Legal Services Institute

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THE LEGAL SERVICES ACT 2007: AN ACT OF REVOLUTION FOR THE LEGAL PROFESSION? [1]

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Introduction

From the 1960s, for forty or so years, I took a close interest in the affairs of the legal profession but it is now quite a number of years since I have published anything on the subject. I was therefore very pleased to be invited to give a lecture on this topic as it gave me the stimulus to try to get to grips with what has been happening as a result of the passing of the Legal Services Act.

Since most of you are lawyers who have no doubt been reading about the Act and its implications for several years, it would obviously be inappropriate to go through it as if this was new legislation requiring explication. Rather I thought it might be of interest to attempt to take some measure of its significance, both in terms of the historical perspective and looking forward.

Before doing so, I should say something about my own stance in regard to the broad topic 'reform of the legal profession'. This was the issue that first drew me to an academic career. When I left Cambridge in 1957, my intention had been to go to the Bar. But after a postgraduate year at Harvard Law School, I spent a year with the great Wall Street law firm of Sullivan & Cromwell. That experience changed everything. First, it led me to decide that the work I wanted to do was corporate law with a firm of City solicitors. Second, I came to the conclusion that the American-style unified legal profession was on balance more efficient and better for clients than the English divided profession. I came back from the United States determined to work for unification of the two branches (or fusion).

[1] This is a slightly expanded version of the King's College London Law Alumni Lecture delivered on 11 May 2011. Contact Professor Zander at mandbzander@btinternet.com.

I did my articles with a City firm. But it quickly became clear to me that writing critically about the profession from within the practising profession was impossible. To give you an idea of the atmosphere at that time, the Law Society's *Gazette* published a short piece reporting on a talk I had given on fusion to the Articled Clerks Society. The Editor of the *Gazette* told me that he had been summoned by Sir Thomas Lund, the then Secretary General of the Law Society, and told never again to carry an article on that subject. The topic was not even to be mentioned.

In 1963, I joined the Law Department of the London School of Economics. Five years later, in 1968, I published my first book, *Lawyers and the Public Interest.* The book grew out of a memorandum of evidence that I had submitted to the Monopolies Commission, which in 1967 had been asked to report on restrictive practices in the professions. It consisted of a strong critique of almost every one of the immense network of monopolies and restrictive practices that at that time affected the legal profession.

Insofar as it noticed, the profession was angered but completely unmoved. Sir Thomas Lund, for instance, was quoted in the journal *The Law Guardian* as saying: "I think you will find that every restrictive practice in our profession is in the public interest and not in our own selfish interests". The Bar's evidence to the Monopolies Commission argued equally that all the restrictions affecting the Bar were in the public interest.

So both sides of the profession accepted that the test had to be whether the rules were in the public interest. And both sides of the profession felt that the best judges of the public interest were the lawyers.

A great deal has changed since then. That includes my own position on one or two of the key issues. In particular, many years ago I came to the conclusion that, provided the restrictive practices were abolished, there was much to commend the divided legal profession – above all because it makes the services of barristers readily available to solicitors and their clients whether as advocates or second tier advisers.

The journey to the Legal Services Act

This is not the occasion to trace the sequence of the many changes that took place in the forty years between the late 1960s and the passing of the Legal Services Act. But let me mention one or two of the more significant events.

In 1979, there was the report of the Royal Commission on Legal Services, chaired by Lord Benson, a leading accountant. From the profession's point of view there were three central issues: the division of the legal profession; the Bar's monopoly of the right of audience in the higher courts; and the solicitors' statutory monopoly over conveyancing work.

On each of the three topics, the Royal Commission found in favour of the status quo. On the divided profession, the Commission was unanimous – all 15 members thought it to be in the public interest. On conveyancing, which at that time accounted for over half of solicitors' income, the Commission divided two to one: 10 for the monopoly, five against. On rights of audience, the Commission was split right down the middle, eight in favour of the Bar's monopoly, seven against. In each case the reason was the same – the public benefitted from specialisation promoted by the restrictive practices[2]. The legal profession breathed, if not easy, at least easier.

But a few years later, in the mid-1980s, a new crisis blew up. The Thatcher Government, having at first accepted the recommendations of the Benson Royal Commission, changed its mind. The Administration of Justice Act 1985 permitted competition for solicitors from licensed conveyancers. Solicitors felt seriously threatened – so much so that in anticipation of the competition they drastically reduced conveyancing charges before the competition had materialised. This proved to be a costly own goal. Licensed conveyancers have not been significant competition.

Then, in January 1989, there was the extraordinary and mysterious eruption of the famous Green Papers, issued by Lord Mackay, the Scottish Lord Chancellor – without warning or consultation – proposing a whole raft of radical reforms: rights of audience no longer to be determined by whether one was a barrister or solicitor but by certification which could include non-lawyers; barristers and solicitors to be allowed to form partnerships with members of other professions and with each other; barristers to be allowed to be employed by other barristers; barristers to be allowed to take instructions from lay clients direct; banks, building societies and other financial institutions to be allowed to offer conveyancing services to their clients; abolition of the solicitors' monopoly over probate work; solicitors to be eligible to be appointed Queen's Counsel and High Court judges; barristers to be allowed to practise without a clerk; contingency fees to be considered. New roles for the Government would include laying down the basic principles for the profession's codes of practice, deciding which professional bodies should have the right to license advocates with the right to appear in the courts, and which specialisms should be officially recognised.

The 1989 Green Papers resulted in uproar[3]. I doubt whether any event in the history of the English legal profession provoked so fierce and so broadly negative a reaction. The Government allowed twelve weeks for responses to the consultation papers. It received over 2,000 submissions. To say that the Bar was critical is to state the obvious. But it was joined, amongst many others, notably by the judges. Lord Hailsham (Lord Mackay's predecessor as Lord Chancellor), writing in *The Times,* said the proposals were seriously flawed: "one does not know whether the Government is sitting on its head or on its bottom. Its trouble is, it is thinking with its bottom and sitting on its head." Lord Templeman said the Lord Chancellor had forgotten the advice tendered by the Chinese mandarin: "Do not remove the fly from the forehead of your friend with a hatchet". Lord Lane, the Lord Chief Justice, said the Green Paper was "one of the most sinister documents ever to emanate from Government", threatening the independence of the legal profession and of the judiciary.

The Green Papers were debated in the House of Lords on April 7, 1989 from 9:56 in the morning to 10:21 in the evening – an unprecedented length for a Lords debate on a Friday. Fifty-one peers spoke. Virtually every one of them was roundly critical. It was clear that the Government would have to make significant changes in its proposals. The White Paper, published in July 1989, and the Courts and Legal Services Act 1990 implementing its

[2] Royal Commission on Legal Services (1979), Cmnd. 7648 (London, HM Stationery Office).
[3] For my account of the battle over the Green Papers, see 'The Thatcher Government's onslaught on the lawyers: who won?', *The International Lawyer,* 1990, Vol. 24, pp. 753-85.

conclusions, represented a major climb down. It was one of the rare occasions when Lady Thatcher was forced to retreat. Many of the proposals in the Green Papers were simply abandoned. Those that were implemented were watered down. The only serious threat that emerged was the provision in the Courts and Legal Services Act 1990 permitting non-lawyers to become 'authorised practitioners' in competition with solicitors for conveyancing work. This time round the threat came not from licensed conveyancers but from financial institutions such as banks and building societies. This much more serious threat developed to the point of draft regulations being circulated by the Lord Chancellor's Department. But then, suddenly and unexpectedly, the Lord Chancellor announced that he had had decided to postpone implementation because of a lack of demand from potential providers. The financial institutions for which the policy was designed, having spent millions in buying up estate agencies, were voting with their feet and indicating that they were not interested in expanding into conveyancing work.

The overall result of the notorious Green Papers in the 1990s was business more or less as usual, except that first solicitors, and later employed barristers and solicitors (notably in the Crown Prosecution Service), won the right to qualify to appear as advocates in the higher courts[4].

It took another decade for the next significant event – the Office of Fair Trading (OFT)'s March 2001 report *Competition in Professions.* The terms of reference for the report were to identify restrictions which had the effect of "preventing, restricting or distorting competition in professions to a significant extent". It was expressly stated that the question whether the restrictions also produced consumer benefits was to be left "for further consideration". In other words, the test was narrowly economic. The question whether restrictions were on balance in the public interest was to be ignored.

The OFT's report dealt with conveyancing and probate services, multi-disciplinary practices and employed solicitors, legal professional privilege and the Queen's Counsel system. In each case, the OFT called for major reforms on the ground that existing rules restricted or distorted competition: the professions to lose their partial exemption from competition law; banks, insurance companies and building societies to be allowed to compete for conveyancing work; solicitors and barristers employed by non-lawyers to be allowed to offer legal services to the public; abolition of the rank of Queen's Counsel; abolition of restrictions on lay clients having direct access to barristers, on barristers forming partnerships and on barristers and solicitors forming multi-disciplinary partnerships. In effect, this was Lord Mackay's Green Papers – "déjà vu all over again".

For a report that had such important consequences, it was actually a rather curious affair. The OFT's document consisted of two parts: the 137-page report of its consultants, Law and Economics Consulting Group Ltd (LECG), and its own nine-page conclusions based on that report. LECG's report was prepared under severe time constraints and was based on very skimpy field research. (For instance, it did not include a single visit to a set of chambers.) They also drew up their extensive reform agenda despite admitting in paragraph 20 that their inquiries "did not uncover significant concerns among users of professional services, whether about quality, price or innovation". (The report said there were two possible

[4] See Zander (1997) 'Rights of audience in the higher courts in England and Wales since the 1990 Act: what happened?' *International Journal of the Legal Profession*, Vol. 4, November, pp. 167-95.

explanations: "One is that the professions are providing a high standard of services at a reasonable price. The other is that they may not be, but that clients have difficulty in judging whether they have received good service and what would constitute a reasonable price".)

Despite these obvious and rather striking shortcomings, the OFT adopted LECG's report. Its report stated (in paragraph 6): "Markets generally work best for consumers when there is unrestricted competition between existing suppliers, and unrestricted potential competition from new suppliers and from new forms of supply." It called on the Government to consider legislative action. It urged the professions to take prompt action to remove those restrictions that did not have a proper justification and warned that, failing readiness to take such action within twelve months, it would "use its available powers with a view to removal of those restrictions" (paragraph 49).

Both the Bar and the Law Society responded defensively to the OFT's report. The Bar even found it useful to quote something I had written. It ended the general introductory section of its response by quoting my comment on the OFT's report in which I had said that it was an over-simplification to believe, as the OFT appeared to do, that[5]:

> equating the work done by professional people to business will necessarily improve the position of the consumer when the reality is that sometimes it may rather worsen it. Certainly one wants competition to ensure that professional fees are no higher than they need to be and that professional rules do not unnecessarily inhibit efficiency, but what one looks for from the professions even more is standards, integrity and concern for the client of a higher order than that offered in the business world.

In April 2002, the OFT issued a 21-page progress statement. The accompanying press release was headed: "Competition in professions – improvement but more action needed". Events then moved forward quite swiftly. In July 2002, the Lord Chancellor's Department issued a consultation paper, *In the Public Interest?*, regarding the topics in the OFT's report which fell to the Department. It said (at page 5) that: "On all the issues raised in this consultation, the Government's position is that the market should be opened up to competition unless there are strong reasons why that should not be the case, such as evidence that real consumer detriment might result from such a change." The Blair Government said that it had decided to review the whole regulatory framework for legal services. It took another year before this culminated in the announcement on 24 July 2003 by Lord Falconer, Lord Chancellor, that there was to be a wide-ranging review of the regulation of legal services to be led by Sir David Clementi, chairman of Prudential plc. And the rest is history.

The Clementi report[6] was published in December 2004. Almost a year later, in October 2005, the Government responded in a 158-page White Paper[7]. It accepted the Clementi Report except that with regard to Legal Disciplinary Partnerships (LDPs) it would go further than Clementi by also allowing Alternative Business Structures (ABSs) with a majority of non-lawyers (and even non-lawyer owners) to provide legal services.

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[5] Zander (2001), 'Should the legal profession be shaking in its boots?', *New Law Journal*, 23 February, Vol. 151, p. 369.
[6] Clementi, D. (2004) *Review of the Regulatory Framework for Legal Services in England and Wales* (London).
[7] Department for Constitutional Affairs (2005) *The Future of Legal Services: Putting Consumers First*, Cm 6679 (London, The Stationery Office).

In May 2006, the Government published its Draft Bill which was sent for consideration to a Joint Committee of both Houses. In November 2006, the Government published the Legal Services Bill and at the end of October 2007 the Bill received Royal Assent.

The Legal Services Act 2007

The Act with its schedules is almost 400 pages long. The major new systems the Act puts in place relate to regulation of the existing front-line regulators, to the handling of complaints and to new forms of business structures. The Act also has important provisions on what are called reserved activities.

The passing of the Act has also had many other effects – including in particular the separation in each of the regulated bodies between the regulatory and the representational functions. So the Bar Standards Board[8] and the Solicitors' Regulatory Authority[9] are completely separate respectively from the Bar Council and the Law Society and each has a large lay component.

In regard to regulation, the Act established the Legal Services Board (or LSB) as regulator of all the professional bodies providing legal services: the Solicitors Regulation Authority, the Bar Standards Board, the Professional Standards Board of the Institute of Legal Executives, the Council for Licensed Conveyancers, the Chartered Institute of Patent Attorneys, the Institute of Trade Mark Attorneys, the Costs Lawyers Standards Board and the Master of the Faculties (Notaries). The LSB has been fully operational since 1 January 2010.

In regard to the handling of complaints, the Act established the Office for Legal Complaints (OLC) to deal with complaints in respect of legal services other than complaints that raise disciplinary matters. In February 2009, the LSB announced the appointment of the first members of the OLC. A month later, in March 2009, the OLC announced that it had appointed the first Legal Ombudsman, an independent consumer-focused ombudsman scheme. The new system began operation in October 2010. It has therefore been operational only for seven months. The size of the operation – and therefore the scale of the problem of complaints about lawyers' services – can be seen from the fact that the front-line regulators and the Legal Ombudsman between them employ close to a thousand people. It remains to be seen whether the new system lives up to its billing as more efficient than the systems run by the professions which it replaced. Adam Sampson, the Legal Ombudsman, says that it is a lay organisation "taking a defiantly non-legal approach to the investigation of complaints"[10]. The emphasis of the new arrangements would be on speed and informality with the ambition of settling complaints by agreement. It sounds promising – but the proof of the pudding will be in the eating.

In regard to new business structures, the Act contemplates two forms: Legal Disciplinary Practices (LDPs) and Alternative Business Structures (ABSs). LDPs are firms providing legal services which can have up to 25% non-lawyer partners or managers, provided they are individuals. They have been permitted since March 2009. As at 1 April 2011, there were

[8] The Bar Standards Board was established as from 1 January 2006.
[9] Originally called the Solicitors Regulation Board, and also established as from 1 January 2006, it was renamed the Solicitors Regulatory Authority in January 2007.
[10] Law Society's *Gazette*, 8 July 2010, p. 10.

377 LDPs (the great majority are small firms). The 377 firms had a total of 438 non-solicitor managers – a little over one per firm. Of these, 196 were lawyers other than solicitors and 242 of whom were non-lawyers. There is virtually no information about the non-lawyers. Of the 196 non-solicitor lawyer managers, 136 (70%) were legal executives; 38 (19%) were barristers, 17 (8%) were licensed conveyancers[11].

ABSs are firms providing either legal, or legal and non-legal, services which can be wholly owned by non-lawyers, including companies or other entities. It is at present anticipated that they will be allowed to operate as from 6 October 2011. From that date (or whatever the date turns out to be), any LDP that has non-lawyer partners can become an ABS – and will have to do so before the end of October 2012.

Reserved activities are activities reserved for persons with specified qualifications. There are six: the right of audience, the conduct of litigation, reserved instrument, probate, and notarial activities, and the administration of oaths. The Act provides that the Lord Chancellor may *extend* the list of reserved activities simply by statutory instrument but only on the recommendation of the LSB. The Board can also recommend to the Lord Chancellor that an activity should *cease* to be a reserved activity, but acting on such a recommendation requires primary legislation.

Evolution or revolution?

Since this lecture is in a series entitled 'World Questions, King's Answers', the title is in the form of a question. Does the Legal Services Act amount to evolution or revolution?

The establishment of the Legal Services Board is *revolutionary*. Hitherto, each part of the profession has had its own regulator consisting wholly of its own members[12]. We now have an overarching regulator. The Board consists of the chairman, eight ordinary members and the Chief Executive. The Act requires that the chairman and a majority of the members of the LSB must be lay. It does not specify the nature of that majority. Including the Chief Executive, the present composition is seven lay, three lawyers. So at the moment lawyers are distinctly in the minority.

The Chairman, David Edmonds, after a career as a senior civil servant, became Chief Executive of the Housing Corporation. He has also been, variously, a managing director in the NatWest Group, Director General of Telecommunications for the UK, a member of Ofcom, Chair of the Board of NHS Direct, and one of the Commissioners of the Legal Services Commission. He has just been re-appointed for a second three-year term. The other eight members are variously: from the Mirror Group plc; a former chief constable; a former senior civil servant who then spent seven years as an NHS regulator; the senior partner of a firm of solicitors and former President of the Law Society; an independent consumer consultant in various fields including food, financial services and health who has also been chair of the Financial Services Consumer Panel and of the Insurance Ombudsman Bureau; the director of a small management consultancy company specialising in the public

[11] The remainder were three law costs draftsmen, one notary public and one patent attorney (figures supplied by The Law Society on 5 May 2011).

[12] Although some Bar Council committees have lay members, the Council itself, even today, has none. The Law Society's 100 or so strong Council has included a small number of lay people since 2001.

and voluntary sectors and Panel Chair at the Judicial Appointments Commission; the General Counsel to the Board at the Financial Services Authority; and a practising barrister, Called in 1991, who was one of the founding members of Matrix Chambers.

The Chief Executive of the Board, Chris Kenny, is a former civil servant with regulatory experience with Oftel and as Director of Life and Pensions for the Association of British Insurers. All the Board members (except the Chief Executive) are part-time.

I know nothing about any of the members beyond what appears on the Board's website, but it sounds like a set of appointments that reflects the thinking behind the Act. The idea that such a group of people should be entrusted with regulation of the legal profession would have been unthinkable even a few years ago. This is the stuff of revolution.

The new complaints system, by contrast, is more *evolutionary* than *revolutionary*. External supervision of the complaints systems run by the Bar and the solicitors' branch has existed for decades. The Office of Lay Observer was created as long ago as 1974. In 1990, the Lay Observer morphed into the Legal Services Ombudsman. Solicitors had for many years become accustomed to the Ombudsman's critical annual report castigating the inefficiencies and inadequacies of the Law Society's complaints-handling system. Both branches of the legal profession had introduced their own lay people: the Law Society's Office for the Supervision of Solicitors, which oversaw complaints handling, included 50% lay members. In 2002, the Law Society appointed an Independent Commissioner, Sir Stephen Lander, to audit complaints handling. The complaints-handling process had long been completely separated from the Law Society's representative arm. The Bar's complaints-handling system was never the object of criticism on the scale of that directed at the Law Society but it too had been modernised with the appointment of a lay Complaints Commissioner to oversee the initial investigation of complaints and to determine whether complaints had validity. The fact that complaints in respect of any form of legal services now go to a single body completely separate from all the professions providing those services is of course completely new. But it could be said to be a logical and organic development from the reforms that had been introduced by the professions themselves.

New business structures, the third part of the Clementi-Legal Services Act reforms, is part evolutionary, part revolutionary. It is *evolutionary* insofar as it makes possible partnerships between barristers, between barristers and solicitors, and between lawyers and non-lawyers. These may have important effects but they are familiar concepts that have been under discussion and serious consideration for many years. The move toward new business structures is *revolutionary* in allowing external investment and 100% external ownership and management of legal practices.

The provisions in the Act regarding reserved activities could be said to be *revolutionary* in that any extension to new activities requires the recommendation of the Legal Services Board and *evolutionary* in that action in response to such a recommendation by the Lord Chancellor can take the form of statutory instrument.

But I want to move on from Evolution or Revolution to consider other questions.

Other questions

The Board's duty is to promote what the Act calls the "regulatory objectives" (section 1):

- 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 the provision of legal services
- encouraging an independent, strong, diverse and effective legal profession
- increasing public understanding of the citizen's legal rights and duties
- promoting and maintaining adherence to the professional principles.

The Act prescribes that the Approved Regulators have those same objectives (s.28).

The Board's website[13] lists the topics around which its work is organised:

- putting consumers and the public interest at the heart of regulation
- widening access to the legal market (Alternative Business Structures)
- improving service by resolving complaints effectively
- improving access to justice: rationalising the scope of regulation
- developing excellence in legal services regulation
- securing independent regulation
- developing a workforce for a changing market
- developing research and public legal education.

Click on any one of these topics and up come the details of what the Board has been doing. On ABSs for instance, the website carries the Board's discussion document about how ABSs should be regulated, a consultation paper with the Board's thinking on the rules required for such regulation, guidance to Licensing Authorities on outcome-focused regulation, final rules for designation of Licensing Authorities and a consultation paper on appeal arrangements. The website carries the minutes of the regular meetings of the ABS Implementation Group set up by the Board in July 2009 consisting of Approved Regulators and the Ministry of Justice. The website also has the slides and speeches given at meetings of the ABS Forum set up by the Board to interact with practitioners and other stakeholders. So far such consultative meetings have been held in Manchester, Northumbria, Bristol and Wales. In addition the website has useful Fact Sheets.

The Board proclaims that it wants its work to be evidence based and it has developed a strong commitment to research both conducted or commissioned by itself and research conducted by others. This is an important development. In the past too much decision-making has been made on the basis of opinion. Policy made on the basis of proper empirical research has a better prospect of being soundly based.

The Board is required by the Act to establish a panel of lay persons called the Consumer Panel to represent the interests of consumers. The members of the Consumer Panel are appointed by the Board with the approval of the Lord Chancellor. Baroness Hayter, first Chair of the Panel, and the other seven members have a wide range of relevant experience.

[13] See www.legalservicesboard.org.uk.

The Panel's role is to advise the Board and to scrutinise the effectiveness of its work. A detailed Memorandum of Understanding outlines the way in which the Board and the Panel are to work together. Topics on which it has worked or is working include: whether will writing should be regulated; whether referral arrangements are in the public interest; an evaluation of existing quality assurance systems; an assessment of price competition websites and development of good practice standards; improvements in the way that the new complaints system operates; and close involvement in the development of the regulatory scheme for ABSs. The Consumer Panel's website[14] carries not only details of its various projects but also the documents it generates in relation to each project. There is a wealth of information about an impressive range of activities.

The LSB, advised by the Consumer Panel, must determine what in regard to each topic is in the public interest. The Joint Parliamentary Committee which considered the Draft Legal Services Bill recommended that the LSB should establish and be under a duty to consult a Practitioner Panel parallel to the Consumer Panel[15]. Regrettably, this proposal was not adopted. Determining the public interest is a matter of judgment in weighing competing arguments. Preconceptions can play a part in decision making. As has been noted, the Board's ten members include only three lawyers. There are none on the Consumer Panel. The legal profession is of course able to make its views felt in every consultation, but an advisory Practitioner Panel would have been a valuable adjunct to decision making.

An issue currently under consideration is whether will writing should be added to the list of reserved activities or whether other forms of regulation to protect the public should be put in place. It boils down to a judgment as to which is the more important – protecting the public from the consequences of inept will writing or promoting a free market. In working through this issue, I imagine that the Board will have found assistance in the two recent very valuable papers on reserved activities by Professor Stephen Mayson, Director of the College of Law's Legal Services Institute. The first of these, on the historical origins of reserved activities showed that there was no coherent policy or rationale underpinning them[16]. The second develops and applies a contemporary rationale[17]. Reservation was appropriate, Professor Mayson suggested, where as a result of legal advice or representation, detriment to the consumer's (a) liberty, (b) physical, mental emotional or social well-being or (c) property, could arise, and for which compensation after the event would not represent an adequate or reasonable remedy. Since problems with a will are only likely to come to light after the death of the testator, and after-the-event remedies are not sufficient, Professor Mayson argues that there is a strong consumer protection case to be made for the reservation of will-writing.

The LSB's Consumer Panel is conducting detailed consumer research and a comparison exercise of wills drawn up by different providers. The LSB itself has said in general terms: "Regulation needs to be proportionate and targeted, focused on outcomes and reflecting real risks in the market. It needs to tackle risk of consumer detriment but, in doing so, stop short of creating an excessive burden that might stifle innovation or restrain competition."

[14] See www.legalservicesconsumerpanel.org.uk.
[15] See the report of the Joint Committee on the Draft Legal Services Bill at para. 185, available at: http://www.publications.parliament.uk/pa/jt200506/jtselect/jtlegal/232/232i.pdf.
[16] LSI (2010) *Reserved Legal Activities: History and Rationale*, available at http://www.legalservicesinstitute.org.uk.
[17] LSI (2011) *The Regulation of Legal Services: What is the Case for Reservation?*, available at: www.legalservicesinstitute.org.uk.

It is publishing a discussion paper this summer on its general approach to regulation. Will writing is an important test case. The arguments are quite finely balanced. It will be interesting to see which way the Board goes on this issue.

Despite its overarching responsibilities, the Board is of course the second-, not the first-, tier regulator. Section 49(3) of the Act states that in preparing a statement of policy in regard to the exercise of its functions, "the Board must have regard to the principle that its principal role is the *oversight* of approved regulators" (emphasis added). This was an important concession won by the profession that was introduced into the Bill at the last moment before Royal Assent.

The front-line regulators want the Board to adopt a light touch in regulation, and the case for light-touch regulation is obviously strengthened by the fact that the Bar Standards Board and the Solicitors Regulatory Authority are separate and independent respectively from the Bar Council and the Law Society Council and have a substantial lay component. But even if the Board basically agrees, it would not be surprising if its concept of light touch turns out to be different from that of the profession. This is bound to be a topic of continuing tension.

The future

Finally, let me look into the crystal ball. What do I think is going to happen?

There are several aspects to this question. One is what will lawyers do to expand the service they provide or to change the way they are organised? Another is what will non-lawyers do to take work away from lawyers – or for that matter generate new work for them?

Barristers and solicitors can now join in partnership, but my prediction is that not many will do so. Certainly, as we have seen, so far at least, very few barristers have become partners in LDPs.

My guess is that the number of LDPs with only lawyer-managers will continue to grow quite slowly. One imagines that, in the case of legal executives and licensed conveyancers, this mainly represents promotion of existing employees rather than bringing in new lawyer fee-earners at partner level. In the case of barristers, it may be a mixture of the two. There has always been a trickle of barristers transferring to the solicitors' branch. That number may slightly increase now that they can become partners as managers in an LDP. But I see no likelihood of significantly greater numbers of barristers leaving the Bar to become partner-managers in LDPs.

In other words, the LDP concept looks as if it will be a useful but not very exciting development.

Nor do I foresee many barristers forming barrister-only partnerships. I have no problem with them being allowed to do so, but one imagines that most will not regard it a good idea. The main reason is the conflict of interest rule. It is common for members of chambers to be on opposing sides in both civil and criminal work. That could not occur if they are partners. By becoming partners, therefore, they would decrease their own earning capacity and, by the same token, restrict the client's choice of barrister.

The Bar has responded quickly and boldly to current pressures – releasing barristers from most of the restrictive rules that traditionally regulated how they could practise. Barristers who have taken the required mini-training course can now take instructions directly from the client. Some 2,700 barristers have taken that course. (There is no way of knowing how many of them have actually done such work.) A very recent development is ProcureCo – a model that preserves the traditional chambers structure but allows corporate vehicles to be added as an adjunct. The company, which could be owned by the chambers' members, can bid for and enter into contracts with local authorities, insurance companies and other large purchasers of legal services including, say, the Legal Services Commission, in order to outsource advice, litigation and advocacy work[18]. A ProcureCo cannot itself supply legal services. It procures services to be provided by others. It contracts with self-employed barristers to provide advice and advocacy and, where necessary, with firms of solicitors to provide solicitors' litigation services. From the Bar's point of view, it has the great advantage of putting the barrister in the financial driving seat. I foresee Bar Direct/Public Access and ProcureCo being more attractive vehicles for barristers to develop and expand their practices than joining solicitors' firms or forming their own partnerships.

The latest development on this front was the announcement a few days ago that the Bar Standards Board had decided that it would regulate advocacy focussed ABSs, LDPs and barrister-only entities; that barristers would be permitted to apply to conduct litigation in competition with solicitors; and that barristers would be permitted to practise as managers or employees of ABSs regulated by other Regulators[19]. These changes are remarkable.

Does this mean that we are beginning to see the end of the divided profession? I do not think that is likely either in the short, or in the long, run. The nature and style of the relationship between the two sides of the profession has changed enormously over the past few decades – very much for the better. There is now considerable and growing overlap in the work done by the two branches but they remain separate. Solicitor-advocates may one day be permitted to join the Inns of Court. But they will remain solicitors. There are some 4,000 solicitor-advocates with rights of audience in the higher courts but I think that a very large proportion of them exercise that right only rarely. The Bar has far more reason to fear competition from the CPS than from solicitor-advocates in private practice. The 162 members of Birmingham's second-largest set of chambers recently joined the Birmingham Law Society en bloc – but they remain barristers. There are moves afoot that may result in a measure of common education for barristers and solicitors. But even if that happens, they will still then go off in different directions and different forms of practice. As I mentioned before, contrary to the view I held at the time, I believe that the Benson Royal Commission was right in its unanimous view that the divided profession is in the public interest. That view seems also to be held by most lawyers.

What then of ABSs? Will law firms float themselves on the stock market or take in significant equity investors or be swallowed whole by large firms of accountants? Will lawyers join in partnership with firms of accountants or of other professions to provide one-stop multi-disciplinary partnerships? Will formidable new competitors enter the legal services market?

[18] For problems with the ProcureCo model (at least in regard to criminal work) see Avtar Bhatia, 'Ready to pitch', Law Society's *Gazette,* 27 January 2011, p. 12.
[19] BSB Press Release, 28 April 2011.

The answer at this point is that we do not know. The LSB of course has been actively and strongly promoting the ABS model. Its draft Business Plan for 2012-13 states – in both hope and expectation (paragraph 64):

> The introduction of ABS is potentially one of the most transformative developments in the history of legal services provision. It will bring new investment, fresh ideas and new ways of working to the market.... New forms of collaboration and new entrants into the market will increase consumer choice, whilst greater competition will raise standards. Existing law firms will be able to attract new capital – providing a driver for sustainability and growth in difficult economic times.

But what will *actually* happen? As already noted, an LDP with non-lawyer managers will have to become an ABS. The vast majority of LDPs currently have only one non-lawyer manager. One would expect both the number and the proportion of non-lawyer managers to expand somewhat. But, despite the LSB's enthusiasm for the concept, I would be surprised if it expanded hugely. And in the case of the large City firms I would be surprised if it caught on at all or at least to any significant extent. The problem for any firm that has an international practice is that most other jurisdictions do not, at least as yet, permit legal services to be delivered by firms with non-lawyer partners. Unless that changes, the big firms will not want to queer their own pitch on the international scene.

I have no doubt that some firms, both small and not so small, will set up multi-disciplinary partnerships. One hopes that the one-stop-shop concept, which has been discussed a great deal over the years, may prosper. If that proves to be the case, others will doubtless follow.

It is even possible that some firms will float themselves on the stock market. It was reported last month that Irwin Mitchell was considering doing so[20]. This happened in New South Wales as long ago as 2007, when first the firm of Slater & Gordon and then a holding company of law firms called Integrated Legal Holdings Limited became listed companies. However, interestingly, no other Australian firm has followed their example. I believe that most firms here will reckon that they would prefer to forego the attraction of additional capital resources in order to retain power over their operation within the partnership rather than have it dissipated among shareholders.

There has been much talk of law firms being attractive to private equity investors. I am a bit sceptical about this. Equity investors tend to want a fairly quick and certainly, a profitable return. Are they really going to put their money into law firms? Could they get their money out? Jon Moulton, founder and managing partner of private equity firm Better Capital, was quoted last June saying: "Law firms fundamentally lack security of earnings. If half a Magic Circle firm's corporate lawyers jumped ship, profits would nosedive. Anyway, what is the value of a law firm's financeability? Why share your firm's profits with others. How long would your best lawyers stay with a firm that was paying 40% of its profits to venture capitalists?" He also warned that providers of legal services risked losing their professionalism as private equity exerted pressure on them to deliver enhanced profits. Only bulk providers of such legal services as conveyancing or personal injury work, he thought, might benefit from external capital to buy IT and employ lots of junior grades:

[20] See *The Times*, April 20 2011, p. 47, and *The Lawyer*, 25 April 2011, p. 1.

"There will be next to no demand from City firms. This is not the legal profession's big bang – it's just a big whimper"[21].

What then of major non-lawyer organisations trying to capture part of the legal services market currently held by lawyers? This would be more of what we already know. The Co-op, a nationwide supermarket and bank, is an example. Co-op Legal Services was established in 2006 with the aim of employing 150 people within five years. In fact, five years on, it has 380 people working for it, including 55 solicitors and some 70 legal executives, licensed conveyancers and paralegals. It offers services for will writing, probate, personal injury claims, employment matters and conveyancing. The website claims, for instance, that it handles over 10,000 personal injury claims a year. Like the trade unions, the Co-op guarantees that if a claim is unsuccessful it will pay any fees or costs incurred by the client. The Co-op's legal services' sales last year grew 19% to an impressive £24m. The Co-op has an exemption from the Law Society to carry out reserved activity work for its members. It intends to apply for a licence to become an ABS. If it succeeds it will be able to offer the full range of its services to the general public.

The same will apply to other non-lawyer commercial organisations – the AA, Tesco, et al. How will this affect the general body of clients? Mainly through lower costs. The profession believes that this means 'pile them high and sell them cheap' and that that, by definition, means lower quality work. I would not myself make that assumption. It could turn out that quality is, at the least, good enough. I share the view expressed by Professor Stephen Mayson that new non-lawyer providers will be anxious not to spoil their brand name reputation through poor quality work. They may have good quality control systems in place. Moreover, as the immense volume of complaints about the services provided by solicitors shows, not everything on the quality scene is as it should be.

How will it affect the profession? Practitioners will be glad to know that in the view of the Legal Services Board[22]: "The demise of the high-street firm is not ... an inevitable outcome of opening the market". That sounds more ominous than I think the Board would have intended. If the high street firm *were* doomed that would be an extremely serious matter not just for the practitioners but for the public. It would be the triumph of one regulatory objective (promoting competition) at the expense of two other regulatory objectives – protecting the interests of consumers, and encouraging a strong legal profession.

Without any solid basis for the belief, my own view – for what it is worth – is that, broadly, the profession will survive and possibly even flourish. I do not subscribe to Professor Richard Susskind's apocalyptic view summed up in the title of his book, *The End of Lawyers?* On the other hand, I do not think it wise to assume that things will go on in the same old way. Over the next decade or two there will be important developments and changes in the provision of legal services, partly fuelled by the Legal Services Act. Certainly lawyers will need to worry even more about achieving maximum efficiency.

The Act was decidedly not written for the benefit of lawyers. But lawyers have a way of coping. Many, perhaps even most, clients will continue to follow the tried and traditional ways of obtaining legal services. For one thing, going for advice to a firm of solicitors gives the client forms of protection not available to clients of non-lawyer advisers. Adam

[21] Law Society's *Gazette,* 17 June 2010, p. 1.
[22] LSB, *Wider Access, Better Value, Stronger Protection,* 14 May 2009, para. 4.11.

Sampson, the Legal Ombudsman, said in April[23] that in the first six months of its operation, his team had received 40,000 complaints but that in many cases they had been unable to deal with the complaint because the complainants were clients of persons not within the jurisdiction of the scheme. Only clients of 'authorised persons' – solicitors, barristers, legal executives, notaries, licensed conveyancers and patent attorneys – are within the scope of the Ombudsman's jurisdiction. Non-reserved legal activities carried out by unregulated persons can be undertaken without any regulatory oversight. So clients who procure activities which are not reserved or regulated, from providers who are not regulated as qualified or licensed practitioners, are left without any protection. That is obviously a useful selling point for the profession.

New kinds of providers doing business in new ways may bring in clients who would not have gone to lawyers. The remarkable story of claims management companies has shown the scope for increasing the aggregate body of clients. The unmet need for legal services is huge. But if new providers generate new clients some of the benefit will accrue to the legal profession.

And, yes, lawyers will be – indeed are already being – stimulated to find new ways of meeting the competition. You will have seen the recent story that the consortium of solicitors' firms known as QualitySolicitors has signed a deal with WH Smith enabling it to place a QS member of staff in 150 of its branches and that the plan is to increase this to 500 branches. There will be a 'legal access point' staffed by a local QS firm. The QS employee will use iPad apps to book appointments for customers, provide conveyancing quotes, sell will packages and fixed fee advice sessions. The deal will be promoted by television advertising. There are already some 175 firms around the country advising clients from behind the QualitySolicitors shop-front and the number is growing rapidly[24].

One trembles to think what Sir Thomas Lund would have made of all these developments – but that is the Brave New World ushered in by the Legal Services Act[25]. Looking forward, my sense is that there is a good chance that the Act will come to be regarded as an important and largely positive step in the provision of legal services in this country.

[23] Guardian Online, 6 April 2011.
[24] Law Society's *Gazette*, 7 February 2011, p.1; *New Law Journal*, 11 March 2011, p. 339.
[25] See also three articles by Jon Robins, (2010) *New Law Journal,* Vol. 160, p.1662, and (2011) *New Law Journal*, Vol. 161, p.7 and p.267.

Legal Services Institute

The Legal Services Institute (originally the Legal Services Policy Institute) was established by the College of Law in November 2006 as part of its charitable activities. Its principal objectives are to:

(a) seek a more efficient and competitive marketplace for legal services, which properly balances the interests of clients, providers, and the public;

(b) contribute to the process of policy formation, and to influence the important policy issues, in the legal services sector and, in doing so, to serve the market and public interest rather than any particular party or sectional interest;

(c) alert government, regulators, professional bodies, practitioners and other providers, and the wider public, to the implications of these issues; and

(d) encourage and enable better-informed planning in legal services by law firms and other providers, government, regulators and representative bodies.

The Institute seeks to form and convey independent views that it believes reflect, support and promote the public interest rather than the preferences or views of other interested parties. Where the College might have views as a provider of education, these are expressed separately.

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