<u>Quality and Standards in a Liberalised Market</u>

Address by David Edmonds, Chairman, Legal Services Board

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Tonight I want to look at standards and quality, and go beyond that to the question of ethics, in the world of legal services following the reforms that the Legal Services Board has been leading over the last four years.

And I will try to answer the anxieties that I heard Lord Neuberger express when I listened to him several years ago as these reforms began.

My Board and I were then laying the foundations for the legal regulation reform that was emerging.

And are now in place.

- A much clearer separation of regulation from representation within, amongst others, the Law Society and the Bar Council.
- A Legal Ombudsman dealing with consumer complaints.
- A framework for the introduction of alternative business structures breaking down barriers to entry for new businesses.

Lord Neuberger's speech was entitled: "The tyranny of the consumer, or the rule of law" .

Of course, I listened with great care to that analysis.

To argue with the Master of the Rolls requires some courage, and indeed higher authority.

So I will pray in aid President John F Kennedy's speech to Congress in 1962.

He said:

"*Consumers by definition, include us all*." ... "*They are the largest economic group, affecting and affected by almost every public and private economic decision. Yet they are the only important group... whose views are often not heard.*"

With that backing, I fear that I plead guilty to having unremittingly acted in the interests of the consumer.

But tyranny – which I define as illegitimate rule – has not been part of my agenda.

Nor do I believe in an inherent conflict between consumerism and the rule of law.

Putting the consumer first is a principle of good regulation. But we also realise that all consumers are citizens and all citizens are consumers.

It is playing the crucial intermediary role of ensuring that those consumer views are sought, are heard, and are properly reflected in decisions that is at the heart of being a regulator.

Lord Neuberger also cautioned me against the dangers of adopting "*unreflective consumer fundamentalism*" in our approach to the legal profession.

The term '*fundamentalism*', in relation to markets, often implies a strong belief in the ability of laissez-faire or free market economy views or policies to solve economic and social problems.

I do have a profound belief that in many markets, competition is by far the best route for delivering social and economic benefits.

And regulators can play a vital part in enduring that fair competition emerges in markets where some players have significant power, and others may have none.

Regulators can break down barriers to entry that restrict wrongly the ability of providers to deliver services that the citizen and the consumer wants.

But regulators too close to the group that they regulate can also hide behind ephemeral public interest arguments to erect barriers and limit innovation.

Regulators at times can support a laissez faire model and at others, undermine it.

The argument is good regulation or bad regulation: or to put it another way: regulate for consumers or regulate for providers?

That is a far cry from being fundamentalist.

Anyone who sees the transparent material on which we consult can surely not believe that we do not listen to debate and argument.

And we are subject, like all bodies, to the rule of law.

But we are too aware of the risks of market failure to the public and consumer interest to adhere to simply 'let it be'.

Being counted as a "consumerist" however does not mean that standards are immaterial.

Appropriate standards – in behaviour, in outcomes, in every aspect of the relationship of the provider to the consumer – are fundamental to the work of the regulator.

Whether we are called clients or consumers matters not.

In short, I want to see the legal profession adopt the same commitment to consumer care as it does to client care – to embrace modern business ethics alongside those of the profession.

They are not mutually exclusive and each reinforces the other.

So what should we be seeking from a liberalised market?

And what can regulation – at both the macro (oversight) and micro (frontline) level – be doing to make sure that standards are not just maintained but improved?

Let me be clear at the outset, though, that for me, liberalisation is not solely about 'new ways of doing things'.

Liberalisation is not just about 'alternative business structures', important catalysts to change these might be.

Liberalisation, if introduced carefully and with an open-mind, should also deliver benefits to those who simply wish to continue to provide legal services in the way that they always have.

If a business model has provided good service to the client base and returned adequate profits to partners I can well understand why a firm might wish to continue as it always has.

Liberalisation should allow for that.

Such firms might well find themselves under greater competitive pressure – and they will need to face it - but there is nothing new in that.

Whether the competitor is a new entrant like Co-operative Legal Services or a long-standing top 100 firm like Russell Cooke – competing for business has always been the name of the game.

I am also a businessman.

I can attest that many lawyers spend their lives advising ruthlessly competitive clients how to get ahead of their competitors and stay on the right side of the law.

And earn very considerable fees for so doing.

A PLC Board will rarely choose a lawyer on the basis of cost – it is their record of delivery that we look at and the quality of the service that they can offer.

Do not the great law firms of the City of London compete ferociously for clients?

How much of the partner role is about business development – securing new clients – on the basis of their offer of value-add?

Yet the reputation of those firms rests on quality.

I see no derogation from their commitment to the principle of the rule of law, despite their efforts to boost year-on-year the fee income, and the partner share.

So, I want to dispel the concept – or in my view the misconception – that the liberalisation of the legal services market place is going to lower quality, reduce standards and perhaps even threaten the rule of law.

What do I expect to see from market liberalisation in legal services?

This is evolution not revolution – but undoubtedly we expect to see innovation in both business structure and service delivery.

By removing out-dated and unnecessary restrictions on ownership and management of law firms, we allow for an influx of both financial and intellectual capital that has historically been out of bounds for law firms.

This approach will give lawyers – and new business partners - much greater flexibility in how they organise and collaborate both with each other and with other non-lawyer professionals.

I want to see new ways of working brought into the market and see the benefits of new competitive pressures harnessed.

I also want, though, the frontline regulators to become sufficiently fleet of foot to identify and mitigate the inevitable risks.

This will:

- increase choice for consumers - who will see better-tailored and better value packages of professional services

- increase choice for legal services professionals – who will see a greater variety of business models within which to practice emerge

Let us reflect on what we have seen emerge since the advent of ABS – and some of the potential services coming down the line.

You will all be aware that the first ABS of any kind was Premier Property Lawyers, which received its licence from the Council for Licensed Conveyancers on 6 October 2011.

Since then, the Solicitors Regulation Authority has licensed a further five ABS ranging from the Co-operative Legal Services – to Lawbridge Solicitors (a firm with just one solicitor which saw the non-lawyer practice manager become a director of the firm) – to the recent confirmation of a licence to Slater and Gordon owned Russell Jones and Walker, a firm which has already made public its intent to build the business through further acquisitions.

So we see a significant diversity of business models in the first six licences alone.

An almost constant flow of new ideas is emerging.

Last week we read that Kent Legal Services – the legal arm of Kent County Council – is thinking of launching an ABS in conjunction with a regional law firm.

Already an innovator, it is clear that KLS sees the ability to harness the benefits of an ABS structure as reinforcing its competitive edge and allowing it to reach a greater variety of clients than it can currently.

We also read that a leading Italian firm is at an advanced stage of its ABS application.

Quoted in the Law Society Gazette their London partner stated "*While we could provide a full range of business services in the UK, we would have to keep the financials separate.*

So we have decided to apply to become an ABS to allow us to ensure we can build a fully integrated office here providing a full range of multidisciplinary services".

This is just one of around 94 ABS applications being considered by the SRA to have reached an advanced stage.

The diversity of business model alone is interesting.

Perhaps what is more interesting is the innovation that we are starting to see emerge in the market in terms of service delivery to people in need.

Cooperative Legal Services recently announced that they would be trialling a family law service in London with transparent and fixed pricing structures for those not eligible for legal aid.

We hear that they may be working with their banking arm to develop ways to finance recourse to law if needed.

That element of cross-selling may not be to everyone's taste – but it may well be a great benefit for the consumer.

On Tuesday we saw Riverview Law – not an ABS, but a business law firm operating, it is claimed, entirely on fixed fees and featuring a mix of barristers and solicitors and with investment from DLA Piper - announce the development of their 'guaranteed divorce cost' package.

A service some have said is already available in the market –what is interesting for me, then, is that such developments are now being marketed much more aggressively.

In early April we heard of Instant Law UK – not an ABS - starting to develop a library-based video-conferencing service giving users access to what it claims is the country's first interactive, online debt and employment law service, in conjunction with a London law centre.

This includes a tie-up with a barristers chamber should it prove appropriate to seek their advice.

And we are all no doubt aware of the growth in online services – such as RocketLawyer and Legal Zoom.

So, ABS provides a mechanism for important changes to the legal services market.

And it seems to be providing a catalyst for a much broader variety of service delivery changes as providers wake up to the possibilities of serving clients more flexibly.

Not just in terms of liberalisation of service delivery but also as a precursor for more flexible – for better - regulation more generally.

Which brings me to my second theme of the evening: what can regulation – at both the macro (oversight) and micro (frontline) level – be doing to make sure that all that is good about the law is available to all in our society?

I want to deal with some of the risks critics allege are inherent in non-lawyer ownership.

First let me reprise the LSB's role in all of this – responsibility for regulation at the macro or 'whole system' level.

We have eight regulatory objectives which are very clear.

We also have a duty to assist in the maintenance and development of standards of regulatory practice and the education and training of lawyers.

It is with these responsibilities in mind that we oversee the regulation of the legal services professions.

This is not a passive responsibility and our approach to regulation has a number of elements:

- ensuring best regulatory practice by those we oversee
- managing our statutory approval role properly

- ensuring that important issues are addressed by regulators, either individually or collectively
- developing and disseminating a comprehensive evidence base
- using our intervention powers proportionately and effectively when needed
- filling gaps in policy making
- abstaining from intervention in individual compliance activities.

This is a mixture of developmental, supervisory and decision-making work.

It is performed by a small tightly focused team led by an ambitious and demanding Board, all of whom have been appointed to take decisions in the public interest.

What is also different is our approach to gathering evidence.

There has been an absence of research and evidence across much or professional and regulatory action historically.

There has been little knowledge about consumers, segmentation, what they want, who they are

And little macro level analysis of market by regulators to drive their action.

We need to get knowledge and understand market and then target by segment or activity.

That is part of liberalisation – evidence not anecdotal history.

We have worked hard to lay the foundations for the liberalised market I spoke of earlier to flourish:

- solid progress on embedding independent regulation – supplanting the discredited model of self-interested self-regulation.
- increased consumer confidence that should things go wrong they will be able to get redress through the services of an independent, fast and fair Ombudsman
- the development of a regulatory framework for ABS that focuses on outcomes, responds to risk, secures intelligence and punishes the rogues – swiftly, fairly and robustly.

And it is this last point that will form the final component of my reflections this evening.

How do we enforce regulatory standards in the newly liberalised market?

Historically, the regulation of legal services has been achieved largely through the regulation of individual professionals.

This approach has provided consumers with a degree of protection.

But I do want to refute the notion that we cannot trust other professions to behave in an ethical manner, or that businesses ignore the rule of law.

And lest we risk looking backwards to traditional regulation through some sort of rose-tinted spectacles, dreaming of the time when professional ethics were consistently high and only jolly good chaps were able to practice law – let's remember:

- the miners compensation scandal – which saw nearly £10m repaid to miners by solicitors who had sums wrongly deducted from their damages and which saw 27 firms accused of wrongly profiting at the expense of miners
- a lawyer who caused losses to clients of around £50 million in what the SDT described as "a blatant disregard of the basic core duties required of a solicitor"
- a lawyer whose dealings were described by the Solicitors Disciplinary Tribunal as "as bad a case of fraud that the tribunal as ever seen" – after being found to have stolen around £2.5 million from clients in part by producing fictitious bills
- a divorce lawyer disbarred for dishonesty, prejudicing the administration of justice and wasting court time
- a solicitor struck off after being convicted of 11 counts of fraud, 3 counts of possession / control of an article for use in fraud and one court on knowingly possessing, another's identification documents.

There have always been rogues in any profession - lawyers, doctors, teachers, dentists and accountants, or whoever – but I remain firmly of the view that it is demeaning in this debate to imply that non-lawyers are inclined to be less ethical than any other group running a business.

I believe that there is a normal distribution curve of ethics among the population.

I would hope that the legal profession (and indeed the non-authorised workforce they recruit) should come from the end of that curve which is more ethical.

But that is not the same as saying that the end of the curve is only populated by lawyers.

We need, as we liberalise and grow the market, to maintain standards.

When the profession grew from 20,000 lawyers to 150,000 lawyers it was necessary to recruit people with strong and acceptable values and we have to do the same as the market changes again.

We want to keep out the crooks and the unethical and those with weak values that can be shaped by other crooks – so we need to understand ethics better and what makes people do wrong things that examples above illustrate.

How can we predict and exclude?

I wager that the title solicitor isn't a good predictor.

This thinking therefore underpins the route we are taking to address systemic concerns.

Better regulation – as required by the Act – would suggest that regulators should expect to regulate, not just individuals, but the systems and behaviours of the entities in which they operate.

This will require greater emphasis on business governance, capability and management competency.

And indeed this is precisely what the licensing framework for ABS has, at its centre - robust consumer protections designed to ensure standards.

New governance requirements within ABS will ensure accountability for ethical behaviour and professional standards.

These include:

- a test to ensure that non-lawyer owners of an ABS are fit and proper (a test much in the news of late!) and
- the introduction of two new roles in ABS: the Head of Legal Practice and Head of Finance and Administration who will ensure compliance with licence requirements

But I want to talk not simply about the regulation of ABS, but also about outcomes focused regulation generally.

I can already see eyes glaze over, but let me explain why that is the wrong reaction.

Outcomes focused regulation seems to me not only to be absolutely compatible with a high sense of professional ethics, but in fact to be the <u>only</u> form of regulation that is compatible with professional ethics.

What are ethics in a profession about?

There are about always focussing on doing the right thing in all circumstances.

About reflecting the responsibilities of the lawyer to his or her client, to the court and to the wider public interest and rule of law.

About keeping those principles always in the front of the mind.

About ensuring that any conflicts and tensions between them are appropriately managed, through a combination of formal training, experience, guidance from professional peers and above all proper reflective practice.

This seems to me to be at the heart of what being a professional is all about.

I would also assert that there is absolutely no way that such a process can be reduced to one of detailed prescriptive rules.

To do so would inevitably fail in the task of seeking to identify how the lawyer should respond in every possible set of circumstances.

Regulation can underpin and reinforce professional judgements – it can't codify and replace them.

Regulation should not reduce the ability of the lawyer to the status to make his or her own professional judgement in the light of sometimes rapidly changing circumstances.

If the professional ethos means anything, surely it means having the *ability* to respond properly at all times, rather than having to seek permission or guidance on every occasion?

The second danger, if anything, even more insidious.

St. Paul wrote in one of his letters to the Corinthians "The letter killeth, but the spirit giveth life".

In the context of professional regulation, the more one seeks to define very detailed rules, the greater the temptation to comply with the letter of them while constantly seeking to subvert their actual intent.

This was my experience as a utility regulator, where I was constantly pressed for more and more detail as a way of both slowing the progress of introducing competition down while also protecting those who were seeking to achieve that very outcome.

With hindsight, a clear focus on the outcome to be achieved and an impatience with those who seek to argue compliance with the letter while ignoring the intent is surely the only way in which regulation in any sector can happen.

And, above all, that surely must be true within a profession.

The tendency of legal regulators – in all parts of the sector – over the years to issue very detailed codes and often to complement that with guidance which in tone appears to be as prescriptive as the rules it purports to explain, surely represents regulatory micro-management.

Some in the legal regulatory world accuse my Board of undertaking such micro-management.

People and glasshouses spring to mind.

I am told that the new Bar Handbook is likely to reach 300 pages.

The SRA Handbook, edition 3, is 516 pages.

I am told that the original Law Society code of conduct was just five pages long.

The truth is that it is our role as the oversight regulator is, on occasion, to specify outcomes, and it's for the front-line regulators to translate those into terms which makes sense for their particular part of the sector.

But it is not for either of us to specify very detailed rules, unless there really is one way and one way alone to ensure that a specific outcome is met.

Far from this being "irrational regulation" as a Lords Blog commentator recently described outcomes-focused regulation in another context, I would therefore say that my approach is the properly professional regulation of properly independent professions.

Indeed, I would contend that it is the only form of regulation that is proper to impose on an ethical profession by giving exactly the right balance of clarity, freedom and, above all, accountability.

If professionals say they cannot cope with the uncertainty of outcome focused regulation, then frankly they should not be giving legal advice to anybody about anything.

If I may make a further biblical reference, you know where you are with Ten Commandments.

It is at least arguable that the detailed regulatory guidance of the books of Leviticus, Numbers and Deuteronomy perhaps did more to cement the power of the priestly class than to encourage the highest standards of ethical behaviour among the ordinary citizenry.

So as we move into the next stage of the reforms now under way – reforms that market forces will dictate rather than regulators prescribe - the commitment of my Board to standards, to quality, to the upholding of the rule of law will be unremitting.

That is a commitment, not a piece of rhetoric.