

## **EUROPEAN BARS FEDERATION GENERAL CONGRESS**

### **"Should we modernise the Lawyers' Profession and the Bars?"**

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The answer to the question posed for debate must be "yes and no"!

Changes to the way the Profession is structured, the way it operates and the way it is financed are inevitable. However, any change to the core values and duties fundamental to the Lawyers Profession should be resisted at all costs.

For the purposes of the debate I thought I would illustrate how regulatory and structural changes are currently impacting on the Legal Profession in England and Wales. The Government sponsored independent review in 2004 by Sir David Clementi considered what regulatory frame work would best promote competition, innovation and the public and consumer interest in Legal Services. It concluded that the Legal Professions' regulatory systems were flawed as a result of:

- (i) (i) The governance structures of the main front-line bodies being inappropriate for the regulatory task they faced.
- (ii) (ii) The over-complex and inconsistent system of oversight arrangements for existing front-line regulatory bodies.
- (iii) (iii) The absence of clear objectives and principles to underpin the regulatory system and
- (iv) (iv) The system having insufficient regard to the interests of consumers.

The main recommendations of the Report were accepted by the Government and set out in the Legal Services Bill, which received Royal Assent on the 30<sup>th</sup> October 2007. The Legal Services Act provided for a single external oversight regulator in Legal Services called the 'The Legal Services Board' to provide consistent regulation of professional bodies such as the Law Society and the Bar Council; that Board answers to the Government rather than to the regulated profession.

The Act also required professional bodies to make governance arrangements separating their regulatory and representative functions and delegated consumer complaints to a single independent body to be called 'The Office for Legal Complaints' recently rebranded as 'The Legal Ombudsman' or LeO for short.

Finally, the Act lifted restrictions on alternative business structures so as to allow different types of lawyers and non-lawyers to manage and have ownership in Legal Practices thereby enabling them to adapt business structures to meet consumer needs.

In response to the Clementi review and in anticipation of the changes required both the Law Society and the Bar Council ring fenced their regulatory and representative functions. In 2006 the Bar Council separated its regulatory function with the creation of the Bar Standards Board. This Board has entirely separate membership from the Bar Council and has a Lay Chair. The Board has final say in all changes to the code of conduct and other regulatory processes.

The Law Society also separated its regulatory function after Clementi establishing the Solicitors Regulation Authority in January 2007 and rules now permit it to have both a lay majority and a lay chair. The SRA handles all regulatory functions including setting the standards for qualifying as a Solicitor, drafting Rules of Professional Conduct and investigating (non-consumer) concerns about Solicitors' standard of practice.

But that, as they say is now history, albeit recent history, matters have moved on!

As previously indicated The Legal Services Act 2007 enabled new forms of legal practice to develop:

- (i) (i) Legal Disciplinary Practices("LDPs) which are firms involving different kinds of lawyers, and up to 25% non-lawyers, but still providing traditional legal services, and
- (ii) (ii) ABSs which will allow external ownership of legal businesses, multidisciplinary practices(providing legal and other services) and many variants

In March 2009 the SRA implemented a package of amendments to its rules and regulations to support LDPs and firm based regulation.

The SRA have recently published a Consultation paper entitled 'Outcomes-Focused Regulation – transforming the SRA's Regulation of Legal Services'.

From its inception the SRA operated as a rules-based regulator primarily responding reactively to individual rule breaches and those rules were contained in a detailed and prescriptive code of conduct. It has recognised that in the current market place it becomes increasingly difficult for detailed rules to keep pace with change and that will be even more the case with the inception of alternative business structures. Consequently the SRA intends to move to a system of outcomes-focused regulation, which they say will be more effective and proportionate and provide them with the ability to regulate

a greater range of Legal Service providers with a targeted risk based approach. By the 6<sup>th</sup> August 2011 they expect to have achieved the following milestones:

- 1) 1) The introduction of a new outcomes-focused Code of Conduct as part of a new Handbook of all of their regulatory requirements.
- 2) 2) The use of an explicit risk-based and outcomes focused approach to their authorisation, supervision and enforcement activities
- 3) 3) To licence their first ABSs.

The final paragraph to the introduction of the Consultation document reads "our new approach will have far-reaching implications for all the firms and individuals we currently regulate, the ABS's we plan to regulate on the 6<sup>th</sup> October 2011, and for consumers of Legal Services". There is no question of that!

As will be evident it seems likely that alternative business structures will be operating from October 2011. Much has already been written on the subject. How will this new type of business affect the provision of Legal Services in the UK? Do they offer opportunities for innovation or a threat to an already crowded and competitive market place, will they be used as a vehicle to expand or restrict access to justice, will they offer a means for capital injection to fund expansion or a means for outside investors to take profit from cherry picked high volume sectors of work. The Co-Operative Group which already provides financial, funeral and grocery services has already indicated its wish to be one of the first alternative business structures and is planning a new campaign to promote its Legal Services Division to food shoppers in its 3000 supermarkets nationwide. The advertising campaign will see the Co-Op's Legal Services Division promoted for 9 weeks in an initiative that will include the use of in-store radio and animated check out till displays.

To paraphrase Donald Rumsfeld- the risks to, or the benefits for the existing professions are "Known Unknowns!". We know ABSs are coming, but we can only speculate how the market will play out.

The issues facing Solicitors are also challenging Barristers.

The Bar is under pressure from several directions. Legal Aid as a fund is subject to huge constraint. At the same time, clients, or if you wish "purchasers of legal services", are across the board seeking increasingly better value for money and are imposing downward pressure on fees. Further the Bar is facing growing competition from other Lawyers in its traditional areas of practice.

A difficult economic climate is, however not necessarily a bad environment in which to bring about change. Practitioners are perhaps more willing to contemplate radical suggestions, if they can see that these might in the

longer term improve their position. In this regard, the Bar Standards Board, in November 2009 adopted a series of rule changes designed to give the Bar a far greater flexibility in the manner in which it practices. The changes, which followed lengthy consultation, include allowing Barristers to practice in partnerships either with other Barristers, or in Legal Disciplinary Practices with Solicitors and permit Barristers to work in more than one capacity at the same time, so that they can practice in an LDP part-time and also be self-employed in Chambers. The Public Access Scheme has been expanded to enable clients to instruct Barristers directly without a Solicitor intermediary in private crime, family and immigration work and the Bar Standards Board also increased the scope for Barristers to conduct litigation allowing them to carry out work which was traditionally been the preserve of their Solicitor colleagues.

That modernisation will in some instances necessarily involving encroachment on the turf of Solicitors potentially biting the hands that have traditionally fed the Bar. Some think that the idea of partnerships will not prove an attractive option for many Barristers, partly because of the conflicts rule, which will operate to reduce the capacity of the Profession to take on cases, but also because of the independent nature of Barristers and their desire to preserve the traditional Chambers structure. Others believe that Barristers will want to go into practice with Solicitors because it gives them access to clients from the beginning of the process and removes the uncertainty over obtaining instructions. If more Barristers do take the option of practicing in partnership with Solicitors to present a one stop shop to clients that will necessarily change the nature of the relationship between the two sets of professionals and may well accelerate a process of integration. Nonetheless, because the Bar Council believes that most Barristers will not think partnerships are a viable business model, it has focused its efforts on developing a model that preserves the traditional Chambers structure but allows a corporate agency vehicle, known as 'ProcureCo' to be set up as an adjunct to Chambers. The ProcureCo would not be able to supply Legal Services but would procure the services of Lawyers' to meet the needs of clients. A client such as a Local Authority would contract with the ProcureCo, which would act as agent for the Barristers, which set it up. If the client requires other Legal or non-Legal Services the ProcureCo can obtain them by creating separate panels of Solicitors and others. It is intended to allow Barristers to get to the source of more instructions and will mean a reversal of the usual referral direction with Barristers instructing Solicitors. Obviously this may be seen as a competitive threat by Solicitors and they themselves may wish in response to expand their own advocacy services.

How many of these changes will be relevant to other members of the European Legal community remains to be seen but I hope this short presentation will have been informative.

It is often said that if America sneezes the UK catches a cold, perhaps it would also be true to say that the regulatory and structural reforms currently

being experienced by the Legal Professions in the UK are bound to impact on the rest of Europe in the not too distant future.

Lawyers face many challenges but they are a resilient and resourceful profession. They have the ability to exploit new markets and to be stronger in those where they are subject to increased competition, whilst nonetheless retaining the core values, which confer upon them the status of a profession.