

Sarah Love

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

Sarah Love

Judging from the responses to Sir David Clementi's consultation paper, both opponents and supporters of the proposed reforms credit him with superhuman powers. The Consumers' Association and the Office of Fair Trading hope that Clementi can improve price and quality for customers, while the Bar Council fears that he will cause the "Enronisation" of the law. Actually, the Clementi Review will have more modest effects. The legal profession is already undergoing big changes. The Review will simply accelerate what was happening anyway.

For many solicitors, life has been tough and Clementi promises more of the same. The Law Society's *Annual Statistical Report 2003* shows that 85% of the private solicitors' firms in England and Wales last year had 4 partners or fewer. These small firms have not fared well recently. The number of solicitors has grown faster than the total level of fees, causing incomes to stagnate. There were more solicitors' firms in England and Wales earning at least £15,000 a year in 1994 than in 2001.

The reason for this fall is increasing competition in their core businesses. According to the Law Society, firms with 5 solicitors or fewer earn 80% of their income from individuals, doing conveyancing, crime, family law and probate work. The profitability of criminal work was hit by recent changes to legal aid. Solicitors lost their monopoly over conveyancing in 1987, since when competition has intensified and fees have been low. And although solicitors do most probate work, they are threatened by the growth in 'DIY wills' (30% of probate applications are made without solicitors' help) and by sections 54 and 55 of the Courts and Legal Services Act (1990), which will allow others to provide probate services. By letting

more organisations offer legal services to individuals, the Clementi Review will squeeze small solicitors' firms and lower prices for consumers. But, far from constituting a radical step towards 'Tesco law', this will merely hasten a trend that is well under way.

Large law firms are unlikely to find that their business is 'Tesco'd' by Clementi. Big commercial clients conducting high-value transactions will still require bespoke legal services. The market for such services is already highly competitive. According to *The Lawyer's* 'UK 100' Report, despite a year of aggressive emphasis on business development, most top London law firms had static turnover and flat profits in 2003–04, while US firms increased their share of London's legal business.

Clementi will probably recommend permitting outside shareholders to provide capital. But it seems improbable that the current partnership structure is preventing large firms from accessing capital and expanding. Since 2000, Linklaters, Freshfields Bruckhaus Deringer, Allen & Overy and Clifford Chance have almost doubled their numbers of partners. Also, other countries' restrictions on the ownership structures of law firms limit how far solicitors' firms can expand overseas, regardless of their sources of funding. For big solicitors' firms, too, Clementi's deregulation will reinforce existing developments.

Likewise, barristers' fears of dramatic change are unwarranted. The Bar Council fears that Clementi will threaten the independence of specialised, self-employed advocates. The Review will remove obstacles to the creation of Legal Disciplinary Practices (LDPs), which are law practices that bring together lawyers from different professional bodies. It may also recommend allowing employed barristers to form partnerships and to offer their services directly to their employers' clients. However, the consultation paper understates the extent to which LDPs are

already possible. Barristers can already practise as salaried employees of both legal and non-legal firms. Barristers who wish to practise as solicitors can qualify with relative ease and without giving up their Bar qualifications. They can also become partners of solicitors' firms, so long as they are not practising barristers simultaneously. So those who wish to combine advocacy with the security of paid employment can do so. The fact that most barristers have chosen not to suggests that Clementi is unlikely to make much difference.

If Clementi enables barristers and solicitors to form joint partnerships and lets more organisations provide advocacy services, pressure on the independent Bar will intensify. Chambers will have to market themselves more aggressively, advertise directly to prospective clients and improve economies of scale. But these changes are happening anyway. In particular, the new Public Access Rules allow barristers to accept instructions directly from lay clients. This transforms the Bar from a referral-only profession to one in which barristers can compete directly with solicitors. Evidence from America, where more lawyers are obtaining specialist trial advocacy certification, suggests that competition increases the value of advocacy skills, so barristers should remain in demand. Altogether, the recent mergers of sets, emphasis on making chambers more 'user-friendly', and opening of the Bar to lay clients suggest Clementi may not be as big a shock as many barristers fear.

Finally, what will happen if Clementi allows Multi-Disciplinary Practices? There are synergies between, for example, tax planning and legal advice. But the 'big four' professional services firms, which are best placed to take advantage of this, are under financial pressure and regulatory scrutiny following recent conflicts of interest revealed by accounting scandals. Should firms overcome the regulators' obstacles and persuade sceptics that they offer impartial legal advice, experience still shows that

when one law firm acquires another, it is hard to stop the ‘top talent’ from leaving. If a professional services firm were to buy a solicitors’ firm, the defections would be greater. Clementi may increase the number of shops that sell legal services over the counter. But this will not increase the number of non-legal firms that employ lawyers.

The legal profession is becoming more competitive. To date, this has generally been good for consumers and made life harder for some lawyers. The Review will accelerate these changes but will not be a panacea for all consumers or a disaster for all lawyers. Contrary to expectations, the effects will be modest. In Henry VI, one of Cade’s co-conspirators remarked, “The first thing we do, let’s kill all the lawyers”. Clementi could have been far worse.