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‘Tesco law: the shape of things to come?’

Will Clementi be good for consumers but bad for lawyers?’

The decline of the ‘closed shop’ has not reached solicitors’ offices and barristers’ chambers. The ability to provide legal services still requires not only membership of the appropriate professional body, but also adherence to rules extending beyond codes of conduct and disciplinary procedures to encompass restrictions on one’s choice of employer and business partners. This is not necessarily wrong; it may be indispensable in guaranteeing an expert, independent and well-regulated legal profession. Yet such restrictions run counter to the spirit of the modern market, in which looser regulation and increased competition generally benefit both consumers and professionals. Regulation must therefore be clearly justified; arguments that the current system functions adequately, that things have always been done this way, or that the interests of lawyers invariably and magically coincide with those of the public, are not good enough. On this basis I shall argue that both lawyers and their clients should welcome the reforms likely to be contained in the Clementi recommendations.

Turning first to the current conflation of regulation and representation, most notably through the Law Society and Bar Council, the arguments may be stated briefly. On the one hand, it is counter-intuitive that a single professional body should have responsibility both for disciplining its members and for defending their interests in the wider world. On the other, heavy-handed government regulation could threaten the

independence of the legal profession: a crucial aspect of the typically British checks and balances restraining executive excess. The *status quo* provides independence at the cost of potential conflicts of interest. Equally, the prospect of an FSA-style 'Legal Services Authority' raises the spectre of government interference. The best solution, therefore, is surely the compromise already mooted by Clementi in his snappily-titled 'Model B+'. The professional bodies would maintain their dual role, but with a clear internal separation of representation and regulation, overseen by a light-touch 'Legal Services Board'. The situation can be seen as analogous to the current Lord Chancellor's mission of self-abolition. Lord Falconer, presumably, does not actually view himself as a source of corruption and coercion. Yet it makes no sense for one figure to combine such prominent executive, legislative and judicial roles. Similarly, even if existing self-regulation is adequate, it is still sensible to introduce a separation of functions. In defending the public interest, self-regulation will then not only be just, but also be perceived as just. Indeed, such reform could even encourage the professional bodies to pursue their representative functions with extra vigour, liberated from nagging doubts of constitutional irregularity.

The second area of reform concerns the permissible variety of legal business structures. Observers from countries without a solicitor/barrister distinction may be surprised that legal professionals could find the possibility of entering into partnership with other legal professionals strange and unsettling. Yet this is the essence of Legal Disciplinary Practices ('LDPs'). Consumers may well want to access a range of legal services through a cost-effective 'one stop shop'. Models of legal service provision should surely be dictated by business efficiency (subject, of course, to regulatory oversight) rather than rigid divisions based more on historical accident than logical

design. Where it makes sense, for example, for barristers to be self-employed specialists handling referred work, the market will accommodate this. Where, by contrast, the only effect of such separation is to increase complexity and transaction costs, other structures should be positively encouraged. Such partnerships could also radically and positively alter career prospects for practitioners – by blurring the distinction between different types of lawyer, individuals would be defined by what they achieve for their clients, rather than by the label attached to their ‘branch’ of the legal profession.

The same considerations suggest that non-lawyers should be allowed to own practices providing legal services to the public. If Tesco can employ lawyers to advise its managers, why should the same lawyers not counsel shoppers? The notion of initiating litigation between the ready-meals freezer and cereal aisle is faintly surreal, but why should one not pick up a will from the legal department? Similarly, if venture capitalists can fund my establishment of a website selling legal textbooks, why (providing, perhaps, that they are reputable and solvent) should they be barred from investing in my business plan for a new law firm? There will be regulatory challenges, but finding solutions should not be beyond the ken of Britain’s lawyers and legislators.

More difficult questions, admittedly, arise in relation to Multi-Disciplinary Practices (‘MDPs’). In any case, there may be limited appetite for further experimentation in this field given the burned fingers of law firms whose ties to accountants were inelegantly severed in the wake of Enron and Sarbanes-Oxley. The regulatory problems of single organisations providing both legal and non-legal advice to clients

are formidable: it may indeed be difficult to find a Chinese wall without a grapevine growing over it. It may thus be wise to shelve such plans for the moment and allow restless lawyers to concentrate their energies on fostering ‘best friends’ relationships with non-legal professionals. Sir David and Lord Falconer can propose a broad reform agenda without entering this dangerous area – particularly as both Prudential shareholders and Labour supporters presumably wish them to emerge from the process with some *joie de vivre* intact.

In conclusion, it is clear that Clementi can be good for both consumers *and* lawyers. Enhanced access, competition and flexibility can benefit clients while simultaneously providing new opportunities for lawyers who, confident in their ability to provide value and professionalism, are not afraid of innovation and experimentation. Such new ways of working may not make it positively thrilling to be a lawyer but, as they say at the check-outs, every little helps.