**RPI Seminar 12/2/13 – Lessons from Legal Regulation for Leveson**

**Introduction**

I initially wondered why George Yarrow had asked me to say a few words about regulation of legal services in response to what Will Hutton has had to say about the Leveson Report. Was it that journalists and lawyers are at a similar place in public esteem - some way above bankers, but some way below where each would like to be ? Was it to demonstrate that, even though Leveson's proposals and the further elaboration which Government seems to be thinking about by way of a Royal Charter is pretty complex, when you look at legal services you realise that "You ain't seen nothing yet?" Or, more likely, was it to recognise some interdependencies between the two sectors in ensuring a constant flow of libel and privacy litigation for the entertainment of readers and the financial benefit of lawyers alike?

Actually, of course, the linkages are clear. We have two sectors whose importance to the public interest, defined in the broadest sense, is quite obvious and which therefore demand the highest standards of practice from those who work in them. We have two sectors in which behaviour

has, on occasion, fallen some way below that which should be expected and, in particular, where there appears to have been little ability to put things right through proportionate self-regulation.  But there are also two sectors where blundering intervention by the legislature or by statutory regulators to correct these failings may actually lead to a rather worse disease than the one the intervention is designed to cure.

So, in both cases, the challenge is how does one secure genuinely independent regulation without government interference, but in a way which does not look like a professional or media stitch-up in which only lip service is paid to the public interest?

What I will suggest tonight is not that there are simple lessons to be read across from the legal sector, but that some of its experience may at least help to sharpen the questions as consideration of policy decisions on Leveson and their practical implementation move forward over the next few months.

**The Legal Services Architecture**

Let me begin with a very brief description of the regulatory regime in legal services. The 2007 Legal Services Act had its genesis in a report written by Sir David Clementi in 2004. Clementi in turn responded to three issues:

- A report on competition in the professions by the OFT in 2001 which saw restrictions on external ownership of legal businesses as a barrier to entry;

- A significant collapse in public confidence in the Solicitors' disciplinary scheme as a result of scandal about access to Government funding in mining compensation cases; and, finally,

- Persistent problems in the handling of service complaints in relation to solicitors which, at its worst, saw routine cases taking more than two years to resolve as a matter of course.

It wasn't quite phone-hacking, but the coincidence of three pressures pushed government into action, against a conclusion that a pure self-regulatory system was no longer operating in the public or consumer interest, as opposed to that of the profession.

From a theoretical perspective, that should have come as little surprise. Work which the LSB commissioned from George and Chris Decker in 2010, looking at the rationale for economic regulation in the apparently highly fragmented legal services market, highlighted the incentive properties in self-regulation, which will, to a certain point, work to expand a market, but will then begin to seek to generate producer rather than consumer surplus and to protect those operating within the market, rather than to facilitate challenging entry. Of course, that doesn't argue for the "nationalisation" of either legal or media regulation. But it does suggest the need for a properly nuanced policy response.

In legal services, that response was to leave the primary responsibility for regulation of individuals and entities with the self-regulatory bodies – The Law Society, The Bar Council, The Institute of Legal Executives and five others. But they were compelled to make a clear separation between their professional/lobbying/"trade union" activities on the one

hand and their regulatory functions on the other. A new statutory body, the Legal Services Board, was created to oversee that settlement.

Alongside that, an independent Office for Legal Complaints was established to run a Legal Ombudsman scheme to ensure faster redress for individual consumers. The Office for Legal Complaints stands in much the same relationship to the LSB as the Financial Ombudsman does to the FSA.

In terms of formal status, the Board is a non-departmental public body of the Ministry of Justice, but one over which the MOJ has no powers of direction (other than about the format of our accounts) and one also where Government has to confer with the senior judiciary about the appointment of Board members. The Chief Executive, who is a Board member, is an appointee of the Board alone. The Board has to have a lay Chair and a lay majority and is funded from a levy which it places on the regulatory bodies which it oversees. The Lord Chancellor gives formal consent to the budget as a check to make sure that the Board does not engage in gratuitous empire building.

**Legal Services Regulation as a model for verification?**

So, is the LSB the equivalent of Lord Leveson's verification body and, if it is, what is it verifying? Well, the first thing to say is that in many ways the LSB goes further than Leveson. We have a set of regulatory objectives which are about the systemic operation of the Legal Services market – the promotion of the consumer interest, the promotion of competition, the development of a diverse workforce – as well as objectives which might normally be expected of a professional regulator – promotion of the public interest, promotion of the rule of law, promotion of access to justice (although, of course, that is in our view intimately linked with the promotion of competition).

So one of the first questions is whether verification can be a totally passive process or whether it has a role in stimulating action on a wider range of fronts than the tighter focus on pure regulation of standards in Leveson.

It seems to me that media verification will rightly be rather less active than the activities undertaken by the LSB, but it will nevertheless be rather more than biennial reassurance over a good dinner that things are

going jolly well indeed.  Let me just unpick some detailed oversight functions to explain why this should be the case.

LSB's oversight functions include the following:

- Devising and policing the internal governance rules – these are the rules which ensure that the Chinese walls between representative and regulatory functions cannot be breached. That means ensuring Nolan-type appointment mechanisms, ensuring a lay majority to give public confidence in independence and ensuring that the regulators have the resources they need to do their job – and cannot be suborned in practice by organisation-wide policies on IT or human resource matters. (There is however, an obligation on the LSB to approve the level of the annual practising certificate fee , by which regulation is funded to ensure that the regulators themselves do not set off on a burst of gold plating).  Although we have increasingly moved towards an annual audit process on this, putting proper independence in place proved far more complex than we initially thought and has certainly demanded a degree of ad-hoc intervention to move things in the right direction. One would hope that media arrangements will not prove so complex, but there may need to be more that a "one-off" endorsement.

- Approving rules – all changes to the frontline regulators' regulatory arrangements as they are termed in the Act are subject to LSB approval. In the majority of cases, this is a routine matter, but it does enable us to challenge where we believe either the process behind rule approval have been flawed or there is a major issue in relation to one or more of the regulatory objectives. The question in the press field, I think, is to what extent a code of standards needs endorsement from a third party beyond the self-regulator which produced it and whether that endorsement is by way of positive approval of the contents, endorsement of the process of production or a "critical friend" challenge in the light of how it operates in practice. The degree of independence of the Code Committee and the gap between it and the regulator may be the crucial determinant of what more, if anything, is needed;

- Policing the boundaries of regulation – the LSB does this in two ways. First, we can make recommendations to the Lord Chancellor about which legal activities should or should not be the subject of specific regulation. (We will be doing this for the very first time tomorrow!) . The one area of Leveson which it appears nobody found very satisfactory, but everybody has been reluctant to criticise because they are similarly rather bereft of answers, is

whether all of the activity proposed is locking the print media stable door when the digital horse has well and truly bolted. It may be that there is a role for the verification body in trying to tease through the very difficult issues of both substance and enforcement in standards of online media.

- Second, the LSB can make recommendations about which new bodies should be added to the list of regulators (or licensing authorities for alternative business structures). Clearly Leveson sees that a verification body may have to recognise more than one code or organisation in the event that this is necessary. In the LSB's case, there is even the provision for us to be the "regulator of last resort" in the event that a body cannot fit within the remit of any frontline regulator. Those are powers which we don't want to use in the legal services context and, I'd suggest, would be even more undesirable in the media one.

- Powers of intervention – the 2007 Act gives the Legal Services Board some very draconian powers of intervention – fining, public censure or even recommending the removal of regulatory status. For a range of reasons, none of these seem very appealing in the

world of the press, but it seems equally unlikely that the public would be satisfied by having a totally toothless watchdog. It may be that a power for a verification body to investigate where necessary, report and call for formal response within a set period, may offer one way forward;

- Finally "assisting" – the LSB is under an obligation to assist in relation to matters of legal education, but also in relation to standards of regulation. We have interpreted the latter remit to mean that we should be encouraging frontline regulators to be self-critical about their standards of governance and performance and to increasingly shift them away from very detailed rules into principles backed by effective risk management and supervision. It is not clear to me that there is a direct analogy here between the legal and the press world, which could not be met by the powers of ad-hoc investigation referred to earlier.

**The challenge for policy makers.**

In considering this range of possible verification activities, one challenge is to find the right Institutional framework in which to do it. The tasks I have outlined do not, at least, sound like the kind of thing one writes a

large cheque to McKinseys for every three years nor do they quite feel the kind of activity which one invites a judge or a retired Permanent Secretary to look at, at slightly cheaper cost – unless something has gone very badly wrong and we have a whole public inquiry again at a significantly greater expense!

There is a mixture of light touch continuous activity and intermittent fire-fighting to be done at least, in the short-term. I personally have enough faith in the independence of economic regulators to see no objection in principle to Ofcom discharging the verification role as Leveson suggested – it does this quite adequately in the admittedly less contentious area of alternative dispute resolution schemes in communication where it is verifying firms' compliance with obligations placed on them, rather than delegating one of its own functions – but this seems to be a dead letter.

The tentative suggestion that I would float against that background is that it would be worth thinking long and hard about the precise functions of the self-regulator proposed by Leveson in order to decide which are the functions which could properly managed within a strong executive-led organisation and which functions, including challenging the executive

body and holding it to account, necessarily fall to be determined by wholly non-executive input.

There is indeed a lesson from legal services regulation here: our first set of scrutiny reports of the performance of front line regulators suggests that, almost without exception, boards should concentrate rather more on challenge and holding to account than performance on hard-edged delivery targets, rather than looking at ever more arcane policy issues worked up through an ever more labyrinthine maze of sub-committees.

The more the executive of the new body has the skills, competence and confidence to manage matters directly - which one would hope meant the more quickly, the public get their cases determined and any systemic compliance risks are identified and resolved - the more that the Board of the regulator can actually become its own “verifier”. Some judicial involvement around or above that process may also add a layer of extra comfort about both perceived fairness and independence in decision making.

On the other hand, the more everything – individual complaints, investigation of compliance in individual firms - is determined in detail by

the great and good around the Commission or Board table, then arguably the greater the need for further oversight, both to ensure speedy and responsive decision-making, quite as much as to guarantee independence .

I suppose there may some similarities in this model with the relationship between the BBC Trust and Board of Management – and that comparison in turn suggests it may not be easy to pull off in practice, even with a Royal Charter to help. But there is also a rather nice degree of irony if, to save itself from rather more intrusive oversight, the print media found itself adopting something not a million miles away from a BBC solution.

I am sure that whatever model is chosen will hide a degree of complexity, but the time seems to be right to begin to focus now on how the standards and dispute resolution arms of the new body will work in detail and how they relate to the role of the regulator's board. That could help to move us forward from the present limbo like state of the transitional PCC - and give the politicians rather less time to tinker and rather less need to worry away at what they should do next.