Evolution or revolution – are we ready for a single legal services regulator?

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Legal Services – Evolution or Revolution?

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When I look back on six years of stimulating evolution in legal services regulation, I usually think – that's not bad.

I go through the change that there has been.

Is it evolutionary?

Is it revolutionary?

Is it sufficient?

Might we stop?

Then I think – what a struggle to get where we are.

How much more could we have achieved if instead of battling on so many issues there had been co-operation and forward thinking?

Where could we be if all those concerned with representing the profession had spent their time working on solutions, working for outcomes to benefit the consumer, working above all in the public interest, rather than as so often pursuing policies that reflected self-interest; and where obstruction and delay were normal tactics?

The fundamental shift towards proper and independent regulation that the 2007 Act was designed to secure was never seen as a legitimate outcome by many of those representing key parts of the legal services sector.

This was illustrated by the almost atavistic response from some to the Ministry's call for evidence last year.

The Law Society called for the abolition of the Consumer Panel; and a reformed LSB with significantly reduced staff, chaired by a Judge.

The Law Society concluded in its response that "*we do not consider that an independent regulator or regulators are an appropriate solution. There is no evidence that professional bodies cannot take decisions in the public interest*".

Yes, really. That's what they said in 2013.

Or a previous Law Society President Bob Heslett who said "*Quite simply, there is no evidence from at least the last 25 years that the legal profession has been unable to regulate itself in the best interests of the public, which begs the question of why the draconian powers of intervention were gifted to the LSB in the first place.*"

Nick Lavender, Chairman of the Bar Council said "*the present situation seems to involve an element of over-regulation and that's why we would be in favour of simplifying it... abolishing the LSB as presently constituted would go some way towards that*".

In an earlier debate in the Lords the Chairman of the BSB exclaimed that excessive focus on the consumer interest may be to the detriment of the professional interests of lawyers.

And described a simple LSB requirement that barristers should inform their clients of the right to make a complaint as "*frankly inept*".

This failure to recognise that life has changed – going back is not an option – has created a compelling argument that we should move the creation of a single regulator with no connections at all to the trade unions representing perceived self-interest.

So... evolution or revolution? Charles Darwin said "*it is not the most intellectual of the species that survives; it is not the strongest of the species; but the species that survives is the one that is best able to adapt and adjust to the changing environment in which it finds itself*".

That is not a principle seems to influence the Law Society and the Bar Council. We have two very strong trade unions who often do not appear to accept the legitimacy of the role of the LSB and / or other parts of the 2007 Act.

Working with the primary regulators the LSB has had battle after battle.

But when we have faced legal challenge to our interpretation of our role to the powers that we have, our understanding of the Act, backed by the Courts, seems to have been rather better than those of the trade unions.

Evolution in independent regulation, the liberalising of the market place, putting the consumer at the heart of regulation is in progress.

But we now need to move on to the next stage of the evolutionary process – which some may describe as revolutionary.

I resent it when it is said that we exist to destroy the profession, to dumb it down or to blacken its reputation.

I admire the skills and commitment of many lawyers with whom I meet.

But the overwhelming goal of the LSB has been to widen access to justice.

I don't admire a hostile attitude to change, resistance to an approach about better meeting the needs of consumers.

Unfortunately this is something I have often come to expect from those who purport to speak on behalf of the legal profession.

Resistance to our very existence even though we are a creature of statute, willed into being by Parliament, has been worrying. The past always seems more important that the future.

So much intellectual energy has continued to be poured into rejecting – rather than delivering – a democratically endorsed regulatory settlement reached with the support of both Houses of Parliament and all parties.

Nick Lavender, again, has said that "*our profession has been around for 550 years*". Mike Todd said "*we have 800 years of experience; we know what we are talking about*".

Yes – but perhaps – just perhaps – after 500 plus years there are alternative views, and alternative ways of doing things.

I accept that the Legal Services Act 2007 is a convoluted piece of legislation.

I have been constantly reminded about adherence to the rule of law.

The Courts have agreed that we have adhered to that rule.

But let's look at some of the messages we've have been given over the years:

- keep your noses out of independence – it's all fine. The Act doesn't require us to have lay majorities or lay chairs so why should you?
- lawyers need detailed rules and don't have time to work out what's right or wrong for themselves – that's why we can't strip down our rule books to simple outcomes
- we're on top of education and training – why should we think about whether we need to do anything more to ensure its fit for the future?
- why do you need to do research – use ours or those of academics and fix up the odd symposium maybe
- take it slow on ABS – learn from LDPs before even thinking about any other form of new structure, and
- quality assurance for advocates is unnecessary.

Had we listened to those messages, I fear our legal services sector would be in an even tougher place than it is, less informed about its challenges and opportunities and less-equipped for the future.

We need to see the same commitment to consumer care as we do to client care.

So we heard the messages, we reflected, we adapted and we adjusted – and we evolved.

Where have we ended up?

Independence in regulation is a fundamental tenet of the Act. The professions must be independent of Government.

The regulators – all of us – must be independent of the professions and Government.

This separation is key to '*supporting the constitutional principle of the rule of law*'.

It formed one of our most urgent and important priorities.

Six hard years later, we have regulators with independence in strategy setting and operational decisions.

In most cases, they have the ability to secure the cash, people and systems they need to do their jobs.

The contortions that some approved regulators have had to undergo to allow themselves to be comfortable with independence in regulation are remarkable.

I'm surprised that they had the time considering their other challenges. It took the Law Society over four years and to put in place a mechanism that both challenged and protected the independence of the SRA. The Business and Oversight Board is doing a good job, but how would you describe the role and purpose of that body to the man on the Clapham Omnibus?

My argument this morning is that mindset is at least as important – if not more so – than perfectly drafted internal governance rules.

To discover in an investigation an email from a trade union to a regulator suggesting that the typeface is changed so that the LSB would not realise who had done the drafting was quite shocking.

So I make no apologies for our continuing hard challenge on the nature of regulatory boards – lay majorities were a critical step forward, lay chairs will now bring a reduced risk of unconscious bias and cultural attachment to heritage and professional tradition.

And we'll be deciding very shortly about control of the appointment process .

Is this about saying lawyers can't be trusted?

No – absolutely not. It's about taking a risk-based, proportionate decision on how best to deliver regulation that is independent of all vested interests.

This is what Parliament intended and what the public expects.

The question of trust in lawyers brings me to professional rule books – to the encyclopaedic volumes that contain the various codes of conduct.

The LSB has championed a move to outcomes focused regulation – a model that combines flexibility, responsibility and accountability for legal services providers. It is a step-change from the prevailing permissions based approach that prevents all behaviour unless it is shown to be safe.

I remain perplexed at the length of most rule books.

Why?

Because I trust the vast majority of legal services professionals to know the difference between right and wrong; to have a strong and unwavering commitment to their professional ethics; and to understand how to adhere to their professional principles.

I simply don't accept that today's barristers are so inherently less ethical than their predecessors or that they need a code which is 277 pages long.

Or that solicitors need 468 pages of rules from the SRA.

Yes, there will always be rogues – but, it won't be the length of the rule book that deters unethical behaviour.

Isn't it time to be clear and to be brave and to trust legal services professionals to make the right choices for their business, for their consumers, within a simple overarching framework?

I'd go so far as to say that fewer rules make for better ethics. And shouldn't we all want that?

In 2010 I asked whether the existing system of education and training was fit for its purposes.

I asked whether a system that had hardly changed over the last 40 years was really able to fulfil what is required of it.

I noted the paradox of ever greater specialisation within the legal profession and ever more fluid boundaries between the traditional branches of the profession.

I asked what that meant for how we train people – and for when and how we ask them to make major decisions about their future career and degree of specialisation.

Questions that seemed to me – a detached observer of the changing nature of professional practice – pretty basic.

It was deliberately provocative. That is also what we are here for – to provoke debate, to challenge, to question – to identify issues that transcend traditional boundaries and to stimulate cross-sector working to find solutions.

Some of the reaction was apoplectic.

Fortunately, thanks to the LSB's intervention, the three regulators most directly affected by the bleeding of professional boundaries seized the nettle and launched the LETR.

They are now working to implementing its outcomes. They are facing the future.

They are making change.

Are we there yet?

The LETR took three years and resulted in 371 pages of text.

It's not an unreasonable piece of problem diagnosis.

Is it a solution in its own right?

Probably not.

Could we have done more for less in a shorter time frame?

Probably yes.

But our subsequent intervention has been solely to issue 6 pages of statutory guidance to make sure all parties pull in the same direction.

This is a proportionate way to help ensure that the regulatory objectives are met.

We are not duplicating work.

We are pressing for progress: the future of the professions is too important to put into the slow lane.

I have never understood or found any rational reason for resisting LSB research and evidence gathering.

Why would professional bodies or regulators be resistant to understanding in detail the nature of the sector they operate in.

What's to be frightened of?

A little investment can deliver significant returns for providers, for users, for regulators – it's a win-win.

The impact our approach to research has had is considerable.

It is something I am proud of.

We have shone light on:

- the plight of small businesses who in 52% of cases reported that they would not choose to go to a lawyer. Research that proactive legal firms seized upon and used to adjust their offering immediately

- what happens when people with learning disabilities have legal needs. Research that The Law Society and individual law firms have acted on rapidly.

Our work on diversity – specifically our mandating of routine data collection – has also been a powerful tool in driving change.

Again, another area that saw vehement resistance – an interesting lesson about the culture within law firms compared to just about any other sector of the economy where understanding the diversity profile of your workforce is second-nature.

I am again proud of the work the LSB has stimulated.

With the benefit of hindsight, I suspect that one reason this market is so data light is its history.

The restrictive nature of practice, the closed shop if you like, has meant that the types of businesses that operate in other market sectors – think tanks, market analysts, business consultants – have simply had no foothold in legal services.

Without these symbiotic partners, there has been little desire to understand the makeup of the market, little need to understand the workings of competitors, the needs of clients and the consumer.

But the most stark indicator of where adhering to a plea for caution would have set our legal services sector back immeasurably has to be in relation to market liberalisation.

Just as they fought hard during the passing of the Act – foretelling all sorts of disasters – so the voices of tradition fought change designed to facilitate new business models, new ways of working, new thinking.

Let's take a look at some of the risks the soothsayers foretold for ABS.

ABS will ditch vulnerable consumers and / or cherry pick the most profitable areas of work.

Any evidence?

No. We asked ABS firms how they thought they were different from other law firms. 41% said they were no different.

Of those firms who did see themselves as being different, one third said it was because they focused on what the consumer wanted.

90% said they had not changed the groups of consumers they provided services to.

83% said they had not changed the areas of law they worked in.

ABS will lead to wholesale mis-selling and standards will decline because of cost-cutting

Any evidence?

No. 77% of ABS we spoke to said they had not changed the way they marketed their services, data from the Legal Ombudsman suggests there is an improved focus on consumers and complaints handling in ABS firms.

ABS has begun a fundamental shift in provision.

The fact of their existence has wrought immense market change.

And much more will follow.

There are 300 or so ABS licensed firms out there with more in the pipelines.

Firms can choose their route to market entry with both the Solicitors Regulation Authority and the Council for Licensed Conveyancers able to license firms.

Soon, I hope, they will be joined by firms licensed by the Institute of Chartered Accountants in England and Wales and the Intellectual Property Regulation Board.

All of which has the potential not just to add to the numbers of ABS firms – but also their diversity

It is the variety, inventiveness, responsiveness and range of ABS firms that is interesting – and the fact that they are forcing mainstream firms to make a similar response.

Looking back, what do those now say who resisted change, who misinformed, frightened and sought to undermine ABS as a concept?

The big businesses aren't churning out low-quality, bulk legal services – the legal equivalent of 'value baked beans' piled high and sold cheap – it's just not happening.

So, here we are in April 2014, we have changed the game: we've changed its rules, the playing field and the teams taking part.

I am proud of all of that.

But as I now have less than 48 hours left in post – we have managed to make progress despite the Legal Services Act.

It is no secret that I consider that the Clementi-settlement has proved to be fundamentally flawed.

A creature of compromise, it does all those it seeks to serve a dangerous disservice by turning a blind eye to the most intractable issues facing the evolving legal sector: protection of title; legal professional privilege; at its most basic, why we regulate what we do in the way we do.

The Legal Services Act 2007 is the 'almost' Act –it's just good enough.

It will never allow for the truly independent, holistic whole-market regulatory solution that is needed.

For sure, the LSB will continue to make it work.

The regulators will do their best.

Incremental improvements will be made.

But it will be a struggle and it will continue to be so.

So, my prescription is for bravery.

It's time for one more evolutionary change – the legal services equivalent of emerging from the swamp...

There is a road map out of it.

The LSB's 2013 blueprint for reforming legal services regulation is not the final answer but it sets out in great detail what I think is needed in order to secure a liberalised market, to offer greater innovation, choice and value to support growth, focus on skills and standards, encouragement for new business models and to improve access to advice for consumers.

It would strip away the over-engineering of the current Act – which is exceptionally complex and which builds in conflict.

There are simple steps that can be taken to get us on our way – steps that can hang on any passing legislative vehicle if there is sufficient political will.

And there are longer term initiatives: an independent review to develop timetabled and costed proposals for a new framework.

One that delivers regulation truly independent of Government and truly independent of vested interests.

There are some tough calls within that…

The first is losing the statutory guarantee of funding for professional lobbying activity.

In no other part of the economy can I imagine Parliament sanctioning the collection of a compulsory levy to practice which can also be used in part to fund contribution to public debate.

The list of permitted purposes for which the compulsory practising certificate fee can be put is both a restraint on trade – by requiring all lawyers to pay for activity beyond that which they need to pay in order to practice - and a tax on consumers who ultimately pay the price.

Next, we should start from a blank sheet when thinking about practising rules.

The current rule books have too much baggage, too much incremental change, too much planning for every eventuality – the details and level of prescription has created a culture of dependency within the sector. Professionals are deemed unable to think for themselves about what is '*right'* or what is '*wrong'* in a given situation.

Instead they look to the regulatory instruction manual for step by step hand holding.

That's not what I want to see from lawyers – if this cadre of individuals, entrusted with fighting for our most basic rights, can't be equipped to make a decision that will deliver a just outcome then I don't know who can.

Let's trust them much more.

If I have one regret from my time as Chairman – it is that I didn't pursue more forcibly a wholesale re-write of rule books.

But arguably my conclusion is that none of these things can happen with ten disparate regulators.

So do I think the time is right for a single regulator?

Yes I do.

Will we get one?

Yes, but not yet.

And maybe not for some time.

It is a box that no current political party will want to open willingly.

But do we need one?

Yes, I think we do.

A single regulator is the solution – is it revolutionary or evolutionary? – time will tell.

But, as Darwin is also claimed to have said:

"*In the long history of humankind (and animal kind too) those who have learned to collaborate and improvise most effectively have prevailed*".

As too often lawyers seem unable to collaborate and improvise without external force what other answer is there?

So let us move from atrophied thinking to a real sense of collaboration in a single body to see what can be achieved for of our fellow citizens.

Which brings me back to Charles Darwin and his view on atrophy and my final parting words in this role. Words which I have naturally adhered to for many years.

"*If I had my life to live again, I would make it a rule to read some poetry, listen to some music, and see some painting or drawing at least once a week; for perhaps the part of my brain now atrophied would then have been kept alive through life. The loss of those tastes is the loss of happiness."*