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Tesco Law: The Shape of Things to Come?
Will Clementi be good for consumers but bad for lawyers?

It is not quite the generational saga of global war, devastating plague and society-unravelling posited by H.G. Wells, but the Clementi vision of law provision in this country is no more palatable to much of the legal profession. The consultation paper published in March of this year promises major changes from this appointee of the Lord Chancellor, brandishing his credentials as deputy governor of the Bank of England and Chairman of Prudential and taking his lead from the July 2003 report by the Department for Constitutional Affairs, which is nothing if not scathing of the status quo. Indications are that, follow Sir David at the end of the year into the Promised Land of ‘‘big bang’ deregulation’¹ and the ‘plummy-voiced white Oxford-educated barrister’² will confront a profession radically transformed; a dystopia where legal services are demystified, brought to the public by deep-pocketed investors and just one more commodity to drop in the shopping basket.

To Lord Falconer’s rhetorical question, ‘Is it in the interest of the consumer and public that lawyers regulate themselves?’ the answer is expected to be an unequivocal ‘No’; given the shortfalls noted in a ‘maze-like’ system of overlapping regulators, through gaps in which ‘claims farmers’ nonetheless escape, and a Law Society and Bar Council that combine regulatory and representative functions. Following a review by the Office of Fair Trading of restrictive practices in the legal profession, it is reform of this regulatory system, ‘outdated, inflexible, over-complex and insufficiently accountable or transparent’³ that is actually the crux of Clementi’s mission - although one would not guess it from the response his interim report evoked. Whilst questions have been raised regarding the wisdom of a government sponsored ‘super-regulator’ for a profession which puts such a premium on its independence, articulated fears centre instead on the next stage of reform, namely that of a more open legal market.

It is necessarily speculation, but the regime of ‘Tesco Law’ would seem to entail no-frills legal services from banks, building societies and even supermarkets, with employed lawyers acting for third parties in contravention of Practice Rule 4. Clementi reforms also bear on the ownership of legal practices, suggesting ‘alternative business structures’ such as the legal disciplinary practice (‘LDP’) and multidisciplinary practice (‘MDP’) and a split between the owners and managers of a practice, allowing for the provision of complete business services practices, outside investment and flotation of law firms on the stock exchange.

¹ ‘Falconer aims for ‘Tesco Law’’, *Financial Times*, 25 July 2003

² *Carla Bennett v London Borough of Southwark Council* [2002] EWCA Civ 233

³ Department for Constitutional Affairs Report, *Competition and Regulation in the Legal Services Market*, July 2003

Reacting to the perceived need to cater for public demand, the Law Society has been relatively quiescent, warning merely of ‘cherry picking’ among new entrants of the more profitable legal services, which may drive established local firms out of practice. It has also stipulated a requirement for suitable proposed safeguards on such issues as the ethics of allowing a non-lawyer to manage a legal practice; difficulties of regulating MDPs; or inappropriate cross-selling of services within new-look legal practices. There is no quibble with the principle underlying Clementi’s proposals and espoused by the Office for Fair Trading, that ‘at no point do we prescribe, even tentatively, how professional services should be supplied. We believe that this is generally best determined by unfettered competition between producers for the customer of consumers’⁴.

Provide a landscape in which restrictions on the supply of professional services are removed and you drive down costs and prices, widen access and choice and give consumers better value for money. In a land governed by ‘survival of the fittest’, so the theory goes, the consumer will automatically be happy, courted by large multi-service providers with modern and efficient business practices, sophisticated marketing techniques and a strong ethos of customer service in addition to those private partnerships and barristers’ chambers which survive the onset of the brave new world; after all, Tesco may do Will Kits with triple club card points but is unlikely to be able to cope with Antitrust or Mergers and Acquisitions.

As a consequence, the vows of the unconverted to fight ‘one-stop shops’ ‘tooth and claw’ as leading to the ‘Enronisation’ of the legal profession appear to be the rearguard action of an entrenched interest, fighting for survival against the patent interests of the consumer.⁵ But when prophets warn of the hefty price ultimately to be paid by both lawyers and consumers for these developments, the concern that predominates is not that of preventing the law from becoming more accessible but improper interference in the provision of legal services. Setting aside the spectre of ‘Maxwell Legal,’ it is the privileging of commercial objectives, which will occur even under respectable business owners, that is seen to entail a necessary compromise in the quality and integrity of the legal profession. How can lawyers give advice in conflict with the loyalty expected from them to their employers? Combine this with the generation of demand and creation of compensation culture using techniques such as large scale advertising, branding and franchising and it is the consumer who will ultimately suffer; take, for example, the higher insurance premiums that will result

⁴ Office of Fair Trading Report, *Competition in Professions*, March 2001

⁵ Matthias Kelly, then Chairman of the Bar

following an inflation in personal injury claims that would not and should not otherwise have been brought.

At the heart of why lawyers are threatened by ‘Tesco Law’, however, is an issue that the government has failed to properly address; and that is what distinguishes the professions from other service industries. Peel away rules regulating the profession and despite the democratisation of legal services, or at least the marketing thereof, one reaches the core truth that is ‘no adequate substitute for good legal advice.’⁶ This is not determined by normal commercial rules - the cash relationship is not privileged over all others, discounts are not available for services bought in bulk and advice cannot be manufactured, machine-like. As the Chairman of the Bar Council remarked in his speech this year to the Bar Conference, ‘barristers see their work as a calling, as a profession, not just another service industry. And they are right. This distinction embodies values of fairness, rigour, of understanding human life in all its range and variety, of putting professional obligation before profit.’ Many lawyers are yet to be convinced that it would be of benefit to either lawyer or consumer to see such a fine distinction destroyed.

⁶ Bruce Richie, Law Society of Scotland