

A crisis of professional self-regulation – the example of the solicitors' profession

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Introduction

In recent years self-regulation by the solicitors' profession may be described as being in crisis. Failures can be seen at all levels, from the appropriate resolution of low-level complaints, to protecting the public from dishonest and other seriously miscreant solicitors. The Law Society has shifted its focus of attention in a variety of ways, but few of its efforts to date have made a significant difference. This article summarises some of the key issues which frame the crisis and attempts to resolve it.²

The history of self-regulation

Self-regulation is one of the typically cited traits of professionalism, and the Law Society has always asserted this as a right of solicitors. A disciplinary committee can be traced back to the Solicitors Act 1888³, with the Solicitors Act 1974 largely governing the current position. Complaints handling has progressed through the stages of direct Law Society control, with a change in 1986 to the semi-independent Solicitors Complaints Bureau (SCB). 1996 saw a renaming and partial restructuring, with the creation of the Office for the Supervision of Solicitors (OSS). This change was the Law Society's attempt to address sustained criticism from consumer interest groups, such as the National Consumer Council. The Council had found dissatisfaction rates by complainants to be as high as 60 per cent and delays of two, three and even four years in the complaints handling process.⁴

Concerns were not assuaged by the changes implemented by the Law Society and criticism has continued into the current century. For instance, in 2004 the Consumer's Association found a significant dissatisfaction rate from the clients of solicitors, 40 per cent of whom had such little faith in the complaints and regulatory systems that they didn't bother to make an official complaint.⁵ During 2003-2004, the Society again reorganised complaints-handling, replacing the OSS with the Consumer Complaints Service (CCS). The CCS has delegated to it the significant disciplinary powers possessed by the Law Society.

The most serious disciplinary issues are dealt with by the Solicitors Disciplinary Tribunal (SDT). The SDT deals with applications in respect of solicitors relating to allegations of unbecoming conduct or breaches of the rules of professional conduct.⁶ The main powers of the Tribunal are to strike a solicitor off the Roll, suspend the solicitor from practice or impose a fine.

External elements of the regulatory process

An important external addition to the regulatory process occurred in the early 1990s, with the statutory introduction of the Legal Services Ombudsman (LSO).⁷ The LSO oversees complaints handling by the Law Society, and it is intended that she should bring independent oversight to the self-regulatory process.

In 2002 the Law Society introduced the role of Independent Commissioner to monitor and audit complaints handling. As a non-lawyer, the Commissioner was to be independent of the Law Society, able to represent the views of the public and to give objective advice to the Law Society. However, it was far from clear how the Commissioner would add to existing oversight roles, notably the Legal Services Ombudsman. The Law Society may have recognised this, as only three years after the creation of the role the Society announced that it was to be abandoned.

Should a legal professional body be deemed to be failing in its complaints handling, the Secretary of State is empowered to appoint a Legal Services Complaints Commissioner (LSCC).⁸ In February 2004 this option was initiated with respect to the Law Society. The LSCC is empowered, inter alia, to investigate complaints handling by the Society; to set targets for improvements; and impose fines if the Law Society fails to comply. In May 2005 the LSCC was reported to have found that complaints against solicitors were still subject to unacceptable delays. An audit of a random sample of complaints from mid-2004 had found average delays of almost six months in 70 per cent of cases.⁹

Problems with self-regulation by solicitors

In June 1998 the Fabian Society called for regulation to be taken away from the Law Society, to be given to a lay dominated independent body.¹⁰ In March 1999 criticism by the Lord Chancellor culminated in the threat to seek to powers to intervene in complaints handling by the profession.¹¹ This did not improve matters, and in December 2002 it was once again reported that the Lord Chancellor had serious concerns and was reviewing the future of complaints handling by the profession.¹²

In recent years the Legal Services Ombudsman has been critical of the Law Society for failing to meet public expectations for discipline and complaints handling.¹³ In addition, the quality of decision-making was also of concern, with close to 50 per cent of the complaints handled by the Law Society being dealt with unsatisfactorily. For example, significant delays have been of particular concern, in some instances for two years or more. Of particular concern are cases of this type which involve solicitors who already have a history of discipline problems.¹⁴

At a more fundamental level, the Law Society has also been slow to adapt its regulatory approach to an increasingly commercial approach to practice within the profession. Commercialisation may frequently occur at the expense of

traditional notions of ethics. But, by keeping any ethical debate largely free of the issue, the Law Society have allowed solicitors to slip further into the mentality of the market without having to consider the ethical or conduct implications of this.¹⁵

Dishonesty

Dishonesty will usually represent the most serious professional offence a solicitor can commit, yet the SDT has not always acquitted itself well when called upon to deal with such cases. Whilst low in number, there are examples of cases where a finding of dishonesty has not resulted in removal from practice. Notwithstanding the mitigation in such cases, it has to be questioned whether it is every appropriate for a dishonest solicitor remain in practice.¹⁶

Similar concerns also arise from cases where the SDT have struck off a dishonest solicitor, but later have been persuaded to readmit him or her. In a few cases this decision has given the solicitor the opportunity to re-offend, sometimes with a severity equal to or greater than the magnitude of the offence which originally led to his or her striking off.¹⁷

Law Society initiatives

During the 1990s the Law Society identified as the solution to its problems the devolving down to firm level many aspects of complaints handling. The Society would be left to concentrate on the more serious cases and to enhance prevention and education. However, a lack of engagement and commitment by some within the profession prevented this strategy from working, and by the early 2000s the Law Society reverted to a system of compliance visits to all firms. The attempt to ensure that complaints had been considered by the firm's internal complaints procedure before the OSS would consider them had failed to work effectively and had been criticised by the LSO and consumer interest groups. The strategy tended to ignore the likely power imbalance between solicitor and dissatisfied client, and also failed to enforce the requirement that all firms actually had a satisfactory internal complaints procedure.

The Law Society has also been criticised for attempting to both regulate and represent solicitors. Even though regulatory powers should not be used to inhibit competition, members will want their representative body to seek the best conditions possible, if necessary at the expense of competition.¹⁸

In recent years the Law Society has given consideration to this issue, no doubt anticipating the possibility that if it didn't the matter would be taken out of its hands. A Law Society Review Group¹⁹ proposed that the Society's regulatory and representative functions should be separated. A new Regulatory Board, half of whose members would be non-lawyers, would take over responsibility for the Society's regulatory functions. In September 2004, the Law Society Council announced its plan to separate the functions of the Law Society in line with the principles recommended by the review group.²⁰

The Legal Services Ombudsman has identified frequent changes in approach by the Law Society as confusing for those outside of the profession. She has also been critical of the Law Society for making important changes without prior communication with her office, or with other interest groups.²¹

Modern challenges to self-regulation

Competitive pressures and the need to meet client demands may lead solicitors to adopt 'ethical tunnel vision'.²² This may particularly be the case with large firms, who, it has been said, are particularly vulnerable to subservience to clients at the improper expense of other parties and the wider social and legal system.²³

The current self-regulation system is still built around the values of an older version of professionalism, involving service to individual, non-influential, clients rather than large, powerful institutional clients.

However, self-regulation remains an important means by which the solicitors' profession can resist external interference. This derives from the 'bargain theory of professions', according to which the profession receives, inter alia, autonomy from lay control, protection from competition, trust and high status in exchange for individual and collective self-control.²⁴ If the profession fails to keep its side of the bargain, the government may be quick to challenge self-regulation.²⁵ From the profession's viewpoint, self-regulation is relatively cheap compared with externally imposed regulation. Voluntary regulation therefore presents a sound business decision.²⁶

The Future

Regulation

In July 2003 a Department for Constitutional Affairs report²⁷ concluded that the regulatory framework governing lawyers was excessively complex, lacked transparency and accountability. Following this, Sir David Clementi was appointed to undertake a review of the regulation of legal services. His terms of reference included consideration of the type of regulatory framework which would best promote competition and innovation, as well as the public interest. Clementi issued a consultation paper in March 2004, and published his report on 15 December 2004.

The Consultation Paper proposed three alternative models for regulation and complaints handling. Model A would remove all regulatory functions from the professional bodies and place these in the hands of a new unified regulator, the Legal Services Authority (LSA). Advantages of this model would include: complete independence of regulator from the regulated; clearer and simpler lines of responsibility because numerous regulators are replaced by a single one, and increased consistency. Possible disadvantages included the risk of increased bureaucracy and a reduction the sense of professional responsibility which should come with self-regulation.

The second model, Model B, would involve a super regulator, the Legal Services Board (LSB), overseeing individual professional bodies, which would retain regulatory functions. This model has the advantage of keeping regulation close to the heart of the profession.

The third model, Model B+, was a variant on the second model. Frontline regulation would remain in the hands of the professions, but in return the professional bodies would be required to separate their regulatory functions from their representative functions.²⁸

The Legal Services Ombudsman favoured Model A, considering that profession led regulation has lost all public legitimacy²⁹, thus ruling out either of the other models. In contrast, in his final report³⁰, Sir David Clementi concluded that Model B+ offered the best way forwards. This would build upon and strengthen existing regulatory systems, whilst also providing the oversight safety net in the form of the LSB.³¹ Model B+ is also more likely than the others to find favour with government, as it avoids transferring any significant regulatory burden to the state.

Disciplinary procedures

Surprisingly, in light of problems with the disciplinary system identified in academic research, the Clementi report found no major problems with the disciplinary processes relating to solicitors. Clementi recommended that in future the SDT would be required to report on an annual basis to the LSB, but otherwise there would be no notable changes.³² These conclusions appear to have been reached without any significant research by Clementi. If this is the case, further consideration of the disciplinary process would be appropriate before it is given a clean bill of health.

Consumer complaints

Whilst ultimately Clementi was content to leave significant responsibility for regulation in the hands of the professional bodies, the same was not true for complaints handling. Complaints handling, rather than regulation and discipline, had long been the focus of concern by bodies critical of the Law Society. The Legal Action Group, for instance, considered that consumer confidence in the ability of lawyers to deal adequately with complaints had been 'irreversibly undermined'.³³ The Legal Services Ombudsman was similarly critical, concluding that an independent an independent complaints handling office would be the minimum acceptable outcome from the reform process.

Clementi therefore concluded that a single independent complaints handling body was the most appropriate way forward. Provisionally titled 'The Office for Legal Complaints' (OLC), the body would incorporate all of the current professional complaints handling bodies and the main oversight bodies. In an attempt to ensure a consumer focus, the OLC would have a lay dominated managing board.³⁴

The OLC would address individual complaints, but it would also have additional strategic roles. These might include, in cooperation with the LSB, target setting for the handling of 'in-house' complaints by practitioners and overseeing indemnity insurance and compensation fund schemes.³⁵

Future business structures

An additional key feature of the Clementi review was consideration of potential future business structures within which lawyers would be permitted to work. Clementi considered two alternatives, Legal Disciplinary Practices (LDPs) and Multi-Disciplinary Practices (MDPs). LDPs allow different types of lawyers, for example solicitors and barristers, to work together. Non-lawyers would be permitted to own LDPs, subject to appropriate fitness criteria. Regulation would have to shift its focus from individual practitioners to the business unit as a whole. Regulatory focus would be upon the senior management within the practice. There would be a 'Head of Legal Practice' (HOLP), who would have overall responsibility for compliance with the regulatory rules.

MDPs would enable lawyers to practice with other professionals, for instance accountants and surveyors. Each professional group within the MDP would practice together on equal terms.³⁶ From the regulatory perspective, a potential problem with MDPs is that of regulatory reach. For instance, the LSB would have no jurisdiction over non-lawyer professionals within MDPs. Clementi's solution would see the development of collaborative arrangements between regulators, including agreement as to which was to be the lead regulator for the business as a whole.³⁷

A theoretical alternative to the current regulatory approach

Both the Law Society attempts to improve the regulatory process and the recent Clementi recommendations have focussed upon relatively traditional models of regulation. In contrast, academic commentators have considered more radical alternatives. A key example of this is reflexive law. This focuses upon procedural norms, rather than formal rules.³⁸ Such norms concentrate upon the design and implementation of regulatory mechanisms, the aim is to achieve intended outcomes by aggregating individual self-regulatory decisions.³⁹ Reflexive law aims to mobilise the self referential capacities of institutions, to enable them to best shape their own response to complex regulatory problems.⁴⁰ Legal control is therefore indirect, avoiding the need to directly regulate complex social areas. Instead, the system focuses upon controlling the regulatory structures and process.

The emphasis is therefore on getting the structures and processes right. Some processes may be narrowly procedural, for example, the requirement that firms have compliance officers. Others may be in the form of legal rules, for example, senior members of firms being liable for the misconduct of junior members. The common theme is that regulation and compliance is delegated down to the level of the individual firm. This should ensure that management

structures adapt so as to maintain issues of conduct and competence at the forefront of the firm's priority list.

Parallels can be drawn between reflexivity and the arguments employed in the nineteenth century to persuade the state to entrust regulation to professional bodies. Key amongst these was the argument that only the profession itself had the expertise to effectively regulate its members. As the profession has grown in numbers and the degree of specialisation increased enormously, similar arguments can now be applied within the profession. The Law Society is now in a similar position to the nineteenth century state, subject to the problems of information complexity and deficiencies in analytical capacity when called upon to regulate highly specialist practices. Reflexivity would see the Society concentrating on the development of effective overarching regulatory structures, whilst regulation in practice would take place at a more local level.

Conclusions

The solicitors' profession is, perhaps for the first time in its long history, facing the serious risk of losing key aspects of its self-regulatory functions. If the recommendations of the Clementi review are adopted, key disciplinary and complaints functions will be taken over by lay dominated external bodies. This would particularly striking for consumer complaints, as all of the powers currently held by the Law Society would be taken over by the OLC. Further significant change is likely if solicitors are allowed to practice in LDPs or MDPs. Whilst Clementi makes recommendations intended to minimise the risk of regulator shopping by practices (firms attempting to fall under the auspices of the most benign regulator), complete success in this regard cannot be guaranteed. The Law Society could, therefore, find its role even further diminished if it loses regulatory reach over some solicitors, to the benefit of other legal regulatory bodies. The Law Society is currently pushing ahead with its latest plans to reinforce its regulatory and complaints handling systems. It remains to be seen whether it will be given the opportunity to put these to the test, or conversely, whether it has finally used up its chances to demonstrate that it can effectively regulate the profession.

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² The issues discussed in this article have been developed further in Davies, M., 'Regulatory crisis in the solicitors' profession', *Legal Ethics*, Vol. 6, No. 2, 185-216 and Davies, M., 'Solicitors – the last twenty years of self-regulation?', *Professional Negligence*, Vol. 21, No. 1, 2005, 3-26

³ Cranston, R. (ed.), *Legal Ethics and Professional Responsibility*, (1995), Clarendon, Oxford, at 2-3.

⁴ National Consumer Council, *Solicitors Complaints Bureau - A Consumer View*, 1994.

⁵ Baron, A., 'A law unto themselves', *Which*, July 2004, 10-13, 13

⁶ The Law Society, *The Guide to Professional Conduct of Solicitors*, para 31.01. Online edition available at <http://www.guide-on-line.lawsociety.org.uk/>

⁷ Created by section 21 of the Courts and Legal Services Act 1990

⁸ Access to Justice Act, sections 51 and 52

- ⁹ Rose, N., 'Complaints delays slated', *Law Society Gazette*, 102/20, 19 May 2005, 3. The Law Society Chief Executive disputed the relevance of these findings, asserting that some of the audited cases were up to 18 months old and that more recently 50 per cent of cases were resolved within three months.
- ¹⁰ Arora, A., and Francis, A., *The rule of lawyers*, Discussion Paper 42, The Fabian Society, 1998, London, pp14-15. It was suggested the current Legal Services Ombudsman, who cannot be legally qualified (see Courts and Legal Services Act, section 21(5), but who has legal support, could provide the foundations for the new regulatory system.
- ¹¹ See *Law Society Gazette*, 14 April 1999, pp14-15.
- ¹² Rovnick, N., 'Lord Irvine threatens Law Society's disciplinary role', *The Lawyer*, 2 December 2002, 3.
- ¹³ See, for example, Annual Report of the Legal Services Ombudsman 2001/2002, HC940, 4 and 7.
- ¹⁴ See, for example, Davies, M., 'The regulation of solicitors and the role of the Solicitors Disciplinary Tribunal', *Professional Negligence*, Vol. 14, No. 3, 1998, pp143-173, 149-151
- ¹⁵ See further, Cranston, R., (ed) *Legal Ethics and Professional Responsibility*, 1995, Clarendon, Oxford, 33
- ¹⁶ For more detail and further examples see Davies, M., 'The regulation of solicitors and the role of the Solicitors Disciplinary Tribunal', *Professional Negligence*, Vol. 14, No. 3, 1998, pp143-173 and Davies, M., 'Solicitors, dishonesty and the Solicitors Disciplinary Tribunal', *International Journal of the Legal Profession*, Vol. 6, No. 2, 1999, pp141-174
- ¹⁷ See Davies, M., 'The regulation of solicitors and the role of the Solicitors Disciplinary Tribunal', *Professional Negligence*, Vol. 14, No. 3, 1998, pp143-173
- ¹⁸ For discussion of this, see Sir David Clementi, *Review of the Regulatory Framework for Legal Services in England and Wales – Final Report*, December 2004, 29.
- ¹⁹ Governance Review Group: Interim Report to the Law Society's Main Board and Council, May 2004, cited in Sir David Clementi, *Review of the Regulatory Framework for Legal Services in England and Wales – Final Report*, December 2004, 38
- ²⁰ Hoult, P., 'Society moves closer to power shake-up', *Law Society Gazette*, 30 September 2004 (online edition)
- ²¹ *In whose interest - Annual Report of the Legal Services Ombudsman for England and Wales 2003/2004*, HC 729, 50-51
- ²² Nelson, R., 'Ideology, Practice and Professional Autonomy: Social Values and Client Relationships in the Large Law Firm', *Stanford Law Review*, 37: 503.
- ²³ Galanter, M., & Palay, T., 'Large Law Firms and Professional Responsibility' in Cranston (ed.) *Legal ethics and professional responsibility*, 1995, Clarendon, Oxford, 196. The experience of the accountancy profession following the Enron scandal in the US illustrates the dangers of situations in which independent professional judgment is overwhelmed by influential clients.
- ²⁴ Rueschemeyer, D., *Lawyers and their Society: A Comparative Study of the Legal Profession in Germany and the United States*, 1973, Harvard University Press, Cambridge, Mass. 13
- ²⁵ Events in the USA following the Enron and Worldcom scandals illustrate that governments can act speedily when self-regulation is perceived to have failed. The US government passed the Sarbanes - Oxley Act was passed, described as probably the most radical redesign of federal securities law for 70 years.
- ²⁶ See, for example, Maxwell, J.W., Lyon, T.P., Hackett, S.C., 'Self-Regulation and Social Welfare: the Political Economy of Corporate Environmentalism', *Journal of Law & Economics*, vol. XLIII (October 2000), 613-614
- ²⁷ *Competition and regulation in the legal services market*, July 2003
- ²⁸ Sir David Clementi, *Review of the Regulatory Framework for Legal Services in England and Wales – Final Report*, December 2004, 25
- ²⁹ *In whose interest - Annual Report of the Legal Services Ombudsman for England and Wales 2003/2004*, HC 729, 10
- ³⁰ Sir David Clementi, *Review of the Regulatory Framework for Legal Services in England and Wales – Final Report*, December 2004
- ³¹ Sir David Clementi, *Review of the Regulatory Framework for Legal Services in England and Wales – Final Report*, December 2004, 49.
- ³² Sir David Clementi, *Review of the Regulatory Framework for Legal Services in England and Wales – Final Report*, December 2004, 79.
- ³³ Sir David Clementi, *Review of the Regulatory Framework for Legal Services in England and Wales – Final Report*, December 2004, 59-60.

³⁴ Sir David Clementi, *Review of the Regulatory Framework for Legal Services in England and Wales – Final Report*, December 2004, 73.

³⁵ Sir David Clementi, *Review of the Regulatory Framework for Legal Services in England and Wales – Final Report*, December 2004, 68-69.

³⁶ Sir David Clementi, *Review of the Regulatory Framework for Legal Services in England and Wales – Final Report*, December 2004, 105 and 139.

³⁷ Sir David Clementi, *Review of the Regulatory Framework for Legal Services in England and Wales – Final Report*, December 2004, 134-135.

³⁸ See, for example, Teubner, G., 'Substantive and Reflexive Elements in Modern Law'. 17 *Law & Society Review*, 239 (1983), p254-5.

³⁹ For further discussion, in the context of environmental law, see Fiorini, D., 'Rethinking Environmental Regulation', 23 *Harvard Environmental Law Review* (1999), p447.

⁴⁰ See Orts, E., 'Reflexive Environmental Law', 89 *Northwestern University Law Review* (1995), p1227.