The College of Law of England and Wales

Legal Services Policy Institute

THE LEGAL SERVICES ACT 2007:
IMPLICATIONS FOR THE BAR'S SOURCES OF WORK

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The Bar Council was rightly proud of its response and effective lobbying as the Legal Services Bill made its passage through Parliament. As a result, the Bar seems to emerge relatively unscathed now that the Legal Services Act 2007 is with us. Indeed, the survey (reported in *Counsel*, January 2008) commissioned by the Bar Standards Board of the Bar's 'stakeholders' found a high level of satisfaction, with barristers seen as competent, highly qualified and dedicated, and whose advocacy skills set them apart.

One could therefore be forgiven for thinking that whatever difficulties there might be in the legal services market giving rise to a need for reform, the problems do not lie with practising barristers. The self-employed Bar can therefore settle back, and look forward to a secure, successful future. But can it?

Let's step back and consider for a moment. The self-employed Bar exists as a referral profession, and the Bar Council's efforts in response to the Clementi Review and the Legal Services Bill were designed to maintain that position. Forgive me for stating the blindingly obvious, but a referral profession needs referrals. What concerns me is a potentially fundamental change following the implementation of the Legal Services Act: a changing landscape, leading to a restructuring of those who refer work to the Bar. As recipients of referrals, the Bar faces few apparent imperatives to change; but suppose the nature, number and structure of those who refer work changes. What then?

Some background

There are about 85,000 solicitors in private practice, distributed among some 10,000 firms. But these aggregate numbers disguise distortion in distribution. Only 500 or so of those firms (about 5%) have more than 10 partners, but they account for 54% of all solicitors in private practice – an average of about 90 solicitors per firm. In addition, those firms generate about two-thirds of total fee income. There is therefore a significant 'skew' in the market towards a small number of large law firms. Theirs is a highly competitive market, acting for predominantly commercial clients.

This leaves about 9,500 law firms and 38,000 solicitors in 'smaller' firms – an average of just four solicitors per firm. Those on the outside of the profession who look at the delivery of legal services as a market – such as the Legal Services Commission and insurance companies – see three principal problems with such significant fragmentation of suppliers.

First, each firm incurs inevitable costs of establishment (premises, technology, support staff, and so on): in a fragmented market, these become replicated expenses that in aggregate drive up the costs of legal services.

Second, there is a tendency for law firms to use qualified lawyers. One point that the Legal Services Act forces us to address is that clients only *have* to use a qualified lawyer to deliver reserved activities (in essence, conveyancing, probate, the right to conduct litigation, rights of audience, notarial activities, and the administration of oaths). Given that qualified lawyers have a tendency to be more expensive than, say, paralegals, again there is a perception that more expense than necessary is built into the system where lawyers are used but are not essential.

Third, where suppliers of work such as the Legal Services Commission and insurance companies have to deal with a large number of firms, their own administrative costs are higher than they would otherwise be – again, driving up the total cost of legal services.

In all these respects, the costs of legal services are seen to be higher than an 'efficient market' would produce. The Legal Services Commission and others (with Government support) are intent on addressing these inefficiencies. The consequent pressure and competition for work is likely to lead to fewer, larger law firms. None of this is dependent on the Legal Services Act, so even without the implementation of the Act we should be contemplating a reduction in the number of firms who refer work to the Bar. Even if the *volume* of referred work does not decline, the *concentration* of referrals in a smaller number of firms will reduce the 'points of access' to work and privilege certain relationships over others.

The Legal Services Act

The Legal Services Act 2007 offers some short-term opportunities to solicitors, as well as long-term opportunities to new competitors.

In the short term, the adoption of Sir David Clementi's idea of a 'legal disciplinary practice' (LDP – in fact referred to in the Act as a 'legal services body') will allow solicitors and barristers to go into partnership (or other forms of co-ownership) together. This will facilitate two types of development – one 'career-related' and the other 'strategic'.

The 'career-related response' reflects the reality that some barristers have decided to switch to solicitors' firms, albeit at the moment they can only be employed (unless they choose to disbar themselves and re-qualify as solicitors so that they might become partners). The advent of LDPs will mean that they can become partners without re-qualifying. This seems sensible, since the 'accident' of their original professional qualification should not in principle preclude them from progressing from employment to ownership. The 'strategic response' would allow solicitors and barristers to create a new type of firm offering the twin pillars of advisory and advocacy services.

There could be a fine dividing line between the career-related and strategic variants. For me, the difference is one of degree. In the career-related LDP, barristers are more likely to be working as solicitors in all but name, and might not be exercising their rights of audience: their focus will be primarily advisory. In the strategic LDP, the new firm makes a significant play for both advisory and advocacy work, and will rely predominantly on its barrister-members for advocacy and exercising rights of audience.

I am very conscious that these solicitor-barrister LDPs give rise to significant implications for the cab-rank rule and for conflicts of interest and client confidentiality. I suspect that these implications will place some limitation (certainly considerable, possibly terminal) on the emergence of what I have described as the strategic LDP. Nevertheless, for present purposes, all forms of LDPs hold some potential for a reduction in the numbers of the self-employed Bar. To the extent that clients and referrers follow barristers to their new LDP home, there will also then be a reduction in the referrals available to the self-employed Bar.

For pragmatic reasons, while we might expect LDPs not to create too many incursions into the territory of the self-employed Bar and its referral work, the same might not be true of the longer-term infiltration of new entrants into the market. These new providers will take advantage of the 'Tesco Law' option of an alternative business structure (ABS) under the Legal Services Act (statutorily referred to as a 'licensed body'). It is a mistake to think, however, that these developments are dependent on the Act. We have already seen Cooperative Legal Services, Halifax

Legal Solutions (Halifax Bank of Scotland), and the Automobile Association, as well as others, establish themselves as serious new entrants. All that the Act will enable is ownership, not the right to establish. Venture capital funds have also expressed interest in acquiring a share in law firms – and not necessarily the largest firms.

The Act will allow potentially 100% of the ownership of an ABS firm to be in the hands of non-lawyers. Even without total ownership, the influence that a significant stake in a law firm could bring will change the predominant approach and culture. It will, in short, be more business-like.

To the extent that qualified lawyers are used in such new-entrant firms, it is likely that fewer of them will hold a major ownership share, and their involvement will generally be confined to reserved activities. Thus, a new entrant can establish its own internal legal capacity with a lower cost-base than the traditional law firm. While it is highly unlikely that these providers will ever internalise their entire need for legal services, it would be reasonable to surmise that they will make less use of external law firms and the self-employed Bar.

Given that a number of the new entrants will have the capacity to capture large sources of work (for instance, as insurers, or as membership organisations), their ability to control access to work is potentially considerable. Their target legal services include conveyancing, personal injury, wills and probate, and employment; because of negative brand association, they are less likely to be interested in crime and family work. Uncertainty, lack of control and the spiralling costs associated with dispute resolution also suggest that these volume businesses will take commercial decisions to litigate less (or not at all), and the associated need for advocacy could also decline.

What the crystal ball might show

Let me be clear: I am describing what *might* happen to the Bar's sources of referral work, not necessarily what *will* happen. One thing I am sure about, though, is that the future challenge is not about the quality of legal services. There is no doubt that the legal profession, and the Bar in particular, is well able to provide high-quality advice and advocacy. The real challenge lies in clients who cannot afford that quality – or, more challenging still, those who can afford to pay choosing not to. No business has a future unless it provides services that its market is able and willing to pay for. Lawyers have to be quite clear that there is value in what they do for the fees they charge – whatever protestations they might wish to make about the client's (often misunderstood or self-denied) need for quality.

Rather than quality and value, the major determinants of the Bar's future as a referral profession lie in access to work and in the distribution of the available work across the legal market. The increasing power of large suppliers of work such as the

Legal Services Commission, insurers and membership organisations means that if they decide (a) to reduce the volume of work for which they seek legal support, (b) increase the amount of legal work they handle internally, or (c) confine their use of external lawyers to fewer, larger, preferred firms or chambers, then the capacity of the self-employed Bar to gain referrals is likely to be compromised. Existing relationships with law firms and other referrers of work therefore need to be cherished and consolidated.

Firms of solicitors might also be lured by the twin pull of best-value tendering and single graduated fees to keep more legal aid work for themselves, with or without recruiting barristers into a 'strategic LDP'. The general forces of competition and client pressure on costs and fees could also exert themselves to encourage law firms to merge and consolidate well beyond the confines of legal aid. Again, with the potential for a reduction in the number of firms able to refer work to the self-employed Bar, the importance of maintaining and valuing existing relationships cannot be over-estimated.

A new world

I will no doubt be accused of painting a gloomy and market-driven picture that ignores access to justice and many fine qualities of busy, highly successful and respected practitioners. I apologise for not having the space to consider every nuance. However, all of the developments that I have discussed as they affect those who refer work to the self-employed Bar have already started to happen or have been seriously discussed. Perhaps not all of them will materialise; perhaps their effects will not be as extensive as planned. Nevertheless, ignoring, denying or failing to consider the consequences of the Act and continuing developments in the marketplace on those who refer work to the self-employed Bar could lead to economic and professional attrition.

Perhaps it is a shame that we have to use the language of business and economics to shape what we do as professionals. But it is difficult to refute Sir David Clementi's conclusion in his final report. Describing how client satisfaction and complaints arise more from poor business service than from poor legal advice, he writes: "If certain lawyers continue to reject the notion that they are in business, such complaints will continue until they are indeed out of business". High-quality technical advice and advocacy will always be needed; however, they are now necessary but not sufficient preconditions to success. A referral profession needs referrers – and referrers who consider (by their own assessment, not the Bar's) that they receive good service and value for money.

The Bar has a long history of adapting to meet challenges. The best can, must, and will survive and thrive in the world that follows the Legal Services Act. That world

heralds greater choice for the users of legal services; but it is also a permissive world that allows more options for the providers of those services, too. Now is the time to consider the options with an open mind, as well as to anticipate and prepare for the consequences of decisions and actions taken by others who will influence the availability and distribution of work in the years ahead.

Stephen Mayson was called to the Bar by Lincoln's Inn in 1977. This article is based on a pre-dinner speech in Hall at Lincoln's Inn on 31 January 2008 and a keynote address to the Bar's Annual Remuneration Conference on 21 June 2008. A version of it was published in the July 2008 issue of *Counsel*.

