

Legal services bill and private practice



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The ability of the legal system to effectively manage and serve its consumers is one of the most important traits of justice. Legal practitioners must be able to offer adequate and effective services for those who require those services, or else the concepts of a fair trial and of a balanced, impartial judicial system are ones that cannot be satisfied.

The legal services bill, which was published in May of 2006, was aimed at improving private legal practice, and improving the level and quality of services provided by attorneys and other legal practitioners. Yet, there are those who dispute the effectiveness of the legal services bill, and there have been many opinions given on the bill and on private practice in the entirety of the legal profession.

These opinions have come from politicians, legal experts, and others who are concerned about the legal profession and its ability to serve its clients correctly and fairly. This essay will attempt to delineate the legal services bill, the way in which it seeks to help the legal profession in the United Kingdom, and the dialogue that has emerged concerning the bill. It will also put the legal services bill in perspective, and will look at private practice and the legal profession with a wider lens.

The problems of the British legal system were widely acknowledged by the government. Sir David Clementi, who was appointed in 2003 to produce a review of the legal services framework for Great Britain, published the results of his review in a 2004 report. Clementi was not optimistic about the state of the framework as he saw it.

“ The current system is flawed,” he wrote in his introduction to the report. “ Whilst some lawyers will continue to argue that the current system ‘ ain’t broke’, I believe there is strong evidence of the need for major reform: (I) to the regulatory framework which, as described in the Government’s own Scoping Study, is flawed; (II) to the complaints system which needs change to benefit the consumer; and (III) to the types of business structures permitted to provide legal services to the consumer, which have changed little over a significant period.” (Clementi, 2004) Clementi believed that these reforms would help improve independent, private practice.

In response to this report, the legal services bill was created, published in May of 2006 and highlighted in the Queen’s speech in November of 2006.

The bill’s main goals, according to a BBC summary of the bill, is to “ create independent regulators for the legal profession and greater competition in the legal services market.” (BBC, 2006) The main provisions in the bill are to set out clear objectives about the regulatory framework and the legal principles of the profession, and to separate the representative and regulatory functions of designated legal bodies; to create a new Legal Services

Board that will provide oversight of legal regulatory bodies; to give the Legal Services Board powers to oversee frontline regulators; to create an Office for Legal Complaints; and to enable new business structures for the legal profession, which will allow various types of lawyers and non-lawyers to work on equal footing. (BBC, 2006)

Yet, in order to understand the reasons for the legal services bill, it is necessary to give a general background for the status of the legal profession in the United Kingdom, which gave rise to the need for this bill.

In 1944, when legal aid and the legal profession in the United Kingdom were still unreformed and were poorly designed, a Departmental Committee appointed Lord Rushcliffe to examine the legal profession in the UK. Rushcliffe advised that instead of the State employing thousands of attorneys to practice cases, it should instead give legal aid to attorneys in private practices. His advice was implemented in 1949, and continued to be used for several decades without much reform.

Since that time, it has been difficult to strike a balance between the amount of aid given out, the amount of legal professionals available for practice, and the availability of legal service to consumers. Many had been calling for major reform since the late 1970s. (Thorp, 1999)

The Law Commissions Act of 1965 was created in order to keep the law and the legal profession under review and to recommend reform where it is needed. The Law Commission had been responsible for many reforms in regards to specific laws, but where independent legal practice is concerned, the jurisdiction of the Law Commission does not permit them to reform the overall system of private legal practice.

Legal work in the UNK can be broken down into three distinct categories: non-contentious, which includes things such as contracts, wills, and other issues between clients that is able to be resolved without litigation; litigation, which includes the actual courtroom process and the formal and informal

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processes leading up to the courtroom proceedings; and advocacy work in the courts.

As Stephen Davies writes, sometimes it is difficult for legal consumers to understand their particular legal problems, and therefore, it is difficult for those consumers to contact the proper attorney or legal personnel to resolve the case.

“ Moreover,” says Davis, “ many will have little or no knowledge about the skills and experience of different advocates, or ability to judge their quality. For many consumers, the demand is exceptional, and there is little opportunity for quality comparison through repeat purchases. Thus, legal services are not homogenous - consumers differ in their problems and barristers differ in their skills, knowledge and experience.” (Davies, 2005)

This is a problem, according to Davies, because those who wish to bring legal cases, but do not understand their particular legal problems, are not receiving justice. The court system, according to Davies, should be open to all, and these restrictions do not allow for all to be satisfied by the current system.

According to the OFT report of 2001, there were 101, 000 registered solicitors in England and Wales, in the year 2000, and the ten largest solicitors’ firms had a market share of 46. 8%. (Davies, 2005) These solicitors are responsible for playing the “ middleman” between consumers and litigators, and their role is an important one in the legal process.

Says Davies, “ In the traditional model, the solicitor plays this middle-man role. This is, of course, not particularly exceptional - few markets in general are characterized by perfect information on both sides, and a common response to this market imperfection is the existence of the middle-man. Of course, we should not expect the asymmetry to be pronounced for those consumers who make repeat purchases, and for whom it is worthwhile to accumulate costly information (e. g. many corporate customers).” (Davies, 2005)

With figures updated to 2004, the amount of solicitors has grown to 121, 000, which represents a 20% growth in the size of the profession, but the number of firms has declined by 500. Size distribution among these firms is very skewed with most either having between 2 to 4 partners, or more than 81 partners.

The Bar, in England and Wales, is a much smaller profession. According to the same OFT report, about 10, 000 barristers are employed in independent practice in England and Wales, and 2, 500 are employed by the State.

While Davies admits that there are problems with the current structure and market saturation of both solicitors and barristers, he derides those who believe that any system of legal service could be made perfect.

“ In some of the public debate, I have seen comparisons between the market so described and the economists’ ideal notion of perfect competition. In my opinion, this is not an appropriate comparator,” Davies continues. “ Perfect competition is characterized by (I) perfect information, (II) an homogeneous

product, (III) the absence of regulation. None of these assumptions is appropriate for legal services.

Asymmetric information is an innate feature of the market, and it is difficult to imagine how any policy intervention could entirely remove this market imperfection. Amongst barristers (and perhaps between solicitors too), there are important differences in their services (specialisms). The profession's obligations to "The Law" and universal access dictates that some sort of regulation is unavoidable." (Davies, 2005)

Davies was directly responding to the original draft of Clementi's report.

"In proposing reforms designed to encourage cost-effective practices," writes Clementi, "there is no suggestion of diminution in standards, either in the quality of legal advice provided or in the ethical standards of practitioners." (Clementi, 2004)

Clementi's recommendations, and the subsequent publishing of the legal services bill, was met with split reactions, and continues to be a lightning rod for mixed opinions. Some believe that the benefits of the bill are "more flexible working environments attracting a more diverse group of high quality individuals into the profession; an increased supply of services focused on what customers want to buy rather than what lawyers want to sell; and increased competition leading to cheaper and better services." (Blanes, 2005)

Yet, "this is the optimist's view," writes Jordi Blanes i Vidal, in a 2005 response to Clementi's recommendations co-written with Ian Jewitt and Clare

Leaver. “ There is also a pessimistic view: a breakdown in the functioning of the legal services industry as professional standards of behaviour become eroded through the unleashing and subsequent enforcement of short-term opportunistic profit motives.” (Blanes, 2005)

The structure of the legal services bill is such that it is designed to work within the regulation, complaints system and the restrictive nature of current business systems.

Regulation will be overseen by the Legal Services Board. They will be in charge of promoting seven regulatory objectives, including the rule of law and improved access to justice.

As Sarah Clover and Lydia Hassall observe, “ More controversially, they include the protection and promotion of the consumer interest, despite the Joint Committee’s recommendation that the Bill should also protect and promote the public interest, which may not always coincide with consumer interest.” (Clover and Hassall, 2007)

One another objective of the bill, which was not featured in the original draft but was added in response to widely-expressed concern from those who believed that the bill threatened the independence of the legal profession, is to encourage an independent, strong and effective legal profession.

However, the addition of this objective in the bill has not completely stopped the criticism from those who see a conflict of interest, which centers on the idea that the Secretary of State appoints all Chairpersons and the members of the board.

“ It remains unclear how the [Legal Services Bill] will operate in practice. Indeed, there is no statement in the Bill as to what the LSB will actually do. Whilst the Government has said in the response to the Joint Committee’s Report that the LSB will operate in partnership with the Front Line Regulators and would only use its powers if the Front Line Regulators were clearly failing, many, including the Law Society, would like to see a positive commitment in the Bill to such ‘light-touch’ regulation.” (Clover and Hassall, 2007)

The government has agreed to take another look at the regulation part of the bill because of such widespread discontent.

The Complaints section of the bill created a single independent service for handling complaints - the Office of Legal Complaints - for all branches of the legal profession, in order to provide customers with greater confidence in their legal service, and to provide a quick and fair fix when things go wrong. The OLC will be funded by the legal profession as a whole, and consumers will get the service for free, assuming that they do not pass £20, 000 in compensation.

“ It will be interesting to see how the increased level of redress to £20, 000 (compared with the Law Society’s current maximum of £15, 000) affects the consumer’s choice in pursuing a remedy against his solicitor. Whilst in the past most complaints to the Law Society have resulted in only a small payment of a few hundred pounds, the available figures relate to a time when the maximum award was only £5, 000 and when the Law Society did not deal with allegations of negligence as such.

It is clear that, in the absence of legal aid, the OLC should provide consumers who have suffered losses of up to £20, 000 with an affordable and quick remedy, although it is unlikely to have much impact on claims of higher value, or those involving complex legal matters.” (Clover and Hassall, 2007)

The third objective of the bill is to affect the structure of firms and legal partnerships. The bill will provide for Alternative Business Structures, or ABS, which will provide lawyers and non-lawyers a chance to work together to provide legal services, and for non-lawyers to inject capital into legal services firms.

It is expected to take several months until these reforms are fully implemented into the current system, and will take years for those reforms to have an impact on the system.

In May of 2006, a report was published by an all-party Committee that has raised concerns about the legal services bill.

Lord Hunt of Wirral, who served as Chairperson of the Joint Committee on the legal services bill, said, “ we have some very real concerns about the proposals put forward in this bill. The draft legal services bill departs from the recommendations of Sir David Clementi in a number of important respects and it is essential the Government should explain each of those departures fully. Most of our substantive recommendations would come under a single heading, namely that of going back to the future - the future envisaged by Clementi.” (Parliament, 2006)

Hunt raised concerns about the legal profession remaining independent from the government. He said that it is not only important that the legal profession be independent, but that it must be perceived as an independent body, and Hunt expressed concern that too much regulation would undermine general support and confidence.

Seemingly, the main concern for all those who are involved in this reform process, including those are for and those who oppose the legal services bill or portions of the legal services bill, is the wishes of the consumer.

In a 2005 white paper, “ The Future of Legal Services: Putting the Consumer First,” the government expressed its views on the topic.

“ Consumers need, and deserve, legal services that are efficient, effective, and economic. They want to have choice, and they want to have confidence in a transparent and accountable industry. Legal services are crucial to people’s ability to access justice. They must therefore be regulated and made available in such a way as to meet the needs of the public - individuals, families, and businesses.

The professional competence of lawyers is not in doubt. The calibre of many of our legal professionals is among the best in the world. But despite this, too many consumers are finding that they are not receiving a good or a fair deal.” (White Paper, 2005)

The government concluded in their white paper that the current system was a ‘regulatory maze’ and that it is outdated, inflexible, over complex and not accountable or transparent enough.

“ Reform is overdue. It is necessary to ensure that consumers are in the driving seat in the provision of legal services. It is also important to ensure that confidence in providers is maintained and increased.” (White Paper, 2005)

In response to this white paper, the City of London Law Society said that there was not much enthusiasm in the city for the alternative business structures that were planned, although the CLLS was interested in the prospect of forming partnerships with barristers and solicitors, and promoting non-lawyers to partner with litigators.

“ Despite the concerns,” write Clover and Hassall, “ most welcome the idea of reform and a better (but not necessarily more) regulated profession. This should have a positive impact on the professional performance of the legal profession as a whole thereby reducing the number of negligence claims.” (Clover and Hassall, 2007) This positive impact is dependant upon the degree and amount of regulation for many in the profession.

Major reform is taking place with the implementation of the legal services bill, despite the fact that not all are satisfied with the type or quality of the reform. Concerns about an outdated system being replaced with a restrictive system are still important to listen to, but the despite its flaws, the legal services bill is aimed to repair many of the flaws in the current system. Reexamination of the bill is necessary to please all parties involved, but the bill seems to be a step in the right direction for the future of the legal profession in the United Kingdom.

With so much riding on the ability to obtain competent, fair and efficient legal service, it is crucial that reforms be taken seriously and should not be used to undermine public confidence and opinion about the legal profession. With so many solicitors and barristers causing concern over the “ middle-man” function in the legal profession, regulation and complaints are mandatory aspects. The legal profession in private practice is able to provide the general public with adequate and effective service, and the legal services bill has an opportunity to improve the quality of service being provided.

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