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## **Professionalism under the Legal Services Act 2007**

Andrew Boon<sup>1</sup>

### **Introduction**

Jurisdictions around the world are regulating and re-regulating legal professions or considering such changes (Darrois, 2009, Koh *et al.*, 2009). This includes the common law countries, where legal professionalism has traditionally been strong (Mark and Cowdroy, 2004, Schneyer, 2009, Devlin, 2011 [nb this collection]). The decline of professional control and privilege coincides with economic and social change, including the drive of the capitalist state towards consumerism and commodification (Giddens, 1991). In the UK, the process began in earnest in the 1980s, when Margaret Thatcher's Conservative government challenged the principle of welfarism and sought to tighten state control of public and private sector monopolies. The 2007 Legal Services Act (LSA) represents a significant watershed, one that might have signalled the death of legal professionalism. In the event the LSA created a Legal Services Board (LSB) to oversee regulation of the legal services market within a framework of statutory goals, including promotion of an independent, strong, diverse and effective legal profession.

Rather than rationalising the professions or abolishing their organisational and normative structures, the LSA promises to enshrine professional aspirations and principles in legislation while tightening control of professional bodies, influencing the professional agenda and shaping the market through competition. This article traces the processes by which the LSA is redefining the professions and professionalism in England and Wales. It considers construction and organisation of professional work, reconstruction of the regulatory system, adjustments in regulatory method and the implications for education and training strategies. The article concludes that the LSA establishes relationships and processes that will undermine aspects of traditional professionalism and indicates ways in which the legal professions might mitigate some of these impacts.

### **Legal professionalism in England and Wales**

There is no single model of legal professionalism since the public role of professions is defined by their relationship to the state. Different arrangements have evolved in different countries, depending on the processes of professionalization and the administrative capacity of states during professional formation (Burrage *et al.*, 1990; Siegrist, 2002; Halliday, 1987). In England and Wales, independent professions were

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assumed to part of the 'balanced constitution', the Glorious Revolution of 1688 having affirmed the autonomy of many professional, chartered and local bodies, including the Bar, as 'little republics' (Burrage, 1997; Sugarman, 1996). This contributed to an assumption of immunity from state interference (Weber, 1978) bolstered by the proposition that the rule of law hinged on the capacity and inclination of the judiciary to hold public officials, including Ministers, to account in the exercise of their powers (Dicey, 1962). In England and Wales, a judiciary drawn from barrister practitioners consider an independent legal profession to be 'scarcely less important' to maintaining the rule of law than an independent judiciary (Bingham, 2010:92).

Solicitors, the other main branch of the profession in England and Wales, flourished during the nineteenth century at the centre of the capitalist, middle class social revolution. They achieved a relationship of trust with the state and eventually parity of esteem with the Bar (Sugarman, 1996; 84, Boon and Levin, 2008: 51) but not a constitutional role. The challenge to this professional idyll is recent. Even in 1979 a Royal Commission on Legal Services (Benson, 1979) made a large number of recommendations but little change of the status quo. Reform of the legal profession was, however, on the agenda from 1987, when the solicitors' conveyancing monopoly was ended by the creation of the profession of licensed conveyancers.<sup>2</sup> Solicitors' charges for conveyancing tumbled even before competition with licensed conveyancers began in earnest (Domberger and Sherr, 1989), at least initially (Stephen *et al*, 1994) vindicating and encouraging the policy of competition. This success also appeared to cast the rule of law as an inhibitor on executive power to achieve distributive justice (Nicol, 2010; 38).

The beginning of a sustained effort by the state to control the 'little republics' met with a bitter campaign waged by the judges to limit the 'damage' threatened by Lord Mackay's Green Papers (Abel, 2003; Zander, 1990). Eventually, the Courts and Legal Services Act 1990 achieved a revolutionary recalibration of the roles of solicitors and barristers, giving solicitors rights of audience in higher courts. In return, the Bar, which had insisted on receiving instructions only from solicitors for the previous two centuries, unenthusiastically agreed to accept instructions from a list of other professions. These changes in professional jurisdiction (Abbott, 1986) had little practical impact on the conduct of advocacy (Boon and Flood, 1999) but affirmed competition as the policy of choice. Demanding justification for any measure that might restrict supply of professional services the Office of Fair Trading whittled away remaining differences between the professions, for example, direct access by lay clients to approved barristers (Flood and Whyte, 2009). Other influences on the standardisation of practice modes were international legal practice (Faulconbridge *et al*, 2011) and European competition policy (Lee, 2010).

Sir David Clementi's report in 2004 threatened a more serious blow to legal professionalism. Clementi was asked to consider 'what regulatory framework would best promote competition, innovation and the public consumer interest in an efficient, effective and independent legal sector' (Clementi, 2004). Serious consideration was given to the replacement of the professional bodies by a single legal services regulator, but while Clementi was unimpressed by the confusing plethora of

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<sup>2</sup> Administration of Justice Act 1985, s11.

processes surrounding consumer complaints, the volume of complaints to the Law Society and its record in handling them (Clementi, 2004, Ch.3) he came down in favour what could be seen as a compromise. Opting for a second tier public agency overseeing the key players in the legal services market, Clementi explained that:

The current system has produced a strong and independently minded profession, operating in most cases to high standards, able to compete successfully internationally. These strengths would suggest that the failings of the system, identified in the Scoping Study and covered in this Review, should be tackled by reform starting from where we are, rather than from scratch. (Clementi, Ch. 2 para 32)

The Legal Services Act 2007 (LSA), which enacted Clementi's regulatory half way house, was then expected to signal the vision of legal practice as a business:

'What has emerged confounds this analysis. Rather than ditch finally the illusions and pretensions of professionalism, the UK reforms have instead sought to enshrine key elements of professionalism in a market model. In England at least, law should be both a business and a profession'. (Whelan, 2008, p.491)

This raises questions about how legal professionalism is defined, both theoretically and practically.

Functional analysis of professions perceived that they fulfil an essential and beneficial social role (Durkheim, 1992, 11; Parsons, 1954) while economic theories tend to view professional ideology as a smokescreen for market exploitation (Larsson, 1977; Abbott, 1988; Abel, 1988). There have been various attempts to identify professions by their attributes or traits (Greenwood, 1957; Burrage *et al*, 1990), but common law countries have tended to see professionalism as a means of controlling occupations through self regulation rather than state or community control (Johnson, 1972). The rationale of professionalism is that consumers benefit from experts regulating their own markets in a spirit of public service, albeit in their long term interests. Halliday (1987) observes that the security of professional monopoly enables lawyers to genuinely consider the public good while Paterson (1996) considered the loss of the conveyancing monopoly a demonstration of how the professions' compact with the state might be adjusted.

Parker (1999) argues that 'neo-contractual' approaches to professionalism accept that professional failings can only lead to state sanction, like the removal of monopoly. This may be an undesirable option in many circumstances and one that denies the possibility of dialogue with stakeholders with a view to improved performance. Treating lawyers as collectively untrustworthy risks both the sense of responsibility that potentially accompanies self-regulation and the will to co-operate with reform (Parker, 1999; 124-134). Parker therefore envisages a 'democratic theory of professionalism' whereby the profession is 'held accountable to the justice concerns of the community...' with reporting by practitioners against 'performance indicators that profession, state and community agree to be fair' (Parker, 1999;144). Such an approach demands a regulatory approach reconciling trust and distrust, flexible enough to deal with the fact that the profession is segmented, complex and ambiguous (Parker, 1999: 138) and able to harness the altruistic impulse of professionalism while controlling the risks of cartelization (Parker, 1999, p.109). Sommerlad, however, senses an inherent paradox in this aspiration, the LSA reflecting, on the one hand:

`... belief that 'professional ethics' are a thin disguise for professional rent-seeking... on the other hand are appeals to lawyers to adopt an ethic of public service and good conduct.'

(Sommerlad 2010; 95)

Previous attempts by the state to regulate legal services directly, through franchise agreements and block contracts imposed on legal aid providers, were resented by the profession (Boon and Levin 2008: 61). Sommerlad (1995) likened the regulatory mechanisms used for regulating legal aid firms to those used by the Thatcher governments for restructuring, organising and managing public services. These methods, New Managerialism and New Public Management (Deem *et al.*, 2007), were loosely coupled innovations offering a flexible balance between strategic and operational control, producing 'regulated autonomy' for the regulated within underlying normative principles (Hoggett, 1996). The tools of these strategies are audit and transparency regimes, which demand system wide, self reinforcing transitions in administrative forms and decision making processes. Professionalism, an ideology that assumes that expert producers are best placed to supply consumer need, proceeds from a different basic premise to Managerialism, an ideology that management is necessary to economic progress, technological development and order.

This brief history and review of the theoretical context of professionalism is a background to two broad interpretations of the LSA. On one hand, competition and a more explicit external focus will reinvigorate legal professionalism. Therefore, the LSA may allow lawyers to reconstruct as a liberal profession (Flood, 2010), or operate as a corrective to professional failings (Maute, 2010), build a new version of professionalism on a responsive form of regulation (Parker, 1999, Webb, 2004). On the other hand, the purpose of the LSA is to compromise or destroy professionalism, at least as a mechanism of occupational control. Therefore, the LSA represents the interests of the state and private capital in controlling professional work (Freidson 1988), or a process of capitalist concentration and rationalisation reflecting political faith in market mechanisms and a rhetorical assault on justice as a public good (Sommerlad, 2010) or, according to Lord Neuberger, Master of the Rolls, a threat the rule of law from 'consumer fundamentalism' (Legal Futures, 2010a). The reality may lie between these extremes, but, assuming it survives, the LSA will redefine legal professionalism.

In England and Wales the ability of professional bodies to set and police standards of behaviour, use the capitalised value of education, training and experience to command resources and control entry (Houle, 1980; Schein, 1972; Larsson, 1977; Abel, 1988) remain, but are increasingly weakened. Kritzer (1999) argues that this 'traditional professionalism' is distinguished from the sociological concept, which is based on exclusive membership and the application of abstract knowledge. Kritzer argues that the formal professions like law are losing their uniqueness and being eclipsed by professions generally. Freidson considers that the 'worst and not unlikely possibility is that professionals will be slowly transformed into especially privileged technical workers' (1988; 209). This moves legal professionalism closer to Perkin (1989), who argued that the professional ideal, trained expertise and selection by merit, as judged by similarly educated experts, permeates society as a vision of the ideal citizen. This version of professionalism is stripped down, generalised, assuming an almost colloquial meaning. Such a view is increasingly reflected in the focus of

the sociological analysis of professionalism on issues of professional identities, competence and responsibility (Evetts 2003).

Freidson (1988) identifies core denominators of professionalism as expertise, credentialism and autonomy,<sup>3</sup> in which discretion plays a key part. Sciulli (2005) emphasises professional 'commitment to institutional design and ongoing deliberation' whereby professions manifest responsibility for determining how client needs are met. Others (Pound, 1953;40, Boon and Levin, 2008;306) assert the importance of collegial frameworks, which support the discipline and the public service ethos. These normative and structural dimensions of professionalism may be vulnerable to regulatory change that replaces collaboration with competition as the dominant cultural imperative. The use of managerial regulatory models may transfer professional discretion to 'external monitors of those procedures and skills' (Sommerlad, 1995, p.182). Audit methods that are said to have transformed higher education 'communities of scholars' into conventional workplaces (Deem *et al.* 2007) may operate to replace the collegiality of professional legal practice with rational bureaucracy. It remains to be seen whether the implicit failure of professional ideology will drive the legal profession 'towards the maximisation of profit and the minimisation of discretion' (Freidson, 2100, p.220) or whether the erosion of professional ideology can be mitigated.

#### **A. Regulatory relationships under the LSA**

The Legal Services Board (LSB) is a classic second tier agency, of a type typically charged with controlling cartelization, laying down minimum quality standards for first tier, front line regulators and acting 'as a proxy for insufficiently informed consumers' (Ogus, 1995; 106). These roles are reflected in the regulatory objectives of the LSA, which the LSB is bound to promote (LSA 2007 s.3(2)). They are protecting and promoting the public interest; supporting the constitutional principle of the rule of law; improving access to justice; protecting and promoting the interests of consumers; promoting competition in the provision of services...; encouraging an independent, strong, diverse and effective legal profession; increasing public understanding of the citizen's legal rights and duties; promoting and maintaining adherence to the professional principles (LSA 2007 s. 1(1)(a)-(h)). The "professional principles" referred to in the last objective, require for example, that authorised persons act with independence and integrity, maintain proper standards of work and client confidentiality, act in the best interests of clients and, when exercising rights of audience or conducting litigation, comply with their duty to the court to act with independence in the interests of justice (LSA s.1(3) (a) - (e)).

Under the LSA, the 'authorised persons' bound by the professional principles are defined by six tasks, the 'reserved legal activities', identified by the LSA as rights of audience, conduct of litigation, work on reserved instruments, probate work, notarial work and administration of oaths (LSA 2007 s.12(1) and Schedule 2). Those entitled to carry on these activities are authorised, or exempt,<sup>4</sup> in relation to that activity (LSA

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<sup>3</sup> Autonomy, particularly in the US, be interpreted as the occupation's independence from the state in internal management, while in the European context, it often refers to the freedom of individual professionals to exercise discretion in their work.

<sup>4</sup> Schedule 3 provides a list of such persons, for example, a person granted a right of audience by the court in a particular matter.

s.13(2)) or permitted to carry out that activity by a body licensed for that reserved legal activity by an approved licensing authority(LSA s.18(1)). A licensed body is one governed by Part 5 of the Act, under which Alternative Business Structures (ABS) are permitted (LSA, 2007 s.71(2)). Such bodies will be operational from October 2011 and are licensable under the Act if a non-authorised person is a manager or has an interest (LSA, 2007 s.72). Some essentially legal work, immigration advice, claims management and insolvency, for example, are not regulated under the LSA but by other statutes. Others, will writing for example, are not regulated by any statute but may be indirectly regulated because the person carrying out the work is a licensed by professional body (Mayson and Marley, 2010).

Before the Legal Services Act 2007 the seven professions that are now approved, or 'front line', regulators under the LSB, controlled the legal services market in England and Wales. The largest, The Law Society represents over sixty thousand solicitors. Practicing in organisations ranging from large commercial and international law firms to local firms and sole practitioners, solicitors provide the bulk of services direct to clients. Around twelve thousand barristers offer specialist advocacy services and advice. They do not generally act for clients direct but, through the intermediation of solicitors. Although solicitors have been able to obtain rights of audience in higher courts since the 1990s, and barristers to act directly for clients (Flood and Whyte, 2009), each profession appear to have continued as before, rejecting the opportunity to conduct the work traditionally associated with the other (Boon and Levin, 2008; 49, Ch. 2).

The most significant numerically of the remaining occupations are the twenty thousand legal executives belonging to the Institute of Legal Executives, an approved regulator (Francis, 2002). These sometimes become senior members and partners in solicitors' firms but many tend to work mainly under the direction of solicitors. Additionally, there are smaller numbers of licensed conveyancers, patent and trade mark attorneys, law costs draughtsmen and notaries, providing specialist advice and services, either to law firms or private clients. Estimates that the number working in the legal services market could be as many as 300,000, suggest that many 'para-legal' workers, including many with legal qualifications but unable to find work as solicitors or barristers, could be outside the ambit of approved regulators.

In addition to covering a diverse group of legally related professions, the LSB oversees a diverse legal services market. This includes two accountancy bodies approved in relation to provision of reserved probate services, a range of sectors (private, employed), work type (corporate, private client), modes of delivery (traditional/ face to face, legal process outsourcing provider (LPO) (Das, 2010, Sako, 2010)) and culture (enterprise or social service) (Hanlon, 1998). Each of the approved regulators has their own professional body, ethical code and disciplinary system, albeit at different stages of development. The disciplinary codes of each profession have similar elements but with differences. For example, the barristers' code is largely concerned with advocacy, reflecting the fact that barristers are sole practitioners obliged to accept any brief. The solicitors' code reflects the fact that they deal with clients direct and can refuse clients except on grounds that are discriminatory. These micro-ethical regimes follow the practitioner in whichever activity, sector or organisation they are engaged, creating a market of considerable ethical complexity. Meanwhile there are potential regulatory gaps over areas such as will writing and legal services outsourced overseas (Ross, 2010).



Whelan (2008; 487) suggests that international concern about the independence of the legal profession prevented the LSB chair being a direct political appointment and the LSB having power to intervene in the operations of the frontline regulators. In the event, the relationship of the LSB and the professions under the LSA is essentially co-regulatory. Prior to the LSA, the Lord Chancellor, initially on the advice of the Lord Chancellors' Advisory Committee for Education and Conduct (ACLEC), with significant judicial involvement, approved changes to conduct rules. The arrangement whereby the LSB is now the approver is broadly similar, but, the LSB is an administrative agency with much clearer accountability to the Ministry of Justice and Parliament. Moreover, whereas, Lord Chancellors are lawyers, and sometime defenders of professions (Abel, 2003), the intention is that agencies such as the LSB resist 'regulatory capture' by the regulated.

The chances of regulatory capture of the LSB by professions are reduced by the relationships required by the LSA. The professional body of the solicitors, the Law Society of England and Wales (The Law Society), and of the barristers, the General Council of the Bar of England and Wales (Bar Council), are confined to promoting the interests of members (LSA s27(2)) and any decisions taken in relation to the regulatory function must be taken independently (LSA s.30(1)). Anticipating this requirement the Law Society created the Solicitors Regulatory Authority (SRA), and the Bar Council created the Bar Standards Board, to manage regulatory activity at arm's length. This insulates the LSB from direct contact with the representative professions and possibly, even, from contact with lawyers depending on the composition of the regulatory arms of the professions. If these are not already in sympathy with the mission of the oversight regulator there are an array of sanctions that can be applied to approved regulators, from performance targets, monitoring and directions (LSA ss.31-34), to penalties, public censure, fines, intervention and cancellation of approval (LSA ss.35-48).

The LSB originally presented itself as the last chance to marry 'the strong heritage of professional self-regulation' and 'best practice lessons from the models of consumer and market regulation widely in place elsewhere' before implementation of 'wholesale statutory regulation, with progressive loss of public confidence in the concept of a profession' (LSB 2009; para. 10). The LSB Chairman recently softened this stance, suggesting his role was enabling '... lawyers to react as flexibly as possible to [an] ever changing landscape' and 'liberalising the market to stimulate innovation' (Edmonds, 2010). The LSB has been true to a promise to engage with the research community, commission research, including for the consumer panel, and convene ad hoc external advisory groups (LSB 2009; para 132-3). Indeed, although it is not a novel question (Bishop, 1989), the LSB has even sought advice on the economic justification for regulation from economists Decker and Yarrow (2010).

The surprising aspect of the LSB's economists' report is the considerable doubt it casts on the reliability of modern neo-classical economics, the quest for an unachievable ideal of 'perfect competition' and the propensity to 'find' 'market failure' to justify public regulation (Decker and Yarrow, 2010; 9-11 and see Bishop *et al*, 1995). It suggests that the well recognised problem, information asymmetries between producers and consumers, are too costly to eliminate completely. One of the best methods of informing consumers is producer reputation, a key function of professions (Decker and Yarrow, 2010; 35). Professional badges, such as the

Queens Counsel, are therefore ambiguous, representing either a helpful indicator of quality or a limitation of supply that drives up price. The economists' report notes that oversight regulation is both a tax on the regulated and a way of shifting rents between competing interest groups. What it does not mention is that the LSB is potentially a competitor as a front line regulator, either of ABS if no other authorised bodies come forward or in the event of the future collapse of professional regulation. To some extent, therefore, the future of the professions depends on number of factors, not least their viability and performance following restructuring of the supply side of the market. The advice concludes that one of the key justifications for the regulation of legal services is that justice is a common good, in the same way as commodities like water, a view that is supported by the antecedents to the LSA and some of its priorities.<sup>5</sup>

During the 1990s lawyers were blamed for rising legal aid costs and declining access to justice. Lord Woolf's reforms, which weakened lawyers' control of litigation processes (Woolf, 1996) were deemed inadequate because they did not address lawyers' financial incentives for complicating litigation (Zuckerman, 1996). This stimulated the thought that, if lawyers were the problem, non-lawyers might be the solution (Moorhead et al 2003). Legal aid is unlikely to stem a rising tide of litigants in person (Hirsch, 2011) and the LSA seeks market solutions to increasing access to justice. The LSA regime offers various strategies for breaking down the legal professions without actually abolishing them. The first is to eradicate practical distinctions, for example, by demanding justifications of professional demarcation arrangements against competition criteria (Baldwin and Cave, 1999; 296). This leads to the second, which is to stimulate competition between them for the same kinds of work. The third is to encourage mingling of different professionals within organisations. The fourth is to encourage competition between lawyers and non-lawyers, the main vehicle for which are Alternative Business Structures (ABS). Licensing authorities for ABS are, for example, under a specific obligation, when considering applications for a licence (in compliance with duties under section 3(2) or 28(2)) to take account, *inter alia*, of the objective of improving access to justice.

The introduction of ABS is one of the strategic aims of the LSA and the LSB regards establishing them as a priority from the point of view of promoting competition and consumer interests (LSB, 2009; para 65). They are intended to add new providers and capital to the legal services market, stimulating investment in technology and enabling commoditisation of routine legal work. This could reduce fees, even for core legal activities like litigation (Susskind, 2008; Edmonds, 2009) by enabling one stop shops for legal and related services (HMSO, 2006; para.5.5. and 5.26), stimulating 'new and innovative ways of meeting consumer demand', improved access to justice for those ineligible for legal aid, 'improved customer experience' and 'legal service professions as diverse as the communities they serve' (LSB, 2009; para. 6). In addition to stimulating domestic competition ABS might also be a vehicle for promoting the City of London's international law firms. The competitive advantages available to highly capitalised, multi-disciplinary organisations might concern US lawyers (Davis, 2010) but it is unclear whether ABS will be able to exploit any such

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<sup>5</sup> It is important not to confuse access to justice, the arrangements for defending criminal charges and resolving civil disputes, and access to legal services. By no means all of the legal services market is concerned with litigation, but it is making courts accessible to the public that may be seen as the particular responsibility, and failing, of the legal profession.

advantages (Schneyer, 2010). Legal professions, even in Europe, are resisting multi-disciplinary practice (Lee, 2010) and in *Wouters* (2002) the European Court held that, while European Community competition laws apply, they may reasonably restrict new business forms considered incompatible with the proper practice of law.

The impact that competition between producers will have on the cost of legal services is unknown. Decker and Yarrow (2010; 44-49) note that there is no evidence of cartel activity among barristers or solicitors and no research evidence to support the idea that lawyers' fees are excessive. The obvious potential for savings therefore lies in using unqualified staff, since US research suggests that salaries of professional workers are higher than those of non-professionals, even allowing for factors like education (and see Lee, 2010). ABS must, however, use approved persons to deliver reserved legal activities and ensure that any non-lawyer employees do not cause breaches of such rules (LSA Schedule 11, para. 16 and s.90). This does not quite eliminate the potential for cost savings and it has been estimated that the use of unqualified staff for non-reserved activities could lead to pay reductions of up to a half for those working in affected fields (Rothwell, 2008). These considerations, together with reductions in associates being employed by firms, may explain a forty per cent growth of numbers of students taking Institute of Legal Executive Fellowships, the main para-legal qualification, at the stage equivalent to A level in 2010 (Rayner, 2010).

While Decker and Yarrow (2010) conclude that economic analysis provides no clear cut answer to the most efficient way to 'bundle' services, ABS will bring more commoditised legal products to the legal services market. Online solutions made available for direct use by the end user, on a DIY basis are an aspiration underlying the current reforms and an outcome predicted by the LSB (LSB, 2009; para. 12). Susskind (2010) predicts that ABS will accelerate the domination of the private client market by commoditised solutions. This is because non-lawyer capital will be more motivated to build technological infrastructure and less inhibited by the professional assumptions of lawyers. ABS may encourage more self-help among consumers and even corporate work may be susceptible to 'un-bundling'. The results are not always predictable. Using para-legals for aspects of complex transactions, for example, may result in fewer lawyers, but release those remaining for direct contact with clients (Griffiths, 2011). Some predict, however, that conventional legal businesses could shrink to core activity like dispute resolution and problem solving (Susskind, 2008).

The position of the Bar in the new market is interesting for a number of reasons. First, as a specialist advocacy and consultancy profession it might be viewed as an expensive anachronism. Indeed, the BSB chair, Baroness Deech, perceives that the LSA could be '... hidden plot to crush the Bar out of all recognition' but urges the Bar to compete using '... independence of spirit and shouldering of responsibility; by economy of overheads and by the collegiality fostered by the Inns' (Deech, 2010). The market case for barristers is that they offer high quality advice and counsel to the lowliest, or most remote, solicitors' firms, providing a realistic means of accessing justice in a market where standardised solutions generally suffice. When solicitors became eligible to gain higher rights of audience, most still supported the retention of an independent bar because of the difficulty of keeping a broad base of advocacy expertise in-house (Boon *et al*, 1996, Boon and Flood, 1999). The Bar has a highly evolved infrastructure supporting advocacy involving the Inns of Court which solicitors do not have and which will be difficult to emulate (Baksi, 2010).

Bishop (1999) notes that the loss of advocacy specialisation may produce a superficial reduction in cost to clients, but actually produce lower quality and higher system costs, including more litigants in person (Hirsch, 2010). Specialisation in advocacy not only ensures greater efficiency in the court system, but may also contribute to higher quality decision making, and therefore precedents, through the sophistication of argument and the ability of judges who were themselves expert advocates. Loss of an independent bar could undermine the constitutional protection of the rule of law (Kentridge, 1998, Kerridge and Davis 1999). While critics might argue that an independent bar has merely served to produce an elite judiciary (Barnes and Malleson, 2011) an independent bar is, at a minimum, more likely to enhance *confidence* in the rule of law (Sommerlad, 1995).

The future of the bar is pivotal to professional diversity since its demise would mark the end of significant differentiation, possibly hastening fusion of the professions under a single front-line regulator, possibly the SRA. The Bar is already conscious of commercial threats, with legal aid work drying up and solicitors keeping more advocacy in-house. If there is more aggregation in larger units, both traditional firms and new entities, more barristers may be forced to work in organisations eroding barristers' unique role. This is far from inevitable. Susskind predicts that some areas of traditional, bespoke service, which the Bar epitomises, could thrive in technology dominated legal markets. The highly profitable commercial, chancery, tax and intellectual property sets, should survive, but common law sets and those doing publicly funded work will be under greater pressure.

The theory that barristers would defect to ABS was tested by the introduction of Legal Disciplinary Practices (LDPs),<sup>6</sup> established under regulation by the SRA from March 2009. LDPs were able to appoint non-solicitor lawyers, potentially barristers, and non-lawyer managers. The SRA and Solicitors Disciplinary Tribunal acquired new powers to impose sanctions on practices and non-solicitor managers and employees regulated by the SRA. By September 2009, one hundred and five LDPs had been established, containing one hundred and twenty five non-solicitor partners (Baksi, 2009a).<sup>7</sup> None of those working in LDPs were, at that time, barristers, because the BSB was undecided about permitting barrister participation. Approval was finally given in November 2009, but by June 2010, nine months after LDPs were authorised, only ten barristers were known to have become partners (Legal Futures, 2010b). A recent survey of nearly two thousand barristers showed that more than a third anticipated joining a new business structure in the next five years (Legal Futures, 2010c). While a third of these envisaged joining barrister only entities, large numbers preferring ABS and LDP provide the bar with food for thought.<sup>8</sup>

The evident uncertainty of the Bar's response to barristers joining SRA regulated entities was reflected in a consultation on whether the BSB should become an entity regulator (BSB 2010). The paper recommended that the Bar regulate entities focused on providing 'advocacy and related services', principally litigation, but even this restricted focus presented serious issues. For barristers to offer a litigation service that could compete with solicitors for convenience, they would need to be able to take money for fees, leading to various proposals by which they would avoid having to operate client accounts. Other compromises involve introducing conflict of

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<sup>6</sup> LDPs will be treated as ABS from Oct 2012 (para 50) *Architecture of Justice 2*.

<sup>7</sup> The partners included licensed conveyancers, legal executives, accountants and a patent attorney.

<sup>8</sup> Barrister only entities were favoured by 23%, ABS by 21% and LDPs by 17%.

interest provisions and potentially compromising the cab rank rule. Moreover, the logic of opening the door to entity regulation, for example by accepting Barrister Only Entities initially, drove the BSB to consider also regulating LDPs and ABS. Then, if they were to accept practices that would be necessary in an entity, they might have to apply the same acceptance to independent practitioners, so that they were not at a competitive disadvantage with entities. In short, if the Bar were to regulate entities, barristers would move significantly closer to the solicitors' business model.

It is difficult to see how replicating a service that can be, and already is, offered by many solicitors' firms fits within the Bar's current *raison d'être*. Indeed, it seems likely that barrister entities might be undercut by solicitors' firms able to brief independent barristers with lower overheads. This does not seem to meet the public interest criterion of promoting a more independent, diverse and strong legal profession. Rather, the BSB regulating entities appears to be a concession to a section of the Bar that is currently at the margins of the Bar's core work. Preserving their distinctiveness, would involve employed barristers being subject to the cab rank rule and receiving instructions from solicitors in the entity. This may be considered to be either too difficult or insufficient to maintain independence, in which case the alternative was succinctly put by the chief executive of one London criminal set:

'... the title of barrister indicates someone who is 'independent' and bound by the cab-rank rule not to select whom they represent. If people want to operate 'client exclusionary practices', based on commercial considerations, they could – but should become solicitors.'(Baksi, 2009b)

An alternative path to the Bar regulating entities, is to play to the strengths identified by Baroness Deech, chair of the BSB, who advocated that the Bar strive to maintain distinctiveness and to remain a niche regulator, in an ideal world, of all advocates who agree to follow the cab rank rule. The proposition that there should be a single regulator for advocacy was reiterated at the Bar Standards Board Annual Conference, by Lord Neuberger, Master of the Rolls, and assented to by the chairman of the LSB, David Edmonds. Such a consensus suggests an opportunity to consider whether the legal profession might be better organised for current needs. into occupations. Kerridge and Davis (1999) suggest that these could be general practitioners (including some advocacy), specialist non-advocates, generalist advocates and specialist advocates. Whether these or other categories might justify the creation of new professions is moot.

The LSB chair's support for regulation by function is controversial given that competition between regulators, as well as between regulated, is implicit in the LSA (Legal Futures, 2010). There could be a need for independent advocates in a market in which conflicts of interest may increase. Independent advocates are not subject to pressures and obligations endemic in large organisations' and the duty to the court is therefore more secure. The cab rank rule ensures that advocates are available to all at the point of need, rather than being corralled in large firms and, because of it, barristers can and will defend clients that commercially minded organisations will ignore (Deech, 2010). The BSB's dilemma is that if it does not compete on regulation it may become marginal, leading to barristers and advocacy eventually being swallowed up by the solicitors. As soon as the legal professions regulate the same thing in the same way, their individual identity is lost and their purpose with it. The

survival of the Bar as the advocacy regulator may be in the public interest. Bringing it about would require a new professional settlement, but it is unclear whether the LSB could or would play broker.

## **B. Regulatory philosophy**

Decker and Yarrow (2010, p.5) define regulation as the institutional superstructure that governs interactions between economic agents, comprising rules ranging from the most formal, statutes, to the most informal, customs. The distinction between public regulation and self regulation comes down to the question of who is responsible for development and enforcement of the 'rule book', which is, typically, considerably wider than the code of conduct. The LSA adopts a similarly wide definition, an authorised body's 'regulatory arrangements' including everything from authorisation to compensation procedures, practice and conduct rules (LSA 2007 s.21(1)). The LSB is under a statutory obligation to ensure that regulatory activities are 'transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed, and ... any other principle appearing to it to represent the best regulatory practice' (LSA 2007; s3(3)). This is a legislative endorsement of 'better regulation' principles, developed by a commission under the oversight of the Department for Business, Enterprise and Regulatory Reform.

The regulatory strategy of the professions is to apply rules to individuals. Assuming some level of transgression, securing compliance depends on a twin strategy of training and deterrence. Deterrence relies on ethical infractions being detected through audit, or as a result of references from public authorities, like courts, clients or other lawyers. The weakness of this approach is that audit is expensive and exceptional. Detection by other means is random at best and unlikely to detect certain kinds of infraction, for example, those committed for clients' benefit. A more basic criticism is that such conventional regulation is not 'reflexive' (Nicolson and Webb, 1999, p.93). Ideal processes might provide routine oversight of the impact of regulatory processes on practice, space for dialogue between regulator and regulated and scope to share successful strategies with the regulated community (Parker 1999, Chambliss, 2001), but methodologies are largely unproven. Yet another consideration is facilitating international legal practice, which detailed conduct rules might inhibit (Lee, 2010).

The main plank of the strategy set out in the LSB's first business plan was a move from rule-based to principles-based regulation (PBR) and risk-based regulation (LSB 2009, para. 30). Principles based regulation (PBR) is one of a suite of approaches, with risk based regulation, internal management and controls and market based regulation, promoted as an alternative to the focus, in rule based regulation, on observance rather than outcome. Favoured by scholars and policy makers for the past ten years under the banner of 'new governance' techniques, PBR was tried and tested in the financial services industry as an alternative to the 'nit-picking bureaucracy [of rule based regulation] in which compliance with detailed provisions is more important than ... the overall outcome' (Black 2010; 3).

Black (2010) suggests that the abandonment of rules is a misguided response to perceived regulatory failure. Distinguishing between formal and substantive PBR,



Black suggests that formal PBR, operates at the level of the rule book, where most regimes supplement principles with guidance, explanations and, indeed, rules ((Black 2010; 5). The substantive features of principles based regulation can vary greatly, but usually involves focus on the suitability of the firms' management systems and controls for ensuring compliance with the regulatory outcomes, defined in qualitative or behavioural terms, desired by the regulator. The processes employed usually include intense dialogue between involved actors about the purpose and application of the principles, but the burden of interpretation and responsibility for achieving outcomes is on the regulated firm. The formal aspects of the PBR regime is generally no clue to its substantive nature; detailed rules might co-exist with an approach that is 'light touch'.

As the SRA considered how it might regulate the solicitors under the LSA, The Law Society commissioned two reports in 2008. For the first, the former Tory politician and life peer, currently chair of the financial services division of Beachcroft LLP, Lord Hunt of Wirral, was asked to consider '... the appropriate regulatory rules, monitoring and enforcement regime to ensure high standards of integrity and professionalism for solicitors and their firms in all sectors...' (Hunt, 2009). For the second, Nick Smedley, a former civil servant, was asked to report on the regulation of corporate legal work as a sub-strand of the Hunt review. Lord Hunt in his role as Chairman of the Financial Services Division of solicitors Beachcroft LLP was familiar with PBR and advocated it in his report. The financial services crash of 2007, presaging the worst financial crises since the 1930s, caused the Financial Services Authority to announce a new focus on 'outcomes focused regulation' (OFR) (Wilson 2010). This did not reflect a change in philosophy but in substantive regime, which promised 'a greater depth of analytical rigour' and intention to 'proactively look to influence outcomes, not merely react to events' (Pain 2010). This involved stronger emphasis on monitoring and inspection involving more investigations and 'intensive supervision'.

Smedley also endorsed the shift to 'principles based regulation' for large firms. He advised that:

'The English and Welsh solicitors' profession should aspire to be not just commercially successful, but also a role model and world leader in the ethical conduct of business – and the regulator should be helping the profession achieve this goal. In a time of ever-increasing ethical fragility, and a crisis in public confidence in the ethics of our business and political leaders, such a position would offer enormous market strength' (Smedley, 2009; i).

Smedley detected considerable unrest among some large firms about the way the SRA operated in relation to them. He alleged that the SRA had inherited no expertise and insufficient understanding of corporate or international legal work to provide either an effective method or system of regulation. This had led to 'a breakdown of trust and relationships between the sector and its regulator over recent years' (Smedley 2009; p. iii). In his view, simply scaling up the traditional model of regulation for large, corporate firms would not work; firms must be 'expert in risk management, rather than the SRA attempting to regulate the risks directly' (Smedley, 2009; 21 para 2.36).

SRA regulation was inappropriate for large firms, Smedley said, because it represented detailed and prescriptive regulation characterising relatively low impact,

high probability risks, like the individual default of sole practitioners (Smedley, 2009 2.27-2.29). In his view, 'effective regulation of the sector needs to be holistic, covering the development and refinement of appropriate practice rules, *ad hoc* regulatory guidance, training and so on' (Smedley, 2009 p. 30 para. 3.22). Smedley p 30 para. 3.22). His proposed regulation of corporate firms, reflecting principles of risk and compliance motivation, operates by reference to the likelihood and impact of failure. In most cases, Smedley predicted, corporate firms would have low levels of complaint by clients to the SRA and could be reasonably assessed as a low risk (Smedley, 2009; iv, recommendation 1). They have a low probability of regulatory failure, but with high impact when it occurs, a risk category suggesting regular, strategic systems level regulation. Therefore:

'In the corporate sector, one might thus translate these objectives into the need (i) to reduce business risks which lead to poor client service; and (ii) to thereby reduce the risk of a general devaluing of the brand of solicitor, which is a risk to the wider public interest. These two objectives need to be combined with the other statutory objectives, including promoting competition and encouraging a strong, independent and effective profession.'  
(Smedley, 2009; para. 2.25)

Another factor to consider is compliance motivation, which can be analysed with reference to different combinations of propensity and capacity. The appropriate regulatory regime for corporate firms, which have both a high motivation and high capacity, would lay down general principles and involve strategic supervision (Smedley, 2009; paras. 2.30-2.32).

Smedley proposed creating a Corporate Regulation Group within the SRA, led by a Group Director recruited from the practice field or with strong regulatory experience in a comparable sector and with expertise supplemented by a Client and Practitioner Panel (Smedley, 2009; p. 47 para. 4.31). The Group would comprise Account Managers to visit firms, examine their business systems and issue low level sanctions as appropriate. Suspension or striking off, however, would continue to be exercised by the Solicitors Disciplinary Tribunal. Investigations would be focused and short – quickly identifying the issue, discussing the shortfalls with senior partners, and requiring assurances via system-wide remedial action. Detailed forensic investigations would be reserved for cases of very serious and deliberate malpractice (Smedley, p. 42 para. 4.12). Smedley feared that, although the SRA accepted his recommendations creating a specialist unit to handle large firms in principle, they would water them down in practice. He urged that, in that case, the Law Society should set up a separate regulator for corporate law firms (Smedley, 2009; p. 54 para 5.5).

Smedley expected his system of corporate regulation to apply only to the largest firms in terms of staffing and turnover, those dealing largely or exclusively with corporate clients (say, a minimum of 70% of its client base), and with high-level compliance and risk management systems in place, together with a designated senior Risk and Compliance Partner, or other partner carrying out a similar role. Hunt thought that a system of Authorised Internal Regulation (AIR), similar to the Smedley model, should be rolled out for all firms with compliance and governance processes that are sufficiently sophisticated and robust (Hunt, 2009; Rec. 41) initially larger, corporate firms (Hunt, 2009; Rec. 42). He also thought the SRA should gather information on the risks of sectors/constituted entities, and allocate the cost of



regulation between individuals and those entities regulated (Hunt 2009 Rec. 38). Introducing his report in October 2009, Hunt welcomed many of Smedley's recommendations but sounded a note of caution on any regulatory measure that might divide the profession.

Principles based regulation responds to a need to accommodate ABS, because it strikes a balance between regulating the entity and the individual (LSB, 2009). At the end of 2009, the Chair of the Legal Services Board announced a consultation on alternative business structures, identifying three 'key protections' that would ensure that 'consumer interests are considered, best professional principles are safeguarded and the public interest protected' (Edmonds, 2009). These were a fit and proper test for non-lawyer owners and managers of legal practices, mandatory introduction of head of legal practice and head of finance and administration and widening the complaints handling system so that complaints about the 'non-legal' activities of ABS can be presented to a new Office for Legal Complaints. The problems of employing non-lawyers alongside lawyers would be addressed by providing that compliance with legal professional privilege rules must be guaranteed by all.

In June 2009 the SRA consulted on the shift of focus from the role and conduct of individual solicitors to role and performance of their employing organisation in the delivery of legal services (SRA 2009). The SRA accepted limitations of its procedures, such as the lack of management information on firms that would enable analysis of risk. It conceded that its approach to supervision was more focused on identifying detailed rule breaches as an end in itself, rather than assessing the outcome for clients and the public interest. It agreed that its ethics culture encouraged dependence, with Ethics Helpline staff spending excessive time advising on detailed cases rather than empowering firms to decide, improving standards or protecting the interests of clients (SRA, 2009 para. 19). It accepted a need to assist firms in achieving standards, to focus on risk management systems and on senior managers rather investigation of rule breaches. It welcomed increased use of Regulatory Settlement Agreements as opposed to disciplinary sanctions (SRA 2009, paras 21-25).

The SRA may have accepted so many of the failings laid at its door because the prize was becoming an approved authority for licensing Alternative Business Structures. The Law Society was a long time advocate of multi-disciplinary practice. A recent president said of ABS:

We consider this to be good for solicitors, for the users of legal services and for UK plc. We are a global leader in selling legal services to the world' (Heslett, 2010).

The Law Society may also have an ulterior motive for keeping the LSB, which is authorised to license direct if no approved regulator comes forward, out of frontline regulation. The SRA will not necessarily have jurisdiction over all ABS activity, only reserved legal activity, non-reserved legal activity undertaken by the ABS and non-legal activity subject to conditions imposed by the SRA on its licence (SRA, 2009; para. 22). This commitment will, however, involve adapting the methodology for regulating individual solicitors to also regulating other kinds of lawyer and non-lawyers in such organisations.

The obvious solution to the problem of professions regulating non-members is to regulate organisations (or 'entities') rather than individuals and to create lines of accountability for their behaviour. In March 2009 the SRA implemented rules bringing into effect 'firm based regulation' whereby all legal practices, regardless of size, are regulated as a firm or 'recognised body' and subject to the SRA's Recognised Body Regulations (RBR), until then used for companies and limited liability partnerships. The composition and structure of recognised bodies, and the services they may provide, is also specified in the rules.<sup>9</sup> So, for example, the business of a recognised body may consist only of the professional services provided by practising solicitors and/or lawyers of other jurisdictions.<sup>10</sup> Individuals can only provide services through recognised bodies. The RBR were amended to enable both entities and individuals within them to be charged a fee in their practising certificate divided between regulation cost and compensation fund contribution.<sup>11</sup>

One of the main mechanisms for enforcing standards across a range of organisations, and diverse personnel, is the obligation to appoint 'responsible officers' charged with ensuring internal compliance. Thus, LDPs are currently required to have a Head of Legal Practice. Presently, at least one manager must be a solicitor with a current practising certificate (Solicitors Code of Conduct 2007 Rule 14.01(2)(a)) and 75% of managers and beneficial owners must be individuals entitled to practise as lawyers of England and Wales, lawyers of Establishment Directive professions or RFLs ((Solicitors Code of Conduct 2007 Rule 14.01(3)(a) and (b)). These mechanisms make individual ethical responsibilities also 'system responsibilities' which it is the business of senior staff to deliver, thus laying the groundwork for accountability structures.

In 2010 the SRA published three major consultations, the first seeking views on the intended move to Outcomes Focused Regulation (OFR) (SRA 2010a), the second outlining intentions for its practical implementation (SRA 2010b) and the third focusing on consequent changes to the code of conduct (SRA 2010c). The promise was a 'proactive, risk-based and proportionate regulation' and a flexible regime for all types of legal service providers, creating a new handbook of regulatory requirements that would facilitate a 'flexible regime for all types of legal service providers, enabling them to create the right controls given their own individual business models, structures and client bases (SRA 2010b; para 10). Despite the different statutory and practical bases for the regulation of first, recognised bodies and sole practitioners, and, second, ABS, the SRA considered that two regimes would create confusion for consumers and providers and would be expensive to operate (SRA 2010b; paras. 15, 17 and 18). It was therefore proposed, contrary to the recommendations of Smedley and Hunt, to apply the new regulatory system to all those regulated by the SRA, from sole practitioners to ABS.

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<sup>9</sup> Solicitors Code of Conduct 2007 Rule 14 based on the requirements of sections 9 and 9A of the Administration of Justice Act 1985.

<sup>10</sup> Or notaries public, where a notary public is a manager or employee of the recognised body. (see the limited exceptions provided by the Solicitors Code of Conduct 2007, Rule 21.03 (educational and training activities and authorship, journalism and publishing).

<sup>11</sup> Rules made under Solicitors Act 1974 ss 79-80 and Administration of Justice Act 1985 ss 9-9A under paragraph 16 of Schedule 22 to the Legal Services Act 2007. For example, solicitors and RELs can only provide services to the public through a firm which is a recognised body or a recognised sole practitioner (both regulated by the Solicitors Regulation Authority) or through an authorised non-SRA firm (regulated by another approved regulator) (Solicitors Code of Conduct 2007 Rule 12).

## C. Regulatory system

In October 2010 the SRA published the results of the consultations to date and offered a last chance to comment on the emergent regime (SRA 2010d). Although there were various objections raised to aspects of the proposals, most respondents were said to approve of the general direction of change. The Law Society raised some serious concerns about the move to outcomes focused regulation (SRA 2010d paras 73 and 83), but the SRA strategy announced in January 2010 was to deliver:

- (a) outcomes-focused regulatory requirements designed to give flexibility by avoiding unnecessary prescriptive rules on process, while giving clear guidance on what it is that firms must achieve for their clients;
- (b) an approach to the supervision of firms that helps firms achieve the right outcomes for clients, and that encourages firms to be open and honest in their dealings with us;
- (c) a high quality desk-based research and analysis capacity to assess the potential risks to the regulatory outcomes, supporting and leading the SRA's delivery of evidence-based and risk-based, proportionate regulation;
- (d) enforcement action which is prompt, effective, proportionate and creates a credible deterrent against failure to act in a principled manner. (SRA 2010a).

The SRA is therefore embarked on a path moving closer to the LSB's agenda, but one of which the Law Society is not entirely convinced. Moreover, whereas Smedley advocated PBR only for corporate firms and Hunt thought it might be extended to the whole legal services sector in time, the SRA proposes that OFR becomes the system of solicitor regulation.

The LSB, Hunt, Smedley and the SRA all cite the regulation of corporate law firms in New South Wales as evidence that PBR works (see e.g LSB 2009; para 36). A significant reduction in complaints, by as much as two thirds, was recorded against such firms after the introduction of the new system (Parker *et al* 2010). It should be noted, however, that only incorporated practices, operating under ordinary company law and with no restrictions on share ownership, are subject to this regime. The NSW system operates alongside more familiar frameworks of discipline, which remain the method of regulation for unincorporated firms.<sup>12</sup> Therefore, in general, the focus of regulation and discipline remains the individual, who is still subject to substantially the same professional code and disciplinary system that preceded the introduction of measures for incorporated practices. Evidence that PBR will be successful in England and Wales as the sole method of regulation, or that it can be extended beyond specific kinds of firm, is thin at best.<sup>13</sup>

The aspect of the regulatory system credited with a significant decline in complaints against incorporated practices is the system of self assessment against indicative criteria as to how far the practice complies with the 'ten objectives of sound legal

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<sup>12</sup> Parker comments that 'the whole self-assessment regime only works because the lawyers responsible for filling it in fear individual disciplinary action if they do not do it properly – and because they understand that it is aimed at demonstrating that their firm has systems to make sure they are meeting the pre-existing rules...'

<sup>13</sup> Parker comments that there are not many true multi-disciplinary practices in NSW and data is not kept to enable analysis of their performance.

practice' (Mark 2009).<sup>14</sup> Gaps in a self- assessment against ten high level principles of good office practice and ethical behaviour is discussed with the regulator, the Office of the Legal Services Commissioner (OLSC). The data assists in developing a 'risk profile' and enables targeting of high risk units. The OLSC can conduct general audits (including finance systems), but restricts compliance audits of appropriate management systems to 'practice reviews' of files and behaviour reflected in returned self assessment forms. Analysis of the complaints against such firms shows that it is the completion of the self assessment which triggers improvement in complaints records, rather than, for example, the fact of incorporation or creation of management systems (Parker, *et al*, 2010).

In England and Wales the promise of PBR appears to be 'lighter touch' regulation. Smedley states that PBR emphasises improving practices and raising standards, not punishing offenders after the event (Smedley p 43 para 4.17) while the SRA promised to remove restrictions not necessary for effective regulation and concentrate on the high level principles governing practice and the quality of practice, rather than 'tick-box' compliance with rules (SRA 2010a). Standard visits to organisations might therefore examine the evidence used for internal monitoring, e.g. results of audits and training or be thematic, for example, looking at client care or conflicts of interest. A stronger focus on client protection, high standards of service and areas of highest regulatory risk is promised, but the main feature that the NSW system shares with that proposed by the SRA is a focus on having 'appropriate management systems' in place (Parker *et al* 2010). The NSW regulator refers to this system as 'cultural regulation' (Mark, 2009) because it focuses on entrenching, promoting and 'more stringently' formalising ethical behaviour (Mark 2009; 14).

The term 'ethical infrastructure' was coined by Schneyer (1998) and developed by Wilkins and Chambliss (2002; 2003) to describe the structures within firms that support ethical behaviour. In the US context Chambliss and Wilkins noted that rules geared to individual responsibility are not easily adapted to organisational accountability. Conventional disciplinary systems hold individuals to account. Disciplining managers before professional tribunals for organisational failures is difficult, at least to judge by the low number of reported cases. This is less of a problem in a system geared to regulating entities. Parker and Nielsen (2009; 5) found that 'compliance management systems implemented thoroughly by competent management with plentiful resources, and combined with management commitment to the value of compliance, might make a difference to compliance, but good management and good values were more important than formal systems at influencing compliance management in practice and, ultimately, actual compliance'. The risk in creating ethical infrastructures, shifting sanctions onto firms and appointing 'compliance professionals' to ensure conformity with the regime is that practitioners may come to regard ethics as 'external' and not their professional responsibility.

The SRA must grapple with a significant level of law firm failure, including through dishonesty, managed through existing processes (Chellel, 2008). Under the SRA proposals the right to discipline individual solicitors remains, but with the shift of

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<sup>14</sup> For example, a criterion suggested for the first objective, 'competent work practices to avoid negligence', is that 'fee earners practise only in areas where they have appropriate competence and expertise' firms rate their practice from fully to partially compliant.

focus from individual to corporate responsibility, sanctions on firms may mean that only the most egregious cases come to a disciplinary tribunal. The lesson of the financial services collapse is that a rigorous OFR regime requires resources and teeth. As result of the change in regulation regime of the FSA, from PBR to OFR, the FSA was required to hire 350 new staff, creating a team of direct supervisors 1,200 strong. The FSA regulates 20,000 firms compared with the SRA's 10,000, but the SRA proposes operating two systems, the new regime alongside a conventional disciplinary structure, while the FSA refers serious cases to the police. In addition to the cost of maintaining two systems, the problem of enforcement may be exacerbated by plans to abandon the traditional code, the basis of individual responsibility.

### C. The professional code

As in most common law jurisdictions, the legal profession in England and Wales currently operates a simple ethical model based on the professional code, supported by education at training from the vocational stage onwards, and buttressed by a disciplinary system dealing with infractions. Solicitors and barristers are subject to separate codes and both are of fairly recent vintage, particularly given the age of both professional groups. The Solicitors Code of Conduct 2007 represented a conscious effort to trim down the voluminous *Guide to the Professional Conduct of Solicitors*, last published in 1999 (Taylor). The bar is currently consulting on a revised code of conduct based on conventional rules (BSB, 2011). Given that there are strategies for regulating legal entities without abandoning codes (Chambliss, 2001), the reasoning behind the decision to do so requires examination.

The future of codes of conduct was not dwelt on by the Law Society's consultants. Hunt's priority was to produce clear policies for ensuring that, and criteria for evaluating, whether, the regulatory regime facilitated wider and speedier access to justice (2009; Rec. 5). Smedley argued that:

'... pages and pages of rules can create a passive, dependent culture. The focus shifts to filling in the form correctly, rather than thinking positively and creatively about how to meet the highest standards of conduct and service. Principles-based regulation, as advocated by the LSB in its draft Business Plan, focuses more on outcomes, allowing the regulated community latitude to achieve stated goals. The idea is to instil a culture of personal and corporate responsibility, maturity and commitment to higher standards.'  
(Smedley, 2009; 22 para 2.40).

Urging departure from 'narrowly framed rules', Hunt urged the SRA to prefer encouragement of better consumer information and consumer empowerment over formal rule-making. He proposed a 'reassessed' Rule 1, capable of being distributed on the back of credit-card sized cards and distributed to the profession, non-lawyers in ABS and to clients (2009; Rec. 4, 5 and 57), but it is doubtful that he thought this sufficient. He advised the SRA to undertake rigorous impact assessments and cost-benefit analyses of all proposed rule changes (2009; Rec. 33), suggesting that he did not envisage rules disappearing altogether. Smedley proposed a single code of conduct with variations in respect of certain types of work (2009; p. 57 para. 6.1).

When the SRA consulted on the new rulebook in 2010, it did not appear to envisage the end of rules. Indeed, it stated that the new system would 'not mean the abolition



of all detailed rules...' but offer a high level structure 'combining the flexibility of Outcomes Focused Regulation with the certainty of rules' (SRA 2010b; para. 25). In particular, it was anticipated that rules might be needed in 'high risk areas' involving client's liberty or money. It was not clear until the SRA's later consultations (2020c) that principles-based regulation meant the end of rules in the conventional sense.

When it produced its proposals for regulation of entities the SRA identified ten principles, the first six similar to the old rule 1, the last four reflecting the new focus on businesses:

1. uphold the rule of law and the proper administration of justice;
2. act with integrity;
3. not allow your independence to be compromised;
4. act in the best interests of each client;
5. provide a proper standard of service to your clients;
6. behave in a way that maintains the trust the public places in you and in the provision of legal services;
7. comply with your legal and regulatory obligations and deal with your regulators and ombudsmen in an open, timely and co-operative manner;
8. run your business/carry out your role in the business effectively and in accordance with proper governance and sound financial and risk management principles;
9. run your business/carry out your role in the business in a way that promotes equality and diversity and does not discriminate unlawfully in connection with the provision of legal services;
10. protect client money and assets.(SRA 2010b)

This high level of generality can cover the wide range of organisations, sectors and professions the SRA aspires to regulate, but the risk is that the principles will be stretched too far, producing inconsistency and insufficiently robust standards (Kinney 1995, Casile and Davis-Blake, 2002).

The proposed SRA code, publication of which will accompany the launch of ABS in 2011, comprises sections devoted to different topics, for example, client care, equality and diversity and conflicts of interest. Each section will contain the relevant principle/s, mandatory outcomes that must be achieved, by firms and individuals, to comply with the principles and 'indicative behaviours'. Indicative behaviours are not mandatory, because it is recognised that outcomes might be achieved by different routes (SRA 2010b; para. 44). It was proposed that all regulatory requirements (code, Accounts Rules, Licensing Rules etc.) would be consolidated in one handbook, published online (SRA 2010c; para 29). The new 'rule book' would lift the 'binding regulatory requirements ("rules") to the level of principles and, repeating the now familiar mantra, it would therefore be less detailed and prescriptive, not 'hinder innovation' and support providers in achieving 'good outcomes for consumers and the public interest' (SRA 2010c para. 1 and 17(a)). It is important to consider how the new rule book is intended to operate and instructive to take the examples, client care letters and conflicts of interest, taken by both Smedley and Hunt to illustrate the need for changes in regulation.<sup>15</sup>

In relation to client care, the thrust of the criticism is that the SRA's requirements, set out in Rule 2 of the Solicitors Conduct Rules 2007 are met by sending out long and

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<sup>15</sup> Smedley cited the examples of client care and conflicts of interest to illustrate how the small business mindset of the SRA impacted on large firms. Hunt used them to justify the shift from rules to principles-based regulation.

detailed client care letters, which are unnecessary for corporate clients. Smedley (2009; 31 para 3.23) reported that an unidentified firm spent over £13.5 million worth of partners' time a year sending such letters; an enormous figure, admittedly. Rule 2.02 of the Solicitors Conduct Rules 2007 states:

- (1) You must:
    - (a) identify clearly the client's objectives in relation to the work to be done for the client;
    - (b) give the client a clear explanation of the issues involved and the options available to the client;
    - (c) agree with the client the next steps to be taken; and
    - (d) keep the client informed of progress, unless otherwise agreed.
  - (2) You must, both at the outset and, as necessary, during the course of the matter:
    - (a) agree an appropriate level of service;
    - (b) explain your responsibilities;
    - (c) explain the client's responsibilities;
    - (d) ensure that the client is given, in writing, the name and status of the person dealing with the matter and the name of the person responsible for its overall supervision; and
    - (e) explain any limitations or conditions resulting from your relationship with a third party (for example a funder, fee sharer or introducer) which affect the steps you can take on the client's behalf.
  - (3) If you can demonstrate that it was inappropriate in the circumstances to meet some or all of these requirements, you will not breach 2.02.
- (Solicitors Code 2007).

The rule is primarily intended for the protection and information of infrequent users of solicitors, but it outlines good practice for whichever client is advised and is both clear and flexible. The final clause puts the burden of proof, showing that meeting the requirements was unnecessary, on the solicitor. A cautious response is to send a letter, the copy of which is evidence that the requirements have been met, but this is not a requirement. Indeed, the final clause offers complete exemption in appropriate cases, as does the final clause of the section requiring solicitors to give details of complaint procedures (Solicitors Code 2007; Rule 2.05). The guidance to rule 2, over seventy paragraphs, reinforces this, stating that writing is not required but should be considered. It suggests that information is given in a clear and accessible form, underlines that the rule is flexible about the extent of information provided, depending on the case, and advises against 'over-complex or lengthy terms of business letters' ((Solicitors Code 2007, Rule 2, Guidance notes 25, 12 and 13).

The most relevant principles, outcomes and indicative behaviours regarding client care from the relevant chapter from the proposed new rule book are:

- 4** you must act in the best interests of each *client*;
- 5** you must provide a proper standard of service to your *clients*;

Any number of outcomes are potentially relevant, but this sample below may be particularly so:

- 6**) where you are providing legal and other services you explain to the *client* the relevant statutory and/or regulatory protections, if any, in relation to each service;

- 8)** *clients* are informed of their right to complain to the *Legal Ombudsman*;
- 9)** *clients' complaints* are dealt with promptly, fairly, openly and effectively;
- 10)** *clients* are in a position to make informed decisions about the services they need, how the matter will be handled and the options available to them;
- 11)** *clients* receive the best possible information about the likely overall cost of their matter;

Relevant indicative behaviours include:

- A.** agreeing an appropriate level of service with your *client*;
- B.** explaining your responsibilities and those of the *client*;
- C.** ensuring that the *client* is told, in writing, the name and status of the person dealing with the matter and the name of the person responsible for its overall supervision;
- D.** explaining any commercial *arrangements*, such as fee sharing or *referral arrangements*, which are relevant to the *client's* instructions;
- E.** explaining any limitation or conditions resulting from your relationship with someone else (such as an *introducer* funder, or fee sharer or *introducer*) that affect what you can do for the *client*;
- F.** clearly explaining your fees and if and when they are likely to change;
- J.** warning about any other payments for which the *client* may be responsible;
- L.** where you are acting for a *client* under a fee *arrangement* governed by statute such as a conditional fee agreement, telling the *client* about all relevant information relating to that *arrangement*;
- M.** where you are acting for a publicly funded *client*, disclosing all relevant information relating to the impact on costs of their publicly funded status;
- R.** informing the *client* at the outset how *complaints*, including *complaints* about your bill, can be made, the timeframe for doing so and to whom *complaints* should be addressed;
- S.** providing the *client* with a copy of the *firm's complaints* procedure on request;

It will be seen that much of the present rule 2 reappears, but has been disaggregated into outcomes and indicative behaviours. As a result, it is more difficult to work out what is required. Moreover, as before, the burden is on the solicitor to show that the prescribed outcomes have been met, if not by the indicative behaviours, then in some other way. It is not clear that solicitors will be better off in demonstrating client care than they were under rule 2.02. Hunt (2009; Rec.14) proposed replacing the "Rule 2 letter" with a more flexible disclosure requirement geared to the type of client. It is almost inevitable, however, that most will conclude, as before, that a client care letter would be a sensible way of evidencing the 'telling', 'disclosing' and 'informing' required.

The second area of annoyance for large firms, as disclosed to Smedley, concerns conflicts of interest. There was a longstanding prohibition on conflict situations where solicitors were instructed to act for both sides in the same matter (simultaneous conflict) or asked to act having previously represented a client on the other side (successive conflict) There were two bones of contention for City firms. First, in some cases of simultaneous conflict, commercial clients were content for firms to save costs by acting for both sides, subject to preserving confidentiality and consent. Second, in cases of successive representation conflicts, there was a feeling that the vast scale of the firms, the frequent movement of personnel between them and shopping around by clients, made the Law Society's conflict rule unworkable the product of another age. In short, large firms claimed they could 'manage' conflicts of interest.



In 2000, a City of London Law Society working party proposed a considerable relaxation of the conflict rules, including restricting the prohibition on acting in successive litigation to individual solicitors within firms (Griffiths-Baker 2002, 164-5). In 2002, Griffith Baker's research suggested that a majority broke the existing rules, prohibiting acting in situations of conflict, by deciding that they had not 'acquired relevant information' about the former client or because the rules were 'out of touch with commercial reality', while many who claimed compliance did not adequately understand the rules (Griffiths-Baker 2002; 10-11 and p174). The Solicitors Code 2007 continued the general prohibition on acting in situations impinging on the ability to act in the best interests of each client (*Solicitors Code 2007* rule 3.01 and 3.01(2)b). Relaxation of the conflict rules was, however, achieved by allowing waiver of simultaneous conflicts (rule 302(2)) and specifying that successive conflicts must arise in the same or related matters (rule 3.01(2)a).

The 2007 rules retained the idea that the firm was the critical actor in successive conflicts rather than the individual solicitor, but brought the desire of City firms to 'manage' conflicts closer to fulfilment. This was a considerable concession from an ethical point of view. Even when it is possible to secure information so that it does not leak between cases, or the matters are not the same or related, or the solicitor believes there will be no detriment to former clients, opposing a former client in litigation might put them at a disadvantage. Knowing their personality and propensities, or the culture of an organisation is useful in judging the likely response to litigation (Boon and Levin, 2008; 206) and having a former confidante acting for the other side may have a psychological impact on a client.<sup>16</sup>

Smedley reported that the main issue was that the rules exceeded the common law, mainly regarding the right to waive a conflict.<sup>17</sup> Rather than considering the underlying principle, however, Smedley accepted the objection as legitimate, focusing on the alleged expense and accepting the excessiveness of conflict checking, estimated to be over £1million per annum by one unidentified firm (Smedley 2009; p. 32 para 3.28). Accepting that this is a credible figure, consent is a flawed solution at best. Informed consent depends on firms disclosing what it is that clients are consenting to, meaning that investigatory costs are unavoidable. The alternative, uninformed consent to conflicts, should be a step too far, even for the most relaxed regulator.

Hunt (2009; Rec. 43) thought that the adoption of principles governing potential or possible conflicts of interest should be sufficient to protect clients and address the concerns of firms engaged in complex and/or multi-faceted corporate work. Judging from the SRA's proposals, he may well be right. The first consultation on the new rule book offered three models (SRA, 2010b; paras. 48-66). The SRA leaned heavily in favour of model 2 and the second part of the consultation confirmed this preference among respondents. Model 2 proposed the following outcomes in relation to non-substantive conflicts:

you have obtained each client's informed consent to act; and

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<sup>16</sup> And see generally Ipp J. in *Mallesons Stephen Jacques v. KPMG Peat Marwick and Others* (1990) 4 WAR 357 at 368 (cited by Griffiths Baker (2002;169)).

<sup>17</sup> It may also be said that the rules also exceed the common law by asserting a general principle against conflict situations rather than recognising that conflicts may not actually exist in all such situations (see *Rakusen v. Ellis, Munday and Clarke* [1912] 1 Ch 831 CA), for example, because it is possible to construct 'Chinese walls' (See Boon et al 2008; Ch. 10, Griffiths-Baker (2002; Ch. 2).

you can act at all times in the best interests of each client; and  
it is reasonable in all the circumstances to act for the client; and  
you comply with your duties of confidentiality

City firms finally have their way, in that they will be able to 'manage' conflicts of interest including by obtaining informed consent to act. This flexibility may possibly be at the expense of some of the more vulnerable clients of smaller entities, but the prejudice to their interests will only be revealed if inadequate processes are picked up by audit.

It is not clear that the SRA's proposed solution to conflicts of interest regulation is based on thorough investigations and analysis of the issue or merely goes with the flow of regulatory relaxation. This raises the question of whether 'commercial interests, whether of the solicitor or the client, be a factor when determining the rules governing conflicts of interest?' (Griffiths Baker 2002; 166). The issue is particularly relevant to ABS, where the potential for cross-selling, for example, of financial services, is great. This was a matter of concern to Clementi (2004; Ch. F, para 53), who felt that a regulated entity owned by a bank should not act for a client on a matter where the bank had an interest. The SRA, however, expressed its dilemmas as follows:

- (a) how much flexibility should firms be given in determining when they [entities] can act in situations involving or potentially involving a conflict of interests?
- (b) how do we deal with the more detailed provisions which currently govern acting for seller and buyer and lender and borrower, etc.?
- (c) should the requirements relating to conflicts be expressed as outcomes or rules?

The last of these is perhaps the most surprising, Clementi having acknowledged that 'rules may still be necessary in high-risk areas' (2004; para. 26). The Law Society responded by observing that the existing conflict rules had developed considerable certainty, stating that it did 'not believe that in this instance, that an outcomes approach provides sufficient clarity' (SRA, 2010d; para. 83).

Other respondents to the SRA's had objected to replacing rules with principles, including the consumer organisation WHICH (SRA 2010d; para.53). One respondent expressed concern that:

'... the removal of rules could lead to suggestions that certain conduct is justified by the outcome.'  
(SRA 2010d; para.45)

The SRA's stance appeared to have hardened since its initial consultation paper and it responded that it 'did not accept any need to return to prescriptive rules, particularly given that our primary concern is the end result - the outcome for the consumer' (SRA, 2010d; para. 90).

It is questionable whether the SRA's draft rulebook achieves a good balance between flexibility and certainty. Although the Solicitors Accounts rules will be retained, of the more ethically orientated material, only the outcomes are mandatory and they lack detail. Taking the outcomes for conflicts of interest as an example,

they are at too high a level of generality to apply as rules. Aggregation would not make a satisfactory code of conduct. In terms of conventional codes of conduct, the indicative behaviours occupy an ambiguous position between rule and guidance. With them, the SRA has created a rebuttable presumption that there is a right answer, or process, to respond to an ethical dilemma. In its response to the consultation on the proposed new rule book the Law Society argued that indicative behaviours had a semi-mandatory status, creating a risk that non-observance would be seen as non-compliance. The SRA's response, to remove mandatory language from the indicative behaviours, may reduce ambiguity but may also increase risk.

It is not clear why, contrary to the views of many academic advocates of entity regulation, and key respondents to its consultation, the SRA is determined to turn its code of conduct into a manual for quality accreditation. There may be confusion between institutional and professional ethics (Greenwood and Hinings, 1996), which Freidson argues must each pursue different goals. Institutional ethics 'serve the transcendent values of the discipline' while professional ethics must 'claim an independence from patron, state and public that is analogous to what is claimed by a religious congregation' (1998; 219 and 221). In practical terms professional ethics represent concrete standards across the whole role, whereas institutional ethics are geared towards institutionalising processes in everyday work (Oost 2007). It would have been entirely possible to have retained the Solicitors Code of Conduct 2007 and issued guidance for inspection visits.

According to Black, one of the lessons of the financial services crash is to escape from regulators' rhetoric and determine the relative roles of principles and rules. This is because '[n]either principles nor rules usually function particularly successfully without the other' (Black 2010; 24). Prescriptive rules are forward looking, suiting circumstances where conduct might occur frequently in the absence of rules or where harm is potentially substantial and irreversible. Standards based approaches are backward looking, whereby the regulator only becomes involved *ex post*, suiting situations where conduct is widely varying and constant change demands flexibility (Decker and Yarrow, 64). Effective regulation depends on finding the right kind of rule for the purpose and considering how compliance will be achieved (Baldwin, 1990). Broad principles may be sufficient to regulate the well-intentioned and well-informed, but they provide ambiguity that others can exploit. It is important that specific and absolute rules are in place when there are references to the Crown Prosecution Service or Solicitors Disciplinary Tribunal. In principle, lawyers should know precisely what allegations they face when they are defending their professional reputations, but the absence of rules will make disciplinary cases more time consuming and difficult, inhibiting prosecution (Baldwin, 1990; 323) and leading to formal discipline being reserved for cases involving criminal behaviour.

Authors arguing for more discretion in lawyers' ethical decision-making do not advocate the abandonment of rules. Nicolson (2006, p. 619-620), for example, argues that vague codes force lawyers to exercise discretion, growing 'moral muscle', but offer insufficient regulation and guidance. Thus, he proposes two codes, one with conduct norms and the other with ethical norms and discussion of how they might apply in different contexts. Codes of conduct also serve a range of other valuable purposes, from the symbolic to the practical. Even at a relatively high level of abstraction, like the American Bar Association Model Code (ABA, 2010), codes have

greater symbolic meaning, appear more relevant to practitioners, as opposed to their employing organisation, and are a teaching resource. An audit manual speaks only to the regulated, or the management of the regulated, and is inaccessible to the public. If the affect of OFR is to reduce the emphasis on individual responsibility and discipline, the preservation of the professional principles will require a considerably enhanced role for education and training.

#### **D. Education**

An important factor in the training agenda of the professions will be the configuration of the market. For example, if the BSB were to become a regulator for advocacy it may decide to surrender its own vocational course, the Bar Professional Training Course, and admit only experienced practitioners, subject to some additional training and or assessment. This would fit with previous proposals for a common postgraduate vocational education of solicitors and barristers (ACLEC, 1996, Kerridge and Davis, 1999) and with Baroness Deech's suggestion that graduates should not choose the branch of the profession they wish to enter on graduation (Deech, 2010). Delayed specialisation in advocacy is consistent with Hunt's proposal that reserved legal activities be restricted to solicitors with separate authorisation, with consequent changes to the point at which the qualification of solicitor is awarded (2009, Rec. 68). He also suggested (2009, Rec. 58) that solicitors consult on creating a fellowship scheme for those reaching a higher professional standard. As with the advocacy proposal, this could mean that qualification processes could become extended, with numerous variations. Thus, common legal training could become extended before becoming more flexible, focused, and specialised and possibly extending into post-qualification.

While the legal professions remain frontline regulators of education and training, the LSB has a statutory duty to 'assist in the maintenance and development of standards of education of authorised persons' (LSA, 2007, s.3(4)). The chairman of the LSB, David Edmonds, recently announced an overarching strategic review of education and training by the solicitors, Bar and Institute of Legal Executives (ILEX), the main para-legal organisation. He identified factors shaping legal education to 2020, indicated a number of areas that he thought legal education needs to cover and some issues for consideration, including routes to qualification that would encourage diversity in the profession. There were also a few clues to revised priorities in curriculum content, with 'management skills and commercial awareness' being one new entry. Referring to the 'changes to the market and the more sophisticated outcome-focused approach to regulation...' Edmonds suggested that '(a)s a minimum, we will be looking at a changed and earlier emphasis on the teaching of professional ethics and wider responsibilities to the client ...' (Edmonds, 2010).

The professions have not previously sought to impose explicitly professional subjects on the academy, reserving their efforts for the vocational stage.. The Bar recently introduced a discrete ethics teaching and assessment to its new Bar Professional Training Course, while The Law Society commissioned academics, Economides and Rogers, to examine the place of ethical training in legal education and practice. Their report (2008) made twenty four recommendations for increasing the ethical content at all stages of legal education, all of which Hunt urged be taken seriously (2009;

Rec. 73). One of the most significant was that legal ethics be introduced to the legal education process at the earliest stage possible (Economides and Rogers, 2009; Rec. 1). This repeated the ACLEC recommendation that Law Schools be set outcomes for coverage of 'legal values and the moral content of law' (ACLEC, 1996). The Law Society then commissioned a further report to define legal ethics and flesh out a model undergraduate curriculum (Boon, 2011). This suggested that a suitable definition was:

'The study of the relationship between morality and Law, the values underpinning the legal system, and the regulation of the legal services market, including the institutions, professional roles and ethics of the judiciary and legal professions.'

(Boon, 2011 p.19)

The report also recommended that, if the profession continues to require coverage of discrete subjects for recognised law degree, that Legal Ethics so defined should be added to this core. This may antagonise an academy that is jealous of its own independence and wary of professional values (Burrige and Webb, 2007, Cownie 2008, Pue, 2008). Implementation may therefore involve a possibly lengthy renegotiation of the Joint Statement on Qualifying Law Degrees (SRA 2002).

The SRA has not yet acknowledged that OFR necessarily places greater emphasis on education and training, although both Smedley and Hunt had suggested this. Smedley summarised the educational implications of the shift to PBR as involving a shift in emphasis from 'investigation, scrutiny and punishment' to 'education, information, training, expert advice and promotion of standards' (2009; p. 22 para. 2.40). Hunt said that moving from 'prescriptive regulation' to PBR requires more flexibility and 'a greater degree of judgment on the part of the individuals concerned' (Hunt 2009; para. 2.13). The vocational stage has previously offered a rather rudimentary pervasive treatment and assessment. Under OFR law students would be need to be taught to make professional ethical decisions in the context of organisational norms while also taking into account an overarching statutory duty in litigation or advocacy to act with independence in the interests of justice (Boon and Levin, 2008 p.346). Interpreting and balancing rules (or outcomes), while recognising where they conflict and how overarching principles come into play (Kupfer, 1996), demands considerable sophistication. In the absence of a detailed rule book, education and training would have a considerable gap to fill (Webb 2002; 149). This may require a shift from the deontological approach often associated with teaching ethics, based on formal rules, to a novel approach, perhaps best described as 'situational', where overarching values are recognised.

The SRA's initial consultation acknowledged a need to examine 'the appropriate balance between requirements for firm-based and individual and pre and post qualification education and training, particularly whether there is 'sufficient emphasis on principles, ethics and financial management at the pre-qualification stage' (SRA 2009; para. 89). The 2009 consultation identified pre-entry education, the code of conduct, the complaints service and accreditation schemes, CPD, mandatory and voluntary accreditation schemes (SRA, 2009; para. 21) as key components in securing practitioner competence. Suggesting that these elements did not represent a 'coherent framework' (SRA, 2009; para. 3) the paper identified the need for further work to align them with the 'day one outcomes' of the training framework (SRA, 2011). Anticipating Hunt, it also proposed formulation of a post-qualification

framework with different standards of knowledge, skills and behaviours for the different roles that solicitors take in law firms (SRA 2009; para. 27). Anticipating also the adoption of 'better regulation' principles, placing responsibilities on providers for quality assurance (SRA 2009; para. 28) would involve developing standards for the management of the work environment (SRA 2009; para. 32-33).

OFR will put both the profession and employers under pressure to provide education and training in management and ethics post-qualification. Despite a longstanding Continuing Professional Development (CPD) regime, there is presently little infrastructure,<sup>18</sup> certainly not a 'deliberative moral community' built on a foundation of aspirational professional norms, supplemented by context specific codes' where necessary (Parker 1999; 171 citing Croft 1992; 1325). Hunt suggested measures that might be steps to building such a community, such as introducing a mandatory requirement that CPD should include elements focused on ethical standards, values and dissemination, (Hunt 2009; Rec. 77 and 78). Hunt also recommended that the SRA give greater prominence to Solicitors Disciplinary Tribunal (SDT) rulings (Rec. 49-51 and see Buck 2001), provide regular email updates and other forms of direct communication and replace call centre ethics guidance with named individuals or groups (Rec. 55 and 56). Such measures would need to be set in a regulatory strategy integrated with other stages in the education and training process.

## Conclusion

The LSA has the potential to revitalise professionalism, particularly by replacing the previous hotchpotch of co-regulation with the Legal Services Board, which could encourage a thoughtful restructuring of legal services in England and Wales. If the only strategy for re-structuring is competition, however, planning will be rather too crude. In the meantime, a new regulatory methodology is emerging, supporting contradictory and possibly irreconcilable aims. The SRA is under various pressures to adopt OFR. This may help to preserve a single system of regulation for a large, diverse and fragmented profession, and accommodate ABS, while satisfying the demands of large, commercial solicitors firms, for a more customised, lighter touch regulatory regime. Yet key players doubt that the SRA can successfully regulate large firms,<sup>19</sup> many large firms are not even sure that they want new-style regulation (Gibb 2009)<sup>20</sup> and it may prove difficult and risky to extend the system to non-commercial legal sectors. If achieving the key aims is difficult, reconciling them may be impossible.

While many changes to the market are gathering momentum the switch from rule based to principles based regulation is arguably the most significant for conventional understandings of legal professionalism. This step, particularly combined with others, could drive fragmentation of the profession. For example, post-qualification specialisation together with the more abstract, principles based code, may

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<sup>18</sup> The Bar's New Practitioner Scheme and the SRA's Professional Skills Course, undertaken during solicitor training, contain ethics components (Boon *et al*, 2008, p.325 and 341)

<sup>19</sup> The SRA board member representing City firms is uncertain that the SRA can successfully regulate large firms (Gill 2010).

<sup>20</sup> Although large firms drove the Smedley agenda, and welcomed his proposals, some were undecided about seeking Authorised Internal Regulation status if it were offered by the SRA (Legal Risk, 2010).

encourage specialist lawyers to develop their own, more detailed, ethics codes, exacerbating the difficulty of uniting under one ethics regime. The numerous impacts discussed in this article are represented diagrammatically in Table 1.

Table 1: The different emphases of rule-based and outcomes based regulation.

Old	New
Profession-controlled	Co-regulation
Individual	Entity
Rules	Principles
Infractions	Outcomes
Observance	Discretion
Acts	Indicative behaviours
Investigation	Accreditation
Professional Responsibility	Compliance
Disciplinary Process	Administrative Sanction
Professional Community	Ethical Infrastructure
Heterarchy	Hierarchy
Deontological	Situational

The traditional organisation of professions is grounded in collegiality. This assumes a heterarchical structure, characterised by more horizontal, equal relationships, rather than a hierarchical structure. Ethical norm generation occurs within bodies of practice and is translated by the professional body into rules of conduct.<sup>21</sup> The new regulatory method allows a firm to negotiate ethical arrangements with the regulator, thus establishing a hierarchical relationship that validates each firm's individual interpretations of the principles of professional ethics. Firms may have a very different practice on a particular ethical issue than that of a neighbouring firm and divergence could magnify over time. The risk here is that the common ground of professional ethics is lost, with each firm becoming an 'ethical silo'. The problem is exacerbated because the principal relationship under this regulatory system is with the regulator rather than with professional peers. This potentially undermines the notion of ethics as the project and notional consensus of the *whole* professional community.

The problem of dislocation of the process of professional norm generation is exacerbated by the separation of 'representative' and 'regulatory functions'. This places both rule generation and enforcement within the regulatory arm, putting the representative side at arm's length from the process. The various reports discussed above, commissioned by the Law Society suggest a strong desire to influence the SRA. Law Society objections to the SRA's consultation proposals were gently rebuffed. The head of the SRA recently said that he would not recommend separation of functions as a *modus operandi* for professional bodies with a choice in the matter (Plant 2010). One way to counteract a drift away from professionalism is to create more profession-wide mechanisms and institutions (Parker 1999; 145), for example, using peer review in entity regulation (Kinney, 1995; Scrivens 1995, 1996;

<sup>21</sup> It is true that in more recent times these norms have been filtered through the professional bodies, but suggested changes have generally emanated from practitioners.

Casile and Davis-Blake, 2002). An ethical focus for this activity might prevent firms falling into the narrow, parochial approach that entity regulation may encourage and help to preserve the normative dimension of legal professionalism.

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