INTRODUCTION

In the last twenty-five years the traditional concept of professionalism amongst lawyers in the UK and the regulatory bargain by which the profession provided access, expertise, integrity and public protection in return for status, restraint on competition and self-regulation, has been steadily re-negotiated. Self-regulation in particular has come under increasing scrutiny. Twenty-five years ago self-regulation was largely unquestioned. The profession’s right to regulate itself was seen as a vital part of being a profession, and was argued to be in the public interest since (1) only peers were in a position to judge their fellows (2) peers were more likely to be tough on errant lawyers than outsiders and thus standards in the profession would be higher (3) it was cheaper than the alternatives and (4) it was quicker and more effective than the alternatives. Today the criticisms of self – regulation are much more to the fore: that it can be a cloak for rent-seeking if not profiteering, for regulatory capture, ineffective disciplinary procedures and anti-competitive practices. More active consumer movements and a global movement in favour of freer trade has led governments of all political hues to embrace deregulation of the profession to a greater or lesser degree. However, the problems of information asymmetry between lawyers and clients which justified regulation in the first place have led to re-regulation in the shape of public protection measures – ethical codes, legal services ombudsmen, penalties for “shoddy work” and financial services regulation. This process of de-regulation and re-regulation has resulted in a greatly enhanced tension between commercial pressures and professional integrity which is forcing the state, the profession and society to re-consider the regulatory framework for the profession and other providers of legal services in a wide range of jurisdictions.


2 Such arguments can be found in many modern writings including Ogus, op.cit at p.108, Seneviratne, op.cit at pp.28-9 and D.Rhode, “Policing the Professional Monopoly” (1981) 34 Stanford Law Review 1.

2. Economists differ over the scope and extent of regulation that is appropriate in the context of the legal profession although it is accepted that the justification for any regulation is the market failure caused by the asymmetry of information between the lawyer and the client.\(^4\) The new consumerism however, would seem to necessitate that regulation of lawyers and providers of legal services should seek to reach an appropriate balance between the interests of the profession and the public interest. Critics of self-regulation by the profession in a range of jurisdictions have pointed to the conflict of interest experienced by law societies and similar professional bodies in achieving this balance and even more so in demonstrating that they have done so in an even-handed manner. In addition, there is a growing body of literature on the attributes of effective regulation in a wider context. Ayres and Braithwaite have argued that regulation should be responsive, involving a dialogue between the regulator and the regulated.\(^5\) In “Better Business Practice” the Scottish Consumer Council\(^6\) identified 13 points of good practice with respect to regulation, including: clear standards, wide consultation on the standards; an independent structure, strong independent presence on regulatory bodies, public accountability, a well-publicised complaints procedure with effective sanctions, and high levels of consumer satisfaction. In similar vein the Better Regulation Task Force in 2000 argued that the principles of good regulation are fivefold: Transparency, Accountability, Proportionality, Consistency and Targeting.\(^7\)

3. Finally, scope. There has been a tendency in the UK to see regulation of the legal profession as being primarily focused on complaint handling, financial services and to a lesser extent the scope of the professional monopoly. Yet self-regulation covers far more than this, as does the scope for market failure. Thus in New South Wales external regulators have an input into the articulation and setting of professional responsibility standards, the education, admission and certification of professionals, as well as the advertisement of their services. As such there is a considerable overlap between regulation and competition policy. This can either be dealt with by making the competition authority (e.g. the Office of Fair Trading) a regulator or by giving an existing regulator (e.g. the Ombudsman) a joint responsibility with the competition authority on competition issues.\(^8\)

Background

4. Traditionally, regulation of the legal profession in Scotland, as in most other

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\(^5\) I. Ayres & J. Braithwaite, Responsive Regulation (New York, Oxford University Press, 1992). By this they mean that regulators should use a pyramid of strategies in a dialogue with the regulated, keeping the strongest sanctions in reserve, to encourage the profession to accept voluntary reform in the public interest. (other supporters of dialogue are Parker op cit 403 and Nicholson and Webb “Institutionalising trust: Ethics and the Responsive Regulation of the Legal Profession” (1999) 2 Legal Ethics 143)


\(^7\) Similarly, the Legal Ombudsman of Victoria has suggested that any regulatory scheme should be independent, accessible, effective, efficient, fair, accountable and set up for the benefit of the public. Submission to Legal Practice Act Review, December 2000 para 2.3

\(^8\) This is the approach taken in Victoria and New South Wales.
jurisdictions, lay in the hands of the courts who had admitted them to practice. Although the supreme courts in many countries retain ultimate control over many aspects of the regulation of the profession e.g. admission, discipline and professional standard setting, they have long since delegated large aspects of de facto regulation to the profession itself.9 Onto this in recent years the UK government have overlaid additional regulation from e.g. the Legal Services Ombudsman, the Financial Services Authority, the Office of Fair Trading, the DTI (insolvency matters), Consumer Credit, the Immigration Services Commissioner and the Legal Aid Board. The resulting model of self-regulation has been described variously by commentators as “coerced”, “mandated”, “modulated”, “regulated” or “sanctioned”10 to reflect the fact that self-regulation now operates within a broad, multi-layered regulatory framework. While such an approach has many supporters, the solicitors’ branch of the profession considers that it has led to them being over-regulated, whilst others point to gaps in the checks on self-regulation11 and note that the different regulatory layers do not sit comfortably with each other. Thus it is unclear what the respective remits of the Office of Fair Trading and the Scottish Executive are with respect to competition policy and the Scottish legal profession following the passing of the Scotland Act 1998.12 In sharp contradistinction to the profession, other providers of legal services in Scotland13 are less regulated than lawyers, sometimes to a very considerable degree. This raises difficult questions of paternalism, client choice and competition policy about the extent to which there should be a level playing field in relation to the regulation of all providers of legal services and the extent to which clients should be able to contract out of public protection measures.

The existing regulatory framework

5. **Standards and standard setting.** Many providers of legal services will be covered by different aspects of private law e.g. the law of contract, agency, negligence, and the Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contracts Regulations 1999. While these can provide effective remedies, the applicability of the relevant law is not always high in the public consciousness,14 and the expense of using the courts and lawyers to pursue these remedies (especially where the person to be sued is another lawyer), will often combine to defeat the efficacy of these standards as a form of regulation. Codes of Conduct, practice rules, guidelines and standards also apply to legal profession and IQCs, and Codes exist for Accountants

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9 In part this came about as a result of resourcing issues. The courts had neither the staff nor the time nor the resources to regulate the profession adequately. This remains the case, and is a potential drawback with respect to those regulatory aspects that the courts have retained. Thus the Lord President of the Court of Session plays an key role in scrutinising the Practice Rules passed by the Law Society but has no infrastructure to assist him with this task.
11 e.g. in relation to the education, admission and certification of lawyers.
13 With the notable exception of Independent Qualified Conveyancers or Executry Practitioners who are held in some respects to stricter standards and a more rigorous complaints procedure than solicitors.
14 Particularly the law of agency.
and voluntary sector advisers. Other providers of legal advice e.g. claims assessors, may be subject to very few constraints. This variability in standards amongst providers of legal services is confusing to the public, who will frequently be unaware of it in the first place. This raises the policy issue as to whether clients should be permitted to purchase legal services without a basic minimum set of regulatory standards over and above the private law. Paternalism and the lack of transparency in legal products argue for a minimum Code of Conduct for all providers of legal services and a ban on clients (particularly legally inexperienced ones) being able to contract out of significant protective measures. Yet supporters of the free market argue that clients should have the right of choice, and that particularly experienced corporate clients should have the ability to opt out of protective measures such as the conflict of interest rules if they deem it in their interests so to do. This is a thorny issue which merits a paper in itself, nevertheless the inability of the market to control for quality in the field of legal services convinces me that non-lawyer providers of legal services should operate with certain minimal measures of public protection and a considerably higher degree of transparency than currently prevails. Moreover, I remain of the opinion that the public interest requires that certain fundamentals of professional ethics cannot be excluded by private contracts between the lawyer and the client.

6. The foregoing should not be taken as implying that the existing standards for legal professionals or the ways in which they are set are beyond criticism. The test for misconduct in solicitors which is applied by the Law Society and the Scottish Solicitors’ Discipline Tribunal – the Sharp test, the test for unsatisfactory conduct, and the test which they apply with respect to what is an Inadequate Professional Service (IPS) are sufficiently opaque as to provide relatively limited guidance to the average client, the Ombudsman or a layperson sitting on a client relations committee or Discipline Tribunal. All three tests require amplification if they are to pass the clarity test of “Better Business Practice” or the consistency test of the Better Regulation Task Force, and to prevent those applying the tests from exercising a largely unfettered discretion in every case. In the case of misconduct there is the Code of Conduct, the Practice Rules and the Practice Guidelines, provided they are brought to the attention of the client relations committees. However, a breach of any of these, no matter how serious, is never automatically misconduct. In every case there is a discretion as to whether the breach constitutes misconduct. A clearer source of guidance might be precedents of the Discipline Tribunal as to what constitutes misconduct. While the Tribunal clearly considers that

15 Just as hirers of cars can purchase different levels of insurance cover or damage excess but must have a basic minimum protection policy, so too should legal services clients in an area where the product is considerably less transparent.
16 Conduct “which would be regarded by competent and reputable solicitors as serious and reprehensible”.
17 “Conduct by a solicitor which does not amount to professional misconduct but which involves a failure to meet the standard of conduct observed by competent solicitors of good repute”.
18 “professional services which are in any respect not of the quality which could reasonably be expected of a competent solicitor”. s.65 Solicitors (Scotland) Act 1980.
19 This anomaly arises from the wording of the Solicitors Scotland Act 1980. In contrast, wilful breach or professional regulations is misconduct for IQCs in Scotland and lawyers in NSW.
its decisions have precedential value, it has been rare for Reporters or client relations committees to be provided with such precedents. Similar considerations apply in respect of unsatisfactory conduct. Again, in the past the Society has been reluctant to try to specify clear and consistent standards for IPS, although a working party has recently been established to try to identify examples of IPS in order to provide guidance to client relations committees and the public.

7. The new consumerism would also identify the process of standard setting as a further area of weakness with respect to Scottish solicitors. Although substantial parts of the Code of Conduct and numerous practice rules and guidelines relate to the relationship between the lawyer and the client, neither the latter nor the wider public (including consumer bodies or regulators) have any input into the content of these standards. This hardly comports with the need under the re-negotiated regulatory bargain to demonstrate that a fair and appropriate balance between the interests of the profession and the public has been drawn in the standard set. While it is true that the Lord President is required to approve practice rules passed by the Law Society, this is not a consultative process involving interested parties and the wider public (as recommended by Better Business Practice) nor does the Lord President have the infrastructure or staff to carry out such a consultation or to research the possible implications of proposed rule changes. In contrast, in New South Wales (NSW) the Legal Services Commissioner (the ombudsman) has the power to scrutinise any proposed rule change by the Bar or the Law Society from the perspective of the public interest and competition policy. In Victoria an independent Legal Practice Board can recommend rule changes and the Legal Ombudsman can recommend the disallowance of proposed rule changes to the Board, on public interest grounds. Similarly, the Legal Profession Advisory Council in NSW (consisting of eleven individuals appointed by the Attorney General of whom at least 5 must be laypersons and 5 lawyers) may review any professional rules of the Bar or the Law Society at any time, from the perspective of the public interest, including competition policy.

8. Complaints Procedures. The Office of Fair Trading has suggested that a complaints procedure should be speedy, responsive, accessible and user friendly, offer conciliation as an option and provide a low-cost, speedy, responsive, accessible, user friendly, independent redress scheme as an alternative to court action. My own view is that a complaints framework for providers of legal services should:
   a) Balance appropriately the interest of the profession/providers and the public interest;
   b) Have clearly articulated goals and written procedures;
   c) Involve the application of clear and consistent standards in order to ensure consistent outcomes;
   d) Cope appropriately with overlapping standards eg IPS, negligence and conduct;

20 With 3 non-lawyers, 3 lawyers and judicial chair. Part 15 Legal Practice Act 1996.
21 S.76 Legal Practice Act 1996.
22 Legal Profession Act 1987 s.57H, s.58 and s.59.
23 Similar criteria have been suggested by the Scottish Consumer Council. SCC, Complaints About Solicitors, 1999 at p.3.
e) Be clear as to the favoured truth-finding mechanism i.e. inquisitorial or adversarial, at each stage in the process;
f) Involve appropriate dispute resolution mechanisms at each stage: the job descriptions and remit of personnel should be clear and they should receive appropriate training and support;
g) Be fair to each side: e.g. adhere to the principles of natural justice, permit equal opportunity to each side to make representations at appropriate junctures, and should encourage an equality of arms where an adversarial procedure is being used;
h) Be relatively speedy;
i) Be adequately monitored (including review);
j) Be affordable to the profession, the complainer and the respondent;
k) Involve sanctions that are proportionate in the eyes of the profession and the public (adequate, meaningful and commercially significant);
l) Satisfy the reasonable complainer

9. I am only able to comment on the complaints procedures with respect to Scottish solicitors and IQCs with any detailed knowledge. Successive Ombudsmen have expressed concern over aspects of the complaints procedures for advocates, but I have no personal experience of it, or that which operates with respect to the voluntary sector. So far as the solicitors’ scheme is concerned the Law Society has been considerably hampered by the existing legislation (which is based on earlier legislation) which is of limited utility in the 21st century. Thus decisions on complaints must all be taken by the Council, since there are no delegated powers in the statute. Again the statutory provisions are unclear, as they are in England, as to the ability of the Council to discipline its members as opposed to recommending prosecution before the Discipline Tribunal.

10. Applying the criteria set out in para. 8 to the complaints process for Scottish solicitors, my observations are as follows:

a) I have detected no evidence of a bias in favour of the profession by the Society’s staff, committees or Council. There are, however, aspects of the procedure which may give some complainers the appearance of favouring the profession.
b) The complaints procedure is only partly articulated in writing and circumscribed by time limits. In these two respects it compares unfavourably with that of the Conveyancing and Executry Services Board.
c) The problems over clear and consistent standards has been described in para 6 above.
d) This is an area which has been addressed in the last year.
e) The current procedures involve a mix of “truth-finding mechanisms” which can result in confusion, especially where they are insufficiently delineated.
f) The appropriate balance between conciliation, inquisitorial investigation and adversarial adjudication in the complaints procedure is an issue on which reasonable minds may differ. In terms of the current balance, considerable work has been done in terms of job descriptions, remit and training but there may be scope for further work

24 I remain puzzled, however, as to why IPS should not apply to advocates.
25 Parts III and IV of the Solicitors (Scotland) Act 1980.
26 See the Scottish Legal Services Ombudsman’s Annual Report 2000/01 p.43.
in relation to (1) case managers (2) client relations partners and (3) laymembers of committees or the Discipline Tribunal. For example, what is the role of the laypersons on the client relations committees? Certainly to ensure that the profession does not favour its own. However, presumably they are not expected to act as untrained lawyers. Thus, without more guidance it is difficult for a layperson to confidently assess what a “competent and reputable solicitor would consider serious and reprehensible”.

g) The system and those who operate it endeavour to be fair to both sides. However this is easier to achieve at the early investigative stage than at the committee stages where an inequality of arms may exist between an unrepresented complainant and a solicitor who may be represented ( albeit in writing ) by the Legal Defence Union. Equally, as the Scottish Legal Services Ombudsman has noted, the ability for Council members to speak at Council on behalf of constituents who have been complained against, without there being a spokesperson representing the complainant is unsatisfactory.  

h) As the Scottish Legal Ombudsman’s Annual Report for 2000/01 indicates, this is a major failing with the current procedure.

i) Compared with NSW and Victoria our complaints procedure is inadequately monitored. There the Ombudsman / Commissioner is statutorily required to monitor the complaints procedures of the profession. This can be at the level of the individual case or by requesting to see a range of random files. Further the Ombudsman / Commissioner can give directions as to how a particular complaint should be handled e.g setting special time limits or lines for investigation. Finally, the Ombudsman/ Commissioner may review any complaints decision of the professional bodies, whether or not they have been requested to do so by the complainant. In doing so, the Ombudsman / Commissioner may order a re-investigation, or conduct that re-investigation or ( in NSW ) substitute his own decision for that of the professional body without further investigation. However, even where the Ombudsman / Commissioner forms the view that the behaviour complained about is misconduct, a prosecution before the Discipline Tribunal is still required, unless the respondent agrees to be reprimanded. Here, the Scottish Legal Services Ombudsman can only review cases if she is requested to and the focus of the review is primarily on the adequacy of the investigation and whether proper procedures have been followed by the professional bodies. These constraints leave complainers who are unhappy with the decision of Council with only an attenuated route of appeal. In relation to IPS decisions taken by Council, the respondent has at least an appeal to the Tribunal, although it is an expensive option.

j) In relation to the investigation and handling of complaints up to and including the Council stage, the procedure appears affordable to all parties, although the level of voluntary, unpaid work by Reporters, client relations committee convenors and

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27 Ibid. p.42.
28 Legal Practice Act 1996 s. 147; Legal Profession Act 1987 s. 149
29 Legal Practice Act 1996 s. 148; Legal Profession Act 1987 s. 150 This power is rarely exercised.
30 Legal Practice Act 1996 s. 154; Legal Profession Act 1987 s. 159
31 s. 34 (1A) Law Reform ( Miscellaneous Provisions ) (Scotland) Act 1990. In contrast, the English LS Ombudsman can re-investigate the original complaint and substitute her own decision for the professional body’s.
members is a potential area of vulnerability. However, the cost of Discipline Tribunal cases is now a serious problem for the Law Society and the respondent. This makes the doubts over the Council’s powers to discipline for misconduct doubly unfortunate.  

k) On paper the range of sanctions statutorily available to the Council and the Tribunal appears reasonable. However, there are a number of problem areas. Responsive regulation would argue for greater scope for dialogue between the Society and respondents at the post-sanction stage. The financial limit for IPS compensation of £1,000 has not been uprated for inflation for a decade and is now well below that existing in England. Without research it is unclear whether average IPS awards have risen in the last five years, and how high that average is. The SCC research on Complaints about Solicitors found that less than half of the complainers surveyed were happy/ very happy with the compensation they had received for IPS. Again, doubts have arisen as to the Society’s powers to sanction for misconduct or unsatisfactory conduct. As the Ombudsman has observed the fact that “findings” of unsatisfactory conduct will not appear on the respondent’s record or be accompanied by any sanction is unlikely to satisfy complainers. Moreover, while the overwhelming majority of competent and reputable solicitors probably do understand the nuances of “regret and deplore”, reprimand and censure, it must seriously be questioned whether they are appreciated by complainers who are likely to see them as little more than a slap on the wrists. This perception of leniency will not be assisted by the fact that several decisions of the independent Discipline Tribunal in the last five or so years have been attacked for excessive leniency in the media. This may simply be an area where there is an irreconcilable conflict between the standpoints of the profession and the public.

l) The only evidence on complainer satisfaction is the SCC study on Complaints about Solicitors (1999) which found that almost as many complainers were dissatisfied with the way the Society dealt with their complaint as were satisfied (41%). Of course, not all complainers have reasonable expectations.

11. Public protection measures. The Guarantee Fund and the Master Policy professional indemnity insurance scheme offer significant measures of public protection – greater than in many jurisdictions – at a relatively low cost to the profession. The rigorous guarantee fund inspections of solicitors’ firms on a two yearly cycle compare favourably with most other legal professions. The Faculty of Advocates and voluntary sector advice agencies also carry indemnity insurance. These are major advantages which clients of claims assessors do not necessarily enjoy, although they may not be aware of this. However, the operation of the Guarantee Fund and the Master Policy (or indeed any of the insurance schemes) is not monitored by an external regulator. This allows those whose claims under the

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32 See SLS Ombudsman Annual Report 2000/01 at p. 43.
33 The comparative figure is £5,000.
34 Op. cit. p.53
35 Ibid. p. 43. Over the last decade Council reprimands have been running at 30 a year, nearly 50% higher than the prosecutions to the Tribunal.
36 Ibid. p. 43.
schemes are rejected, to harbour suspicions as to the independence or even-handedness of the schemes. In NSW the Commissioner’s remit extends to monitoring the operation of the mutual indemnity fund and the fidelity fund.

12. Education and Admission. Entry to the legal profession is controlled effectively by the Law Society and the Faculty of Advocates. It is not subject to monitoring by an external regulator, although the Lord President has to approve the Admissions Regulations. The Office of Fair Trading refer to the regulatory impact of professional control of entry in England in *Competition in Professions*.\(^{38}\) There is an inevitable tension between quality standards of admission and ease of entry to the profession.\(^{39}\) Perhaps for this reason in New Zealand and most of Australia admissions and educational standards are in the hands of an independent body chaired by a judge and with representatives of the profession and the universities sitting on it. Although we have no statistics as to the social make-up of today’s entrants to the profession, it is perhaps a matter for concern that it is now harder\(^{40}\) to enter the solicitor’s branch of the profession in the UK than to become a lawyer in Australia, New Zealand, Canada, or the United States. It would be fair to say that education, admission standards and entry to the profession has become an area of debate between the universities and the Law Society in the last seven or eight years.

13. Certification and accreditation of specialists. The granting of practising certificates (with or without conditions) lies in the hands of the Law Society, as does the accreditation of specialists. Neither of these functions are monitored by an external regulator. In NSW the Commissioner’s remit as a co-regulator also covers these areas.


a) Level playing field. Currently there is not a level playing field between different providers of legal services in relation to the extent of regulation to which each is subject. For the reasons set out in para. 5 above, I believe that a basic regulatory framework and minimum set of standards is required for all providers of legal services. This is not an argument for reducing the standards or regulation of the legal profession which are justified by their status and monopolies. Remaining differences in regulation between providers should be dealt with by greater transparency. There should also be a common regulator/co-regulator for all providers.

b) Options. Some commentators consider that the legal profession should be independently regulated\(^{41}\) reducing the professional bodies to a purely trade union function. I remain unconvinced that depriving the professional bodies of a major

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\(^{39}\) In other jurisdictions there have been examples of admission standards allegedly being used to restrict the numbers entering the profession.

\(^{40}\) In terms of entry barriers such as cost, years required and educational hurdles to be overcome.

role in standard setting, complaints and the consideration of the public interest is the appropriate solution to today’s regulatory challenges. Rather I believe professional self-regulation should operate within a broader, multi-layered co-regulatory framework.

c) **Co-regulation.** The Law Society needs greater disciplinary powers with respect to professional misconduct and unsatisfactory conduct. The emphasis, particularly in IPS cases, needs to shift towards client care and education of the profession. Access to the Discipline Tribunal needs to be more affordable – perhaps by the use of a Registrar as in Victoria. Standard-setting should become consultative and monitored by a co-regulator. Certification, accreditation and public protection measures should be monitored by a co-regulator. Admission and education standards should be handled by an independent body as in the Antipodes. Finally, I believe that the complaints procedures of the Law Society should be brought more in keeping with the attributes of an effective complaints framework and that the Ombudsman’s powers should be considerably extended in relation to complaints. In Victoria a twin entry system of allowing the professional bodies AND the Ombudsman to entertain complaints, with latter having review powers, has not been a success. In NSW the Commissioner receives all complaints and passes the great bulk to professional bodies to handle, subject to his monitoring and review powers. This model works very well and I believe it to be one that is worthy of closer scrutiny.

**Professor Alan Paterson**

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42 The bewildering array of existing regulators of the legal profession are set out in R. Baldwin, *Regulating Legal Services* (London, Lord Chancellor’s Department, 1997).