

EDITORIAL

THE LEGAL PROFESSION: FUSION OR DIFFUSION?

THE SOMEWHAT WHIMSICAL PROPOSAL by the past President of the Law Society, at the Law Society conference in 1999, that the two branches of the profession fuse, with the Law Society regulating the whole, seems to have missed the real point of the debate. The debate about fusion has traditionally focused on advocacy services, the sub-text being that there is no rationale for these types of legal services being confined to one branch of the profession. This restrictive practice has now diminished, with the new Higher Rights test for solicitors wishing to act as advocates in the High Court being significantly simpler than the original version. The question of fusion has now re-emerged in a different guise. Fusion is no longer canvassed in order to give solicitors rights of audience, but as recognition that solicitors and barristers are, in effect, delivering the same kind of service. Now that it is intended that all qualified barristers and solicitors have the right to appear in any court, is there any real difference between the two branches of the profession? If there is little practical difference between the two branches of the legal profession, what does that mean in terms of professional regulation?

The legal profession, together with other associated legal and para-legal bodies, has grown rapidly in the last two decades. The Bar's growth has been particularly rapid, but it is not clear whether this will continue. Apart from the criminal Bar – essentially state funded defenders or prosecutors – the Bar exists on its civil litigation and family work. Civil litigation has expanded rapidly, but it may not continue to do so. In the future, the bulk of civil litigation, particularly in the fast-track, will be funded through various conditional fee arrangements, backed by insurance. In general the Bar exhibits a reluctance to engage in this type of funding. If this continues, its work will increasingly be limited to the minority of complex high value cases in the High Court multi-track. Solicitor advocates may increasingly encroach upon their work, particularly if clients (institutional and commercial) make increasing use of franchising and contracting arrangements, with a global fee for a given workload. Offering work to “sub-contractors” will reduce the profitability of the business.

The Bar is responding to this by increasing specialisation, centralisation and modernisation of its practice. This will make it more attractive to solicitors. Its other mechanism for fighting back, allowing direct access to a limited class of the public (generally corporates), through Bar Direct, brings its own disadvantages. It will bring barristers into direct competition with the solicitors who refer work to them. It will also lead to an increase in overheads, and thus remove one of the rationales for the current arrangements of independent barristers.

The civil Bar may thus find that its numbers reduce dramatically over the next few years. With such a reduction, it is hard to see how it can support its own independent regulatory and educational arrangements. On the other hand, it is possible that the

solicitors branch of the profession may increase to 100,000 active members. Despite this, it would be a mistake for the Law Society to assume that fusion, in the form of a take-over, is inevitable. Talk of unification and fusion looks curiously out of place, when set in the context of the fragmentation of the solicitor's profession. It is now commonplace to note the polarisation which is characteristic of the profession, with the large city firms having little in common with the traditional high street practice. General practice is becoming an exceptional way to deliver legal services, and specialisation, although not formalised to the same extent as in medicine, is becoming the norm. Such diversification calls into question whether there is any longer one single solicitor's profession. The corollary question is whether one single professional body can meet these diverse needs.

The call for fusion thus conceals the more pressing debate – what professional structure is relevant for today's market conditions and consumer interests? The outcome of this debate may well be a unitary legal profession, but the Law Society is deluding itself if it believes it will necessarily become the regulator and representative of this large profession. Even within the present structure, there are serious questions as to whether the Law Society can control the profession's disparate groups. Some large City firms consider the Law Society as irrelevant to the way they practice. The different, indeed conflicting, aims of the various constituencies make it difficult at present for the Law Society to represent the interests of the profession as a whole.

If it is recognised that there is one, albeit diverse, legal profession, there may be some value in having a regulator to cover the whole profession, including other legal and para-legal professionals. The public seems largely sceptical about the ability of professional bodies to perform both regulatory and representative roles. Is the answer therefore to introduce a new, independent, umbrella regulatory body to take on all the regulatory functions at present performed by the professional bodies? The various sub-groups within the profession, whether they be advocates, conveyancers, litigators, or whatever, could then be free to form themselves into whatever representative bodies best suited their needs. To echo the words of the Legal Services Ombudsman, what is needed is a "willingness to rethink the working model of legal professionalism itself." This is the real point of the debate.

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