like never before. They found that fire was coming from some unexpected angles. Several examples come to mind. For example, the Law Society on numerous public interest grounds fiercely resisted the breaking of the solicitors' conveyancing monopoly in the 1980s. The objections to the private members' Bill brought by Great Grimsby MP, Austin Mitchell, to create licensed conveyancers were many and detailed.

What has been the effect of these conveyancing reforms? Well not, as predicted, a flood of householders up and down the country that only own half the house or no right of way down the garden. In fact the number of registered conveyancers is tiny but the price of conveyancing has fallen considerably so that we now have some of the lowest conveyancing costs in Europe – still the slowest, but that is another story.

Equally, the debate over whether it was in the public interest for barristers to maintain their monopoly to rights of audience in the high courts drew responses, which took the form of self-interest dressed up as public interest. Speaking in the House of Lords about the modest reforms proposed in the Courts and Legal Services Bill in 1989, Lord Ackner predicted the demise of the Bar. In fact the practising Bar – as I noted above – has grown by more than 50 per cent.

OFFICE OF FAIR TRADING

But the Government's squeeze on the regulators does not stop at the LCD. The Office of Fair Trading (OFT), the provisional wing of the Treasury, is gearing itself for a major fight with the legal and accountancy professions. Its March 2001 report, *Competition in the Professions*, pulls no punches. The opening paragraph stirred up a hornets' nest when it said:

'Restrictions on supply in the case of professional services just as with other goods and services, will tend to drive up costs and prices, limit access and choice and cause customers to receive poorer value for money than they would under properly competitive conditions.'

The OFT's Director General, John Vickers, observed there were perennial concerns relating to the professions, and said ominously that 'significant restrictions remain which may very well not be justified'. Any doubt that the director general was deeply underwhelmed by the Law Society and the Bar Council was dispelled by paragraph 10, which concluded: *'Indeed, the professions are run by producers largely for the benefit of producers.'* But it did lead to one of the most remarkable radio interviews ever on the Today programme, as Roy Amlot QC, chair of the Bar Council, attacked the OFT - for not taking account of the public interest.

What are these heinous crimes of which the Law Society and the Bar Council stand accused? Well, it is mostly about putting restrictions on the ways their own members deliver services, to the detriment of innovation and competition. There are also specific complaints, like the position of QCs. It is hardly surprising that the QC system comes in for a bashing. With the greatest respect to those who have made it to the front row, it needs the skills of a silk to justify the system whereby the Government picks out private sector lawyers for distinction, giving them a licence to load the fee notes. The OFT said the QC system distorts competition and 'changes in the process are desirable', which is nearly as damning as the measured language of the OFT can get.

The Bar Council set up a committee to respond. The committee of 11 contained one solicitor - Lord Philips of Sudbury whose conservative views on legal reform were already well known - one economist already working for the Bar Council, and nine barristers. The report produced by the Bar Council is thus produced from an entirely supplier viewpoint - about the public interest in how that supply should be conducted. Was the quality of the response reduced because there were no representatives of clients sitting around the table?

The response from the Bar Council essentially recommended 'no change' in the existing system - with some good arguments and some fairly hopeless ones. The quality of arguments is not the point here. The question is whether anyone can accept that the public policy arguments being advanced were principally serving the financial interests of the profession or wider interests policy interests.

But more serious for corporate lawyers were the questions raised about the rules that lawyers could only work for clients when they are in partnerships, could not share risks with third parties and so on. Why, the OFT asked, are employed lawyers only allowed to work for their employers, and not their employers' clients?

Now that is a good question. Why should an assistant

solicitor in a mega law firm with hundreds of partners, which is either incorporated or has limited liability under the rules of the New York Bar (to take a neutral example), be able to act for clients whereas that same solicitor working for a limited company where the directors are not lawyers is prevented from doing so? George Bernard Shaw said that 'all professions are conspiracies against the laity', and the rule that only lawyers can sit at the top table looks very much like a conspiracy to the OFT.

Is the OFT report a slippery slope leading to legal advice being offered to Sainsbury's customers along with banking, vegetables and a takeaway biryani? Well, the banks and the insurance brokers cannot complain that the supermarkets are moving into financial services; they have to compete. The takeaway cannot complain either, and must compete or go out of business. Lawyers see legal services as being entirely different; but is that a defensible argument?

That brings us to one of the great weaknesses of the present regulatory system. There is no general legal restriction on anyone offering legal advice in this country. No one can advertise as a 'solicitor' without a practising certificate, but apart from very limited areas of work such as conveyancing, conducting cases in court, or probate, any Tom Dick or Harry can set up shop in the high street to provide legal advice. You do not need to be insured, professionally regulated or even have any qualifications to offer legal services to the unsuspecting public.

Provided that lawyers do not stray into the limited areas where there are statutory restrictions on practice - and these form a tiny part of most commercial legal practices - it is open to lawyers to send their practising certificates back to the Law Society and carry on working in an entirely unregulated way, provided they do not fall foul of the Financial Services Authority in the way they handle financial issues. In practice, that is what accountancy and consulting firms are increasingly doing, whether the Law Society and the Bar Council likes it or not.

Thus the greatest challenge to the Law Society and to a lesser extent the Bar is that lawyers will pick up their bat and ball and simply stop playing the game, voting with their feet to move away from the profession. In the late 1980s estate agents gave up their independence and sold out to the multiples. Most made a pile of money and, five years on, bought back the businesses for a song. What is to stop lawyers doing the same thing?

One firm, Statham Gill Davies, has already gone down that road, giving up practising certificates for £1m-plus per partner from business services group Tenon. With

paydays like that it does not take a crystal ball to suggest that they will not be the last firm to sell out.

Apart from anything else, having regulations which force law firms to operate as partnerships requires them to operate in, arguably, the worst possible way to run a modern business. Bringing in outside capital to improve efficiency is nigh on impossible because of the lack of any permissible risk sharing. Incentivising the staff with share options is impossible because there are no shares. Anyone who is not a practising solicitor cannot be a full partner, is a second-class employee and, however valuable to the business, cannot be of equal worth.

So where does all this leave the poor old regulators? They only have two choices. They can either try to force the Government to legislate so that anyone who provides legal services is forced to work under a regulated umbrella, or they can set out to compete openly with the unregulated market. Legislation to require all legal advice to be given by advisors under a regulated body is, I suspect, a total non-starter. Defining 'legal' advice is virtually impossible.

The Government set up the Blackwell Committee in 1998 in response to the horror stories put about by lawyers about personal injury claims assessors and unqualified employment advisors. When the committee came to report it found a startling lack of evidence to support the claims of abuse, and even some support among clients for the user-friendly way in which non-lawyers gave advice. Despite the presence of so many lawyers on the panel, in effect, they recommended very little change.

But how do the professions compete? Faced with pressures on all sides the only way forward is improving the 'brand identity' of regulated lawyers. That means driving up quality so a customer of a regulated lawyer can have confidence that the service level will be sky high (as opposed to the charges). It may be the only route to ensuring that lawyers will want to remain as solicitors or barristers because the brand has a commercial value that merely being a 'lawyer' does not. But — and there is always a but — that means facing some tough decisions.

The chain of quality of the brand is only as strong as its weakest link. Retraining is all very well, but in the medical world, GPs are facing compulsory re-validation. Will the trade union role of the Law Society or the Bar prevent them grasping this nettle? Moving those who fail out of practice will undoubtedly improve the quality of the

brand, but it is antithetical to the trade union impulses of the Law Society and the Bar Council, which brings us directly back to the question of whether a single body can be a union and a regulator.

It is a tough call, but there is little point in aggressively publicising the 'brand' solicitor when, at one end of the profession, one in five solicitors receives a formal complaint each year and, at the other end, competent firms are selling up and getting out. May I come back to the third test, and ask whether the response to the lawyers are not using their rights to control the way lawyers work to thwart proper economic competition or to prevent the proper development of the system of justice. This is a matter of opinion, and mine is slightly affected by being the target of their wrath of the lawyers every time anything was proposed which affected their wallets.

However, at present I would have to say that the Law Society is showing real efforts to meet the public interest test and is driving forward change to the benefit of its members. For the first time for many years the Law Society recognises that it cannot — like King Canute — stop the waves of change. In contrast my own regulator, the Bar Council — well the least said the better.

The key question is — where do we go with regulation in the future? There are, in my view, only two options. Either legal regulators take a long, hard and cold look at their operations and, when they take any decision, have a placard in front of them which says 'I represent the public and our clients, not the suppliers', or they will give government increasing justification for taking away or circumscribing their independence. Government will find it impossible not to respond to the pressure to act.

In some areas — complaints with the Bar and OFT with the Law Society — there has been a sea change in attitude. But the key test is whether, when public interest and financial interest come into conflict, the latter will prevail. The evidence to date on that is far from encouraging.

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