Speech to Oxford/Harvard Legal Symposium

Thank you for that very kind introduction.

It is a great honour to be asked to give the keynote address at the first of these conferences. The vision of the organisers is that academic research should constantly renew and inform both the practice of law and the business of law and likewise be informed itself by that practice and business.

That vision is absolutely at the heart of what my organisation stands for as well. Change, development, and evolution, informed by the best evidence and the widest range of input.

Gone, I hope for good, are the days when legal academia and working profession lived in separate worlds. Likewise, gone are the days when regulators operated behind closed doors, occasionally descending from their mountains with the latest tablets of stone. Regulators, like judges, have occasionally been described as "students marking their own exam papers". That's gone. All of us now live in a world where greater transparency and consumer involvement is not simply expected, but is widely recognised as a sine qua non for doing our jobs properly. And that depends on discussion at this type of event, just as much as it does on formal consultations and the like.

But it is just a little intimidating to come to Oxford and talk about new developments. Partly that nervousness arises from speaking before such an academically and professionally distinguished audience. The organisers are to be congratulated for gathering such a stimulating group of people from such wide backgrounds. Ambrose Bierce, famously in his "Devil's Dictionary," described litigation as "a process which you enter as a pig and leave as a sausage". I think I know how the pig felt!

Another reason for feeling slightly intimidated when talking anywhere at Oxford is, of course, the sheer weight of history about the place.

One of the most inadvertently entertaining moments of the last 10 years came when Tony Blair, in announcing the Good Friday agreement on Northern Ireland said "This is not the time for soundbites, but I feel the hand of history on my shoulder". Well, you will not hear anything either so portentous or momentous tonight. But the hand of history around us in such superb settings is all too visible.

This college, I should say, is not the oldest in Oxford. That privilege belongs to my own college – University - a little way down the High Street, which dates back to 1249, when a priest called William of Durham left an endowment to support poor scholars. My college has occasionally argued with Merton College about whether it is genuinely the more senior foundation: Merton, although endowed later, started building rather earlier.

However, the dispute was settled quite definitively in the 18 century, when, in some bizarre legal case, the judge ruled definitively that University College was in fact founded by Alfred the Great. Since then, generations of lawyers trained in the college have learnt the fine legal principle that one must never argue with the Judge - especially when he is wrong but on your side.

The third reason for being daunted in speaking about new ventures in Oxford is because of the University's rather dreadful reputation as being "the last home of lost causes ". I believe that this title originally dates back to the position of Oxford as the base of Charles the First in the Civil war, but it has been applied on many other occasions to describe its perceived academic, political and institutional conservatism.

Perhaps my favourite example at the micro level is the President of this college Martin Routh, who was famously the last man in England to wear a full powdered wig, preserving the style of the Georgian period right up to his death in 1854. I could go into a long digression about the regulation of court dress at this point, but I will resist the temptation.

Of course, this is very far from the whole story. What instead we see is a rather odd, but profoundly invigorating interplay of the old and the new. As the whole, the modern university is as distinguished by its scientific Nobel laureates as it is by it continuing distinction in the traditional humanities. It has retained the profound sense of

Britishness – whilst developing partnership with vast range of other countries. And it has retained and indeed enhanced its reputation for academic excellence whilst never been afraid of applying that excellence practically in the real world.

This conference is an ideal case study of that. We are in one of the oldest colleges in the University, yet with many colleagues from its newest institution The Said Business School. Here we are in a profoundly English setting, complete with Deer park and punts outside, but with colleagues from the States and India and practitioners regularly working in multinational markets. And here we are in the home of some very abstract and theoretical scholarship - to revert back to my own college for a moment, in my undergraduate days, my legal peers went in awe of the great legal philosophers Herbert Hart and Ronald Dworkin who were in the college simultaneously and almost constituted a two person syllabus in jurisprudence on their own – addressing commercial and regulatory issues about how the law is managed and is made available to individual consumers and corporate customers alike.

In short, this is all rather paradoxical. What we see is an institution which appears profoundly traditional, but consistently forward-moving. An institution, which I would argue, has avoided revolution, but only through constant radical evolution and change.

And I want to pick up paradox as the theme of my remarks tonight, looking at the changes which the Legal Services Act has introduced into legal regulation in the UK and how my organisation, the Legal

Services Board, - working with others - plans to turn them into reality.

Just to recap with a little history. If we go back a decade, there was broad agreement in public policy terms that reform to legal regulation in the UK was needed. A report from the Office of Fair Trading, the UK's premier Competition Authority in 2001, criticised the barriers to entry in the legal market. For a variety of reasons, complaints about solicitors were being handled extremely slowly, with strong accusations of professional bias.

The role of the Law Society and the Bar Council, acting as professional bodies, Trade Associations and almost, some might say, Trade Unions, while simultaneously attempting to be dispassionate regulators, looked increasingly odd. Profound organisational schizophrenia did not look to be a price worth paying to protect the status quo.

Nor did a regime focused on regulating the behaviour of the individual professionals, rather than firms, look fit for purpose in a £20bn plus industry. The focus of regulation in other sectors was on identifying the right incentives and enforcement structures to drive ethical behaviour and good outcomes for consumers, identifying systemic weaknesses and seeking to identify and eliminate the risks which led to them. An ethical rulebook for individuals, while absolutely necessary to protect the public interest, looked far from sufficient to achieve the task on its own.

Against that background, Government asked Sir David Clementi, a former Deputy Governor of the Bank of England, to review the regulation of the legal services market. His report included a rather spectacular wiring diagram of what he called "the Regulatory Maze" it was the kind of wiring diagram that it would lead any respectable electrician to give up his job in despair!

But here is the first paradox. Government decided to simplify the regulation maze, not by removing bodies from it, but by actually adding a new one. **So adding complexity can create simplification.**

How does that work? The first thing to say is that Government resisted the apparently more simple solution, creating a single regulator on the basis of the Office of Communications in the Telecoms and Broadcasting worlds or The Financial Service Authority. The market for legal services was – quite rightly – seen as different in kind to those other markets because of its unique balance of citizen and consumer issues. A single mega-regulator runs the far greater risk of impinging on the independence of the legal profession from government than the structure Parliament decided upon.

The Legal Services Act created the Legal Services Board, with a staff around 35 and a budget of around £4.5M. We have a lay Chairman and a lay Chief Executive and a Board with a lay majority and skilled professionals on it as well. We don't regulate individual law firms or individual lawyers: we regulate 8 -soon to be 10 – Approved Regulators, who in turn have day-to-day responsibility for direct regulation.

But we oversee those bodies on the basis of shared statutory objectives – protecting the public interest, protecting consumers, enhancing access to justice and the rule of law, ensuring a diverse and independent profession, boosting competition, promoting professional principles. And we, and all the Approved Regulators, abide by the better regulation principles set out in a variety of UK statutes - proportionality, targeting, accountability, consistency and transparency.

So, we resolve the paradox of apparent over complexity in the number of organisations by ensuring far greater coherence of mission and direction to the regulation of the sector as a whole. The Legal Services Board is, if you like, primus inter pares in that process. We have some very strong intervention powers in our ability to give directions, levy fines and, ultimately, withdraw regulatory status from the other bodies if they fail to advance the objectives. But, because we share the same agenda, our expectation is that we will often and, indeed usually, be able to agree on the nature of the action needed.

Let us turn to the second paradox. **The more professional regulators surrender power, the more influence and authority they gain.** I spoke earlier about the frankly impossible position in which the Law Society, The Bar Council and others found themselves at the start of this millennium. If one looks around any profession, pure self-regulation is dead. Full stop. No matter what its strengths – and it would be foolish to pretend that it does not have some– it no longer

convinces in a world where the media and the public demand some independent verification that the man in the white coat or the man in the white wig - and they usually are men - is acting in their interest.

So one key responsibility of the Legal Services Board is to make sure that regulation of the profession is demonstrably independent of all pressure from the profession's representative wings. We produced proposals for consultation on this in May and will be announcing our decisions and next steps shortly. Without given too much away this evening, people will be able to see that we have listened and responded, even when we have not always agreed whole- heartedly, with the many points put forward in debate.

But many of the themes remain unchanged. What I want to stress is that independence of regulation is not simply about independence of decision-making in individual disciplinary cases. The profession has long recognised that the perception of "Chaps regulating chaps" needed to be tackled. But protecting case work is not sufficient on its own. Truly Independent regulation means that the regulators we oversee must have freedom to determine their own strategy. They must be able to get the support services that they need at the costs and quality that they need, when they need them, not at the whim of another body. They must be able to shout from the rooftops when they need to – and quietly walk the corridors of power when they need to as well.

That doesn't mean the representative wings of profession are simply ignored. Quite the reverse. They have a voice – and a vital voice – but they do not have a veto.

Paradoxically, that voice becomes more important and more persuasive when it is unfettered by the operational responsibility for day-to-day regulation. It is far easier to set the terms of debate authoritatively when that is what you are aiming to do, rather than appearing to limit the discretion of the regulator.

The initiative of the Law Society in commissioning Nick Smedley to review regulation of the larger firms in the UK exemplifies this kind of development. The wider review of legal regulation led by Lord Hunt of Wirral, which will appear in the next few weeks, will, I hope, have similar effects on debate.

What will come out of the series of debates and our own work in devising the process of regulatory reviews to ensure that all the regulators learn lessons from each other and other sectors will be a change in the pace and modus operandi of legal regulation. Together we need to ensure that it stays closer to the market and consumer – perhaps I should make that plural given the globalisation of the market and the need to learn lessons cross jurisdictions - and becomes ever more flexible in responding in a timely way to ever changing needs.

And this takes me to my third paradox, which flows from discussing moving at market speed. But it is in fact a rather old observation, first commented on by Cicero who opined that "the more laws, the less justice". My variant, I am afraid, is significantly less pithy – "**the fewer detailed regulatory rules, the more effective and encompassing the regulation**".

This is not, of course, an argument for wholesale de-regulation, any more than Cicero was a closet anarchist before his time. But it is an argument for avoiding the spurious certainty and perverse effects which are very detailed rulebooks can produce.

At the micro level, the Smedley Report argues that there is little or no benefit for either provider or corporate consumer alike in imposing some of the detailed client care requirements of the current Solicitors Code of Conduct in corporate work. That doesn't mean that suppliers in that market are not under client care obligations. Many of these will be enforced by commercial discipline, rather by the regulator. General Counsels in multinational enterprises who need multiple client care letters to give them reassurance probably need a new job rather more than they need another letter!

We want increasingly therefore to look at how to develop an approach to regulation where we and the Approved Regulators specify the outcome to be achieved and the principles to be observed, moving to specify very detailed rules only when there is only one single conceivable way of achieving the goals or of making

sure that risks to regulatory objectives are mitigated. It may be that the regulators can ensure offer guidance on safe ways of meeting obligations, but that should not prevent firms from finding other ways of meeting their obligations – or indeed, from the perspective of an oversight regulator, from individual front line regulators finding different ways of getting the message across to those whom they regulate.

I do not want to pretend that this is an easy endeavour. Shifting away from rules towards principles, as experience in the Financial Services market shows, leads to challenges in enforcement. Some would claim that regulatory certainty is being eroded and therefore risk increased (although, I dare say, that others, perhaps some here tonight, will view this as a helpful business opportunity!).

And there is no doubt that achieving it represent a significant challenge both to the capacity of the oversight Regulator and to the Approved Regulators themselves. But, by coming back to the regulatory objectives set out in the Act and the outcomes we want to achieve, it ought to be possible to give both creative freedom and greater assurance of delivery.

The final paradox I want to pick up revolves around the aspect of the Act most commented upon in the UK and the media, evolution of alternative business structures. The aim is, very simply, to allow different types of lawyer to enter into partnership with each other. And to allow non-lawyers - whether from a managerial background, information technology or human resource management or from

another profession such as accountancy – to enter into partnerships and for outside investors to own some or all of a law firm's equity.

From the comments of some at different points in the debate, one would believe that these changes represented a fundamental threat to access to justice, as the evil, profit making, asset-stripping investors destroy all existing law firms, leading to competition on price alone, withdrawal from unprofitable and unpopular parts of the market and legal deserts appearing for consumers up and down the land.

I obviously believe that nothing could be further from the truth. The truth, I think, is yet another paradox. **The more that the law behaves and is regulated like other businesses, the more its uniqueness will be recognised**. Practitioners here tonight are business people as well as lawyers. Your business acumen no more reduces your professional excellence than your professional background limits your commercial savvy.

That blend of skills will be the starting point of many ABS firms. And, far from introducing the new risks, I am confident that the Act gives great protection to customers in the ABS environment. Unlike the current framework, the specification of roles of Head of Legal Profession – almost a Director of professional compliance within the individual company – and the Head of Finance and Administration actually gives greater certainty in the corporate governance of those firms than would necessarily be the case in the mainstream market.

My one regret about this part of the Act is that Head of Finance and Administration has passed into the jargon by the acronym HoFA, which rather sounds as we have outsourced protection to the Mafia .

But the development of a "fit and proper person" test should give reassurance in the surely unlikely event of wholly inappropriate market entry by Mr Hoffa or any of his family members. I really find it very difficult, with those safeguards properly scoped out, to see that firms with external ownership face or constitute any more or any different risks to those in the heart of the current market place.

To suggest that there is some kind of unique danger that only the profession can protect the public from is profoundly patronising to clients and potential partners. And it's potentially commercially naive and damaging of firms to fail either to engage directly with ABS or to think about how their own model might develop in response if they choose not to go down that route themselves.

As with regulatory Independence, we have made development of momentum in this area an early priority for the Board. We published a discussion paper in May, setting out how we are approaching the key issues and in particular, challenging the regulators and the market to advance the timetable by a year from 2012 to 2011. I am pleased that that conclusion has stood up well in the lively debate which has followed.

We are mindful that many firms represented in this room, while not opposed to principle of ABS, do not see it as for them because of the potential impact in other jurisdictions. That's a fair commercial judgement, but I'd regard it as one that should, as good bureaucrats say "Be kept under active review".

The global legal market, like all others, is clearly converging. Like all other markets, regulation will probably move rather more slowly, but will begin to emerge. Even in our first year, we have started to develop links with similar bodies in Canada, Australia, mainland Europe – and even Edinburgh! But one thing that other markets teach us is that regulation in global markets doesn't move at the pace of the slowest. Economic regulation of utilities has moved from being an odd British aberration in the mid '80s to a near universal feature of free markets. Looking back from 20 years hence, a freer market in legal services with less restrictive regulation will look equally natural.

Some assert that there is little evidence base for some of the changes we propose. The major challenge that we give back is that, where restrictions on the ability to practice in different models are imposed today, then the status quo demands justification as much, if not more, than any changes to it.

Doubtless this debate will continue. Our next major publication later this year will deal with guidance to those regulators who wish to become ABS Licencing Authorities on the content of their rules and the process by which we recognise Licensing Authorities. In other

words, we are clearly shifting from questions of “whether?” to questions of “how?”. There will be no going back.

Let me just make one thing clear. This will not be a rigged market. The Regulator is not in the business of making rules to back ABS winners. ABS will not be a consumer protection free zone. But nor will we let anybody weigh down ABS’s with so many “safeguards” that they can’t get off the ground. Fair competition, in other words, on a properly level playing field.

So, in conclusion, let me leave you with these 4 paradoxes about reform of legal regulation in the UK.

First, greater complexity can lead to simplification – if it is based on strong oversight regulation of a group of regulators with aligned objectives.

Second, the more power professional regulators surrender, the more influence they gain – we can already see the sign of this happening, but there now has to be detailed implementation to protect the independent regulators and so underpin public confidence.

Third, the fewer regulatory rules, the more effective regulation – provided that that regulators gain in capacity and capability to rise to this challenge and stay close to the market, the profession and best regulatory practice elsewhere.

Fourth and last, the more the law becomes more like a business, more its uniqueness is recognised – ABS, far from being a threat, needs to be seen as an opportunity to liberate creativity and imagination within the market by gaining new perspectives from outside and tap new resources within.

So, a set of paradoxes seem a good place to end a speech in Oxford, which tends to be a place with a rather unique and paradoxical blend of high seriousness and high playfulness. I did manage to resist the urge to pad out my speech by scanning Google for the best one liners from this College's great master of paradox - Oscar Wilde - but I should perhaps finish with "The Importance of Being Earnest"

When Algernon appears, pretending to be Ernest, he is berated by Cecily who has always believed that her mythical cousin is really a scoundrel and now has doubts: "I hope you have not been leading a double life, pretending to be wicked and being really good all the time. That would be hypocrisy".

If we get the regulatory framework right and if we see regulatory practice continually improving, then the profession as a whole and those who have been really good all the time will be better able to demonstrate and carry the deserved confidence of consumers and investors alike and the respect they merit for doing so.

Thank you.