House of Lords - 3 December

Legal Profession: Regulation

Question for Short Debate

8.10 pm

Tabled By ***Baroness Deech***

To ask Her Majesty's Government what assessment they have made of the efficacy of the regulation of the legal profession.

Baroness Deech: My Lords, I declare an interest as the chairman of the Bar Standards Board and as a non-practising barrister. I have regulated several enterprises in my time, but I have been fortunate in only ever regulating those which I am convinced do good and with which I am familiar and well briefed. This House spent many hours last year debating the merits of and need for public bodies, and the principles aired then are ones that we need to be reminded of tonight.

The background to regulation of the legal profession is simple to grasp, and it is quite different today from the situation that prevailed when the governing statute, the Legal Services Act 2007, was conceived and passed. Simply, it is the lack of legal aid and affordability. That is no problem for those who go to the thriving commercial side of the Bar, but the average wage earner often finds the expense of legal advice beyond his means, in part because of the built-in cost of regulation. The effect on the profession is dire too, for

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the very large numbers of the Bar who do, arguably, the most socially valuable work, in criminal and family law, are seriously affected, because payment for regulation has to come out of their own pockets. This works against mobility and diversity, for the altruistic young people who qualify and want to come to the Bar cannot earn the modest living they once relied on without the legally aided work, at the very time when their higher education debts have peaked.

The Legal Services Act, which governs my work, is grounded in the 2004 report by Sir David Clementi on the regulatory framework of legal services. He was concerned with the then over-complex existing regulatory frameworks and with complaints handling, although, to be fair, that was more relevant to the solicitors' branch than the Bar. He was trying to reconcile liberalisation, allowing competition and access to flourish, with protecting the public, with special focus on complaints handling. His report led to the Legal Services Act 2007.

Consumerism was the other motivating factor behind the Act, but that policy was formulated in 2000, in an entirely different economic climate, following the Office of Fair Trading report about competition in the professions. This was all before the crash of 2007-08 in the financial world and its dreadful results. That demonstrated the failure of financial regulation, which, with hindsight, might have affected the principles behind the Legal Services Act. It was once thought that the division between clearing banks and merchant banks should go, and that there should be a free market of unfettered competition and deregulation. I am no economist but I would not be alone in pointing out that the meltdown and bank collapses resulted, and the Financial Services Authority seemed to have no power to prevent any of this or stop any innocents from losing. Indeed, that super-regulator is about to be dismantled. Legal regulation was developed without regard to this history and its risks have yet to play out.

Under the 2007 Act, the profession is overseen by the Legal Services Board. Its powers are devolved to some extent to the front-line regulators-for these purposes, the Bar Council and the Law Society, which have separated out their regulatory and representative functions. Therefore, the Bar Council represents barristers and the Bar Standards Board regulates them; the Law Society represents solicitors and the Solicitors Regulation Authority regulates them-not to mention six other regulators. For the purposes of this debate, I will

concentrate on the Bar and the solicitors, of whom there are 10 times as many, and I am married to one of them.

Proper regulation, in the public interest, is absolutely vital but it needs to be balanced against cost and existing resources, and performed efficiently. It does not take much to see that, rather than sorting out the maze of regulation, the statute adds to it; there may be over-regulation, duplication of regulation and competitive regulation, none of it cost-capped. The cost of the Legal Services Board and its demands are serious issues, for the practitioners have to fund it, as well as the other projects it has required-quality assessment of advocacy, an education review, diversity data collection and the Office for Legal Complaints. More than that, it is arguable that the Bar was caught up in the

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slipstream of the criticisms that were levelled at the handling of complaints by solicitors, and the heavy structure of the 2007 Act is not suited to as small a profession as the Bar.

When the Legal Services Bill was introduced in 2006, the regulatory impact assessment calculated the annual running costs of the Legal Services Board, which is the super-regulator overseeing the specialised ones, at £3.6 million. However, the total borne by the entire legal profession up to now is £19.5 million, with another £50 million for the Office for Legal Complaints. The cost falls on clients and, in the case of legally aided clients, on practitioners. That is due to duplication of work through micro-management of regulators and the pursuit of objectives more akin to a market regulator than an oversight public interest regulator, as was mandated by Parliament.

I echo the fears of Sir Sydney Kentridge when regulation of the legal profession was first advanced a few years ago. He feared an increase of power of the Government to control the legal profession through a government-appointed body, but he was confident that the Lord Chancellor would ensure that the Bar was protected. Sadly, as I have learnt at international conferences, the outside world sees the independence of our legal profession as diminished by regulation.

The 2007 Act laid down eight regulatory objectives in no particular order. Some conflict with others in practice. Therefore, a margin of appreciation clearly must be left to front-line regulators to decide what steps to take. It is not clear from the statute whose view would prevail in case of disagreement between the Legal Services Board and the front-line regulators. Nevertheless, history has shown that one objective-promoting the interests of consumers-has been elevated above the others by the super-regulator, and in so doing it sees it as its task to "direct" rather than "assist"-the word chosen by Parliament-the front-line regulators.

Excessive focus on the consumer interest may be to the detriment of the professional interests and standards upheld by the lawyers. Commercialism is not everything, although one wants legal advice to be available and affordable. Certain services, such as education, health and the law, are beyond market value. The public interest must prevail. It does not seem to me that the public will be well served if there is authorisation for a new category of partly qualified or underqualified providers of legal services who offer only one service-for example, will writing, which cannot really be confined to a small area.

Too many new projects are being imposed by the super-regulator on the front-line regulators without due regard to cost, need and effort. For example, outcomes-focused regulation does not work well for the rules of conduct of the Bar, because court litigation is a process-driven system, where the rules are not merely means to an end but an end in themselves and intrinsic to the rule of law itself.

Let us take referral fees. They are seen by the entire Bar as unethical, restricting competition between lawyers and denying the client freedom of choice. They are likely to be illegal under the Bribery Act 2010, but the front-line regulators are being told to retain them except where specifically banned by law, in the face of evidence that they are a bad thing.

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Another example is that the members of the Bar have been told that, when they first meet a criminal client in the cell, they must give that client on a piece of paper directions as to how to complain. There could not be a worse moment at which to do it. Now there is required detailed collection of barristers' equality and diversity data, which go beyond the Government's recommended approach, in that they require data on sexual orientation and socio-economic status. They are to be collected chambers by chambers, yet many chambers have fewer than 10 members, which makes collection of such data very sensitive, because anonymity may easily be breached. The Bar's preference for aggregate collection of such data across the profession was rejected.

The Bar Standards Board does not dispute the need for proper regulation, but it should be proportionate, affordable and effective. We were disappointed that the Ministry of Justice's triennial review of the Legal Services Board did not address those concerns directly. The opportunity will present itself again in the quinquennial review of the 2007 Act.

The noble Lord, Lord Carlile, who cannot be in his place this evening, has said, in support of what I am saying, that the regulation of the legal profession is cluttered and bureaucratic. It may not have gained the confidence of the profession or the public.

At this stage in the implementation of the Act and the introduction of alternative business structures, there remains a role for the Legal Services Board, but not many more years should pass without an overhaul of the complications introduced by the Act in establishing a super-regulator. I hope that the Lord Chancellor and the Ministry of Justice will start a discussion with the profession and identify a simpler, cheaper and more balanced future.

8.21 pm

Lord Faulks: My Lords, I begin by declaring an interest. I am a practising barrister. I was a head of chambers for nearly a decade until relatively recently and I am a former chairman of the Professional Negligence Bar Association.

I shall make a few observations about the position of the Bar. My noble friends Lord Gold and Lord Phillips of Sudbury will no doubt speak about the solicitors' profession. When I started to practise, the Bar was lightly regulated, the profession was much smaller, chambers were much smaller, circuits had more power and influence, and most senior barristers proceeded to some form of judicial post. The standard of ethics was extremely high, but there were undoubtedly some restrictive practices which needed to change. Those practices, together with the considerable increase in the size of the profession and the way it functioned, called for examination.

Following the report of Sir David Clementi, the Bar Council carried out his central recommendation: that there should be a split between the regulatory and the representative elements of the Bar Council's work. It therefore established the Bar Standards Board. The members had extensive experience of regulation and corporate governance and were appointed on Nolan principles.

It would be inaccurate to say that the Bar, a still small and independent profession, universally welcomed the arrival of the board but, since it has been set up, there has been a growing respect for what it does. There have inevitably been increasing demands on chambers in terms of record-keeping, compliance with regulation and a variety of measures that the board has imposed on the profession to secure high standards and ensure that the Bar functions in a way that reflects the public interest.

The key to the respect that the BSB commands is the evidence-based approach adopted by the board and the sense among barristers that it has taken the time and trouble to understand the Bar and the way it practises, both its weaknesses and its strengths. The need for a super-regulator, or oversight regulator, to oversee the approved regulators like the BSB has not been seen by the profession to have any obvious justification-to put it mildly-particularly when it seems to involve sets of chambers duplicating many of the obligations placed on them by the BSB and increasing still further the cost of compliance.

What is the proper role of the Legal Services Board? As the Legal Services Bill was going through Parliament, a number of parliamentarians expressed the fear that the LSB might be heavy-handed and would not allow approved bodies such as the BSB, once they were operating effectively, to get on with the job. Reassurance was provided by the then Government. For example, on 13 June 2007, Bridget Prentice MP, the Parliamentary Under-Secretary of State in the Department for Constitutional Affairs, said:

"It is important that the oversight regulator does not micro-manage and second guess the actions of the approved regulators, as Members on both sides of the Committee will agree".-[*Official Report*, Commons, Legal Services Bill (Lords) Committee, 13/06/07; col. 95.]

This is a reference to the work of the Joint Committee on the Draft Legal Services Bill, to which Sir David Clementi had said in evidence that there should be "minimal interference" by the LSB in the work of the approved regulators.

I have had the opportunity of reading the Bar Council's response to the triennial review of the LSB by the Ministry of Justice, together with the LSB's response. To the disinterested observer, I recommend reading these two documents. The arguments of the Bar Standards Board are compelling. Those of the LSB are rich with regulatory language, not easily understood by the general reader, and include a great deal of self-justification. They also indicate a desire to play an increasing role in the regulation of the legal profession. The response concludes with an observation about a review of the 2007 Act:

"Any significant change to the current settlement in advance of such a review will divert effort unnecessarily from the current challenging delivery agenda".

This does not sound very much like what Parliament had in mind for the Legal Services Board.

I will give the House an example of where the LSB clearly wishes to have a significant involvement in the way the legal profession functions, which is in relation to legal education. The chair of the LSB

observed in his Lord Upjohn Lecture in 2010 that the current framework for legal education and training was,

> "simply not fit for purpose".

In his own 2012 Lord Upjohn Lecture, Lord Neuberger, the president of the Supreme Court, made this observation about David Edmonds, the chairman of the LSB, and the Legal Education and Training Review:

"I cannot share the view which David Edmonds was reported in the *Guardian*as expressing in March this year, namely that he would be 'extremely disappointed' if the LETR only made minor recommendations. That suggests a conclusion that major reform is both necessary and proportionate, reached in the absence of any evidence and analysis. But surely we should wait for the evidence, the analysis of that evidence, and the conclusions drawn from that analysis before we start talking of disappointment or the nature of the appropriate recommendations. We should all be surely approaching the Review and its outcome with an open mind".

No doubt the observations of the chairman would be said to be consistent with one of his goals in the LSB's draft strategic plan for 2012 to 2015, which was,

> "to reform and modernise the legal services market-place in the interests of consumers, enhancing quality, ensuring value for money and improving access to justice across England and Wales".

The LSB clearly has very significant regulatory ambitions.

Who pays for the increasing regulation? The cost falls on practitioners and very harshly on those who are starting and who depend on the publicly funded fees which are steadily reducing in their true value. Smallish sets of chambers with a high BME quotient are particularly hard hit. For those not dependent on publicly funded work, the cost of regulation-much of which, in my view, is unnecessary-will ultimately fall upon the consumer of legal services, who will have to pay more for the increasing infrastructure that is necessary in chambers in order to comply with the burden of regulation.

Barristers are, frankly, bewildered by some of the requirements imposed by the LSB. The inept requirement by the LSB that barristers should inform their lay clients at the point of first instruction of their right to make a complaint to the chambers and, as necessary, to the legal ombudsman, shows very little understanding of the way barristers actually practise and an insensitivity of the circumstances in which a client sees a barrister. Similarly, the requirement by the LSB that quality and assurance should extend to practitioners' advisory work reveals a complete ignorance of the way in which the profession works-not to say a failure to grasp fundamental principles of law in relation to the privilege which attaches to instructions given to barristers. These examples and many more illustrate the perils of having a non-expert lay regulator attempting to devise rules of conduct for practice by members of the legal profession.

Barristers understand the need for regulation and for public confidence in the legal system. However, it should not be forgotten that the legal profession is held in high regard throughout the world, as is our system of justice, and results in considerable benefit to the economy of this country. We should take considerable care before ripping up the model.

I am sure that the Minister will accept, as do the Government, that regulation needs justification and that our economy generally has been overburdened by

unnecessary and inappropriately onerous regulation. I urge the Minister to support post-legislative scrutiny of the effectiveness of the Legal Services Act, particularly the scope of the LSB's activity.

I congratulate the noble Baroness, Lady Deech, for bringing forward this important question to your Lordships' House. I applaud her contribution to the raising of standards at the Bar and endorse all that she has said so ably in today's debate.

8.30 pm

Lord Phillips of Sudbury: My Lords, I, too, thank the noble Baroness, Lady Deech, for bringing this subject before the House. I confess that I received her e-mail warning us of all this only this morning, so my contribution may be lacking in coherence, but I will make a few points if I may. I started full-time in a solicitors' office-admittedly, as an office boy-55 years ago, and have seen an astonishing transformation over that time in the regulation and, I believe, the ethos of what is still called a profession. When I started there was a maximum of 20 partners; you could have only partnerships, not limited liability; there was no advertising and no conditional fee arrangements; referral fees were not permitted; and, above all, there were no such things as "alternative business structures", that charmingly denominated abortion that we now have among us.

Sadly, I must be honest and say that I do not actually think that solicitors are any longer members of a profession. I think that we are just another business. Thank the Lord, integrity is still largely to be found within the solicitors' branch of the profession, but I do not see it long maintaining itself because the structures within which we now function have become so commercialised and driven by bottom-line considerations that it is unreasonable to expect integrity to survive organically-in rather the same way, I am afraid, as the City, little by

little, has lost its values base. I agree with what the noble Baroness said about the big bang and its consequences

I feel that we are going down a blind alley in thinking that more and better regulation can maintain the essential integrity without which we are no longer officers of the Supreme Court and handmaids to justice but something a great deal less and, in some ways, quite threatening. I say that with great reluctance but cannot avoid it. I was the only solicitor member of the committee set up under Sir Sydney Kentridge, and he had a very lively belief in the ethos of the profession-a set of values, if you like, autonomous to each practitioner, without which the whole structure could not survive.

The truth now is that we are deep in regulation-I would say, as have others, overregulation or inappropriate regulation. I looked at *Halsbury's Laws of England* this morning and found to my amazement that there are two volumes on the professional regulation of lawyers-1,196 pages of stuff about it. When I started, I doubt that there were 60 such pages. The life of the lawyer today-I can speak only of the solicitors' profession-is unbelievably bureaucratic. There is somehow a belief that if you are forced to write a six-page letter to a client before you start work, that will somehow improve the work, or that some of the forest of internal bureaucracy that now prevails in big

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firms can maintain those essential elements without which there can be nothing.

I look to the regulatory objectives of the 2007 Act. I may say that I was one of the very few Members of the House of Lords-in fact, I may have been the only one-who was flat-out opposed to the part of the 2007 Act that set up the alternative business structure. But as has already been remarked, the eight regulatory objectives are not entirely internally consistent. When you think that the eighth of them is,

> "promoting and maintaining adherence to the professional principles",

of which there are five, it all adds up to a not entirely clear set of guidelines for the young person entering the profession. Above all, integrity should surely trump everything. I do not think the word appears in the eight regulatory objectives.

I leave my few remarks at that. I warn against the bureaucratisation that attempts to set the values for the practitioners. Up to a point, of course you have to have a complaints mechanism; of course you have to have somebody who can strike down the few bad apples and maintain that integrity. But I believe, as had been said by the two previous speakers, that we are not at the point where we are doing the regulatory process the best we can. In fact, going back to the drawing board-as I think was the phrase of the noble Lord, Lord Faulks-might well be what is needed.

I have not embarked on the alternative business structure, except to say that if anybody thinks that you can have a law firm 70% or 80% owned by whoever the hell you like and that that is not going to impact directly on the ethos of that enterprise, they are living in cloud-cuckoo-land. There are 120-plus applications now for ABS status and it is already observable that these big combines are going to be driven first, secondly, and thirdly by profit, profit, profit. It is all about the bottom line, just as in the City. Everything else can go hang. The notion of informal pro bono work is, I am afraid, inconsistent with the values that will bring into existence the vast majority of these alternative business structures. I would like a re-examination of them as soon as is feasibly possible, because they are a real nail in the coffin of professionalism.

8.37 pm

Lord Gold: My Lords, I start by thanking the noble Baroness, Lady Deech, for bringing this debate forward this evening. Perhaps like the noble Lord, Lord Phillips, I was somewhat sceptical of the Legal Services Act and what was intended by it, but I was not here then. Maybe I would have joined in voting against it. But we are where we are, and we must have a properly regulated legal profession that ensures that all providers of legal services

meet high standards of competence and behaviour. This is even more important now as the first alternative business structures start providing legal services. I share the concerns of the noble Lord, Lord Phillips, about where that takes us, but we will see.

The present system reflects the proposals in Sir David Clementi's 2004 report, as we have heard from earlier speakers, for which there was general parliamentary support on all Benches as well as support from both the Law Society and the Bar. High on Clementi's recommendations was the separation of representative and regulatory functions.

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The Legal Services Board was created to provide oversight of a variety of different regulators to ensure that the right regulatory objectives are achieved and to secure some independence from the Government. The current regulatory framework has been in place only since 1 January 2010, when the Legal Services Board took on the majority of its powers under the Legal Services Act. In a review published in July this year, the Ministry of Justice was supportive. It concluded that the LSB should continue to deliver its functions in its present form. Recommendations for some improvement to its corporate governance were made but, by and large, it was to carry on operating as before.

Despite the endorsement from the Ministry of Justice, there has been some criticism of the LSB. We heard some this evening. The noble Baroness, Lady Deech, indentifies criticisms made by the Bar Standards Board, notably that there is overregulation and duplication, leading, among other things, to unnecessary cost which inevitably is being picked up by the consumer. While generally supportive, the Law Society, representing 120,000 solicitors in the UK, is also critical. It believes that the LSB has not got the balance right and that the objective to promote competition in the provision of services is given greater emphasis than improving access to justice, encouraging an independent, strong, diverse and effective legal profession and promoting and maintaining adherence to the professional principles.

The regulatory arm of the Law Society, the Solicitors Regulation Authority is a bit more supportive, but also believes that the balance is not quite right at the moment. The SRA approves of the LSB's emphasis on putting the consumer and public interest at the heart of regulation and its role in the appropriate co-ordination of standard setting across the various front-line regulators. The SRA also considers that the Legal Services Board has made significant progress in achieving its objectives, including making the market more diverse, as seen in the licensing of ABSs, and developing a regulatory regime that is both independent and transparent. However, the SRA believes that the LSB now needs to work closely with regulators to develop a common understanding of its role. It considers that the LSB must focus on properly developing its oversight role and, in doing so, reduce its approval, enforcement and investigatory functions. However, the SRB acknowledges that there have been improvements.

The main thrust of the complaint against the LSB is whether it is truly performing the role of oversight regulator, which was what was intended, or whether, in the words of the Bar Council, there has been "mission creep", with the LSB now duplicating and overlapping the work of the front-line regulator, micro-managing the activities of those regulators it is meant to oversee. Front-line regulators, such as the SRA, are much more in touch with the profession, so why should we defer to something much more remote, where I do not believe that there are any legal practitioners involved? Critics claim that this duplication and the LSB's micro-management have greatly increased the cost burden. It seems, from other speeches this evening, that that is indeed supported. Although it might be said that the fact that there is some tension between the LSB and the regulators over which it has oversight, or at least

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some of them, is not a bad thing-it might keep both sides on their toes-the extent of the serious criticisms that are being made suggests to me that we really need to look again at the balance.

I have spent the past two years immersed in the world of corporate governance. This has demonstrated to me that finding the right balance is key. While businesses must adopt a proper governance regime, it is essential

that governance does not take over and damage the very business that the organisation is promoting. So those responsible for regulation must be practical and sensible in their outlook. Regulation for regulation's sake cannot be right. Any regulation that is put in place must be appropriate and proportionate to achieve the required result. Its purpose must be understood and supported by those being regulated.

I am also sure that, if at all possible, finding the right balance should be achieved through greater dialogue and perhaps compromise between the relevant parties. Those concerned may need to demonstrate that they understand the issues raised by the other parties and are willing to be flexible. In the perfect world, by working in partnership and accepting that each side may be making valid points, the LSB and the regulators will be better able to deliver excellence in the regulation of legal services. This is far better than seeking to impose a solution on the regulators or the LSB. However, I understand there has been considerable dialogue between the LSB and the regulators and that little progress has been achieved. That is unfortunate and harmful to the legal profession and the administration of justice.

Under the circumstances something more is needed; it has been suggested that even late on there should be post-legislative scrutiny of the effectiveness of the Legal Services Act in order to test whether the original objectives have been achieved. I suggest to the Minister that this is something that should now be looked at seriously. The Bar Council wants such a review, and I do not think that the solicitors' profession would have much difficulty in supporting it. Despite this, I think that the LSB has a continuing role, particularly as we have alternative business structures coming into place. Until we see where that actually takes us and how these new bodies operate, the LSB should remain, but I think the sort of review I have mentioned is necessary.

8.46 pm

Lord Mackay of Clashfern: My Lords, it seems a long time since Burns Night 1989 when I introduced Green Papers about the reform or control of the legal profession. Your Lordships who are old enough will remember that these Green Papers provoked a certain ripple of interest from the judiciary and others. There have been great changes since then. In formulating the Green Papers we were principally, although not entirely, dealing with what looked like anticompetitive practices in the legal profession. To what extent a particular practice is anticompetitive is quite a difficult question. For example, it was thought that preventing the legal profession advertising was anticompetitive; I am not sure that the legal profession is better today with the kinds of advertisements you see on the television and in the newspapers. What one characterises as

anticompetitive may, in fact, be something to do with the quality, independence and integrity of practitioners. If I am a reasonable member of a legal profession, I surely do not need to make my way forward by criticising my fellow practitioners. Relationships created in the course of professional work should, in my view, be the principal recommendation for a professional person.

Matters have since moved quite a distance. In my final proposals, which went through as an Act of Parliament, judges were given an important role in the control of the legal profession, which worked pretty well for a time. Gradually, the influence of judges was reduced until it disappeared altogether from the formal aspects of the regulation and eventually new standards were set up. I believe that the late Lord Nolan was the first to point out the need for a division in the Bar between its regulatory and representative functions, particularly in relation to the charges levied by the Bar Council for being a member of the Bar. If it was regulatory, it could be compulsory, whereas if it was representative, it should be voluntary. "No taxation without representation" might be an adapted expression for what he said.

It is also important to remember education in this connection. It was important in my judgment, and I remain of the view that it was probably correct, that a reasonably efficient system of education was required to maintain the professional quality of the Bar and of the solicitors' profession.

It seemed to me, and I still take this view, that the different branches of the legal profession have different challenges to face. Therefore, I am glad that the Bar Standards Board, the Solicitors Regulation Authority and the other regulators which exist now in the legal profession have independent existence. I remember

discussing the need for differences with Sir David Clementi. I think he did not fully agree with my point of view, which was why he suggested this overarching supervisory body for the legal profession as a whole. He thought that the legal profession should be regarded as a whole, and I could see the force of that. I also think that overspecialisation in the legal profession is detrimental to its success as a proper organ in the general affairs of our country.

We must recognise that it is important that the legal profession should be independent. In recent days, we have heard a little about regulation in relation to another independent part of our economy with a fairly heated argument on one side and on the other. That was part of the burden of the debate that we had on the Green Papers on that marvellous Friday, which I certainly remember with great-what should I say?-anxiety as to whether I was doing the right thing.

As I have said, education is important. In this connection, I would be glad if the Minister would comment on a report that I have recently read that the College of Law has been transformed, no doubt with the authority of the Privy Council, into the University of Law. I always thought that a university was supposed to be an institution which had perhaps not absolute universality but at least covered a few disciplines, including medicine and the like. But the University of Law seems to have only one discipline as its subject matter.

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Lord Phillips of Sudbury: Is it not also true that the university which emerged from the College of Law is a profit-making entity? I rather think that it is.

Lord Mackay of Clashfern: I am just about to come to that point. I understood that the something or other-I am not sure exactly what-of the College of Law has been sold to a commercial organisation, which I assume has a profit motive in it. I do not think that it is a charity. However, the university would be a charity, at least under the ordinary definition of charity which prevails as an institution for the advancement of education. I would be glad to know a little about the Government's policy in relation to having the legal profession taught, and a university financed, by a profit-making organisation. I am not against profit for profit's sake at all but, hitherto, universities have not been regarded primarily as institutions set up for profit, except for the profit of those who profit from them.

The noble Baroness, Lady Deech, has led the Bar Standards Board with tremendous distinction. I sensed a certain amount of frustration in her remarks this evening about the way in which really efficient standard-setting for the Bar can be damaged by unnecessary and sometimes overcomplicated interventions by those who do not quite share the same objectives as the Bar Standards Board. I feel that the same may be somewhat true in the solicitors' branch of the profession.

I hope that the Government will take very seriously the suggestion that this whole area should be subject to post-legislative scrutiny. The Joint Committees of this House and the other place have shown themselves to be very valuable in scrutiny of legislation. Post-legislative scrutiny of this legislation, which is so fundamental to the success of our free legal profession, is now due.

8.55 pm

Lord Goldsmith: My Lords, I shall speak briefly in the gap and have alerted both Front Benches to this. It is a pleasure to speak after the noble and learned Lord, Lord Mackay of Clashfern, because it was probably as a result of the innovations and reforms that he has referred to that I first became involved in questions relating to the regulation of the legal profession. I have now been involved in this for more than 20 years, both nationally and internationally. I was chairman of the Bar during the first year that it faced competition from solicitors in terms of rights of audience and when it for the first time had to succeed on the basis of its merits and not on the basis of restrictive practices.

I want to spend two minutes underlining a very important point raised by the noble Baroness, Lady Deech. It is not the question of whether there should be regulation for the legal professions; of course there should. It is

not the question of whether the regulation should be for the public interest; yes, it should. It is not the question of whether regulation should be carried out purely by lawyers-the body which the noble Baroness, Lady Deech, heads has a majority of non-lawyers on it. Those are not the issues. Rather, the issue is: what is it that the Legal Services Board is doing? This came about when I was fulfilling a different role as a member of the Government who introduced the Legal Services Act. I did not have direct responsibility

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for that; that was the Lord Chancellor. However, obviously I knew well what was going on and expressed my views at the time. We tried to make clear to both sides of the legal profession, and indeed to the other legal bodies, that the Legal Services Board was not going to be an alternative regulator. It was to be an oversight regulator which had to be there as a backstop in case the regulators themselves-the Law Society, the Bar Council and the two bodies that they set up-were not doing their job.

I am still involved in the regulation of the legal profession as a bencher at Gray's Inn and a member of its management committee-a constituent part of the way in which the profession operates. I have a growing concern about whether the Legal Services Board is micromanaging and suffering from mission creep, which is almost inevitable whenever a body is set up. I know, because I have seen the operation, that the noble Baroness is not a pushover as far as the Bar is concerned; absolutely not. I have seen her berate-very nicely but still enormously effectively-Lord Justices of Appeal who were quivering, not realising what they had done wrong. When she does that it is very good for the profession and for the public. What is not needed alongside that is a body which thinks that it has the same responsibility-it is not there in the background but is forward. The Bar Council said in a briefing that on the important public issue of the extension of direct access the Legal Services Board sent 14 points that it wanted to see addressed in any submission on this question. If that was the case, it was over egging the role.

I have a single question and a single proposition for the Minister. Will he say, having heard from the noble Baroness, that the Government will take on the question of having a proper review of what the Legal Services Board is doing? Many people with experience, from inside and outside the profession, will be able to assist in relation to that. It is important. As the noble and learned Lord, Lord Mackay, said, what matters at the end of the day is the independence of the legal profession. That needs to be safeguarded as well as the public interest, efficiency and the other things that noble Lords have referred to.

8.59 pm

Lord Hunt of Kings Heath: My Lords, this has been a very interesting, although short, debate. At the moment we are thinking very much about regulation of the media. Whatever the outcome of the current debate, in most sectors of the economy it is generally accepted that there should be statutory regulation of the affairs being conducted within them-and, where the professions are concerned, by the individuals who practise in that sector. However, there is much less consensus about the right regulatory approach.

The noble Baroness, Lady Deech, said that circumstances had changed considerably in the past decade since the architecture of the 2007 Act was formed-and, indeed, many years after the noble and learned Lord, Lord Mackay, first put his mind to these rather difficult subjects. She was right to say that the economic climate is different, both in the country and for the profession; and she was surely right, too, when

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she pointed to some of the experiences of regulators in other sectors. She mentioned financial services. I will mention the health service sector, where the existence of the long-standing-almost long-running-inquiry into Mid-Staffordshire has moved on from what happened in the hospital to look at the role of the various regulatory bodies, and at whether collectively they did the right thing or whether there were gaps, shortcomings or tensions between them.

It is absolutely right for us to have this debate and to discuss regulation within the legal profession. I am sure that the Government will welcome the opportunity to state their views and perhaps to reflect on some of the

comments that have been made about the need for them to think in the next two or three years about how to take their views forward. I listened with great interest to the comments of the noble Lord, Lord Phillips, on ownership structure in the profession. I readily recognise that there have been huge changes over the past decade. However, in my experience of the National Health Service, doctors in particular as well as other parts of the profession are able to maintain professional standards within a large organisation. I am not persuaded that it is impossible within new ownership structures for there none the less to be a strong ethos that will be very much underpinned by the principles set out in the 2007 Act, and by the regulatory framework that comes from it.

Lord Phillips of Sudbury: Does the noble Lord not have concerns that an organisation that buys lots of law firms is likely to be interested only in what it can screw out of them? That is not consistent with any view of professionalism.

Lord Hunt of Kings Heath: Of course, in the development of the kind of organisations to which the noble Lord refers, profit will be a core concern. However, one could look to other sectors where people are involved in seeking profit and point to professionals who practise to the highest quality, usually underpinned by regulatory functions. I do not subscribe to the noble Lord's view that ownership structure per se will change the professional ethos of people working in the sector. I understand his concerns on the matter, but surely he will recognise that even if you are working in a sector where the objective clearly is profit, it is still perfectly possible to act in a responsible and ethical way. Even before the ownership structure changes, it was my understanding-although I am a novice in these matters-that barristers none the less would seek to earn good income if they could.

Lord Phillips of Sudbury: I am most grateful to the noble Lord for seeing that I was hovering. Lawyering is a very particular business. It is not like manufacturing tins of beans. It has all sorts of social and ethical issues at the heart of it. Unless you can allow a lawyer to give full vent to his or her social purpose, the position of the lawyer as the gatekeeper to justice is impeded.

Lord Hunt of Kings Heath: Having been a Member of your Lordships' House for 15 years, I now recognise the special characteristic of lawyers, and I rejoice in it. I have only five minutes left and perhaps I ought to press on.

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Clearly it is important to ensure that professional regulation works effectively. It should not be overly bureaucratic and it should uphold the independence and integrity of the profession. We should be very proud of the whole legal services profession in this country, the fact that it is recognised globally and that legal services are a huge export for this country. Clearly we should do nothing that undermines the strength of the legal services industry in that regard.

I supported the passage of the Legal Services Bill in 2007. Although the Legal Services Board has come in for some criticism in your Lordships' House tonight, we should recognise the progress made by the board under the chairmanship of David Edmonds. We should also recognise that the board will be publishing its inaugural assessment of the effectiveness of each of the approved regulators, including the Solicitors Regulation Authority and the Bar Standards Board. It might have been better if this debate had been timed after we had seen the outcome of these arrangements.

The triennial review to which the noble Lord, Lord Gold, referred has suggested that there is a continuing role for both the Legal Services Board and the Office for Legal Complaints. The next review will take place in 2015. The suggestion by the Bar Council and a number of noble Lords for post-legislative scrutiny, which I would always support as a matter of principle, might be better timed to coincide with the next triennial review around the 2015 mark so the two might run concurrently.

I have noted noble Lords' concerns, and particularly the Bar Council's concern and criticism of what they describe as mission creep by the Legal Services Board, citing micromanagement, duplication and overlap of

regulatory activities and unnecessary cost. These have to be guarded against. I understand the total cost of the LSB start-up and first three years' running costs of just under £20 million is not insubstantial, although it is modest compared to many other regulatory bodies. The noble Baroness, Lady Deech, commented on examples of where the LSB is considered to have gone overboard, and mentioned equality and diversity data collection. My understanding is that the LSB-as it saw it-gave best practice advice on how that collection could be done anonymously and made it clear that there should be no compulsion on individuals to take part. The consultation was explicit that the reason for going beyond the blanket survey was so that clients and potential employees could see the diversity make-up of individual firms and chambers. I am not going to argue one way or the other, but it is important that we also hear the viewpoint of the Legal Services Board. We have tended to hear from one side.

Baroness Deech: My Lords, perhaps I might explain in response to the noble Lord. There is obviously no objection to collecting diversity data across the entire profession of 15,000; the Bar has done it for a while. It was difficult to collect data from chambers where there were perhaps only 10 people. Even if it is anonymous, identifying someone by ethnicity or sexual orientation would of course be very easy. Because a unit is so small, that encourages people not to participate. I am afraid that our practical arguments in that respect

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were simply rejected, with the outcome, I believe, that rather fewer data are collected than might have been the case if we had been able to organise it ourselves.

Lord Hunt of Kings Heath: My Lords, I am sure that the House is very grateful to the noble Baroness for that explanation. As I said, I do not seek to argue one way or the other. However, I suggest that in any debate on these matters, it is important that the views of both bodies are heard by your Lordships' House.

Lord Goldsmith: My Lords, in those circumstances, I wonder why my noble friend does not agree that when you have the sort of comment that has come from a regulator-from the noble Baroness, Lady Deech-saying there is a problem, he does not now support a review to see whether there is a problem or not.

Lord Hunt of Kings Heath: I am most grateful to my noble and learned friend for that remarkably helpful intervention. We have just had the triennial review by the Ministry of Justice. Another one will take place in three years' time. The Bar Council has put forward the proposal that there should be post-legislative scrutiny, and again, I have no doubt that your Lordships' House will want to give that every consideration, because most noble Lords strongly support the concept of post-legislative scrutiny. The question is when it would be best done. I suggest that it might be best done in parallel with the 2015 triennial review, which would allow a little more time for both these bodies to see if they can meet together and work out a more constructive relationship. That ought to be the outcome of both tonight's debate and discussions between the two bodies.

9.12 pm

Lord Ahmad of Wimbledon: My Lords, I begin by thanking the noble Baroness, Lady Deech, for securing this debate. The excellence of the UK's legal profession is well recognised worldwide, and rightly so. The regulatory framework is a key factor in ensuring that these high standards are maintained. I would add-looking towards the noble and learned Lord, Lord Goldsmith-that we meet once again at a late hour. However, the quality rather than the quantity of speakers is an important issue when it comes to the legal profession.

Before addressing many of the interesting points made by the noble Baroness and other noble Lords, I would like to talk briefly about the regulatory framework for lawyers in England and Wales and the reforms introduced in the Legal Services Act 2007. I would simply highlight, as the noble Lord, Lord Hunt, so rightly said, some of the positive elements that we have seen, accepting the challenges that we have faced since the introduction of the Legal Services Act. When we talk about regulation, let me assure you that, as someone who spent 20 years in the City of London and in financial services, the word "regulation" resonates quite loudly in my ears.

The Legal Services Act 2007 had three key aims: a more effective and simplified regulatory framework; a more effective and independent complaints-handling system; and more effective competition within legal

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services. I turn to the first of those. In January 2010 we saw the new regulatory framework become operational, with the Legal Services Board-which several noble Lords have mentioned this evening-getting up and running. The role of the Legal Services Board is set out in statute. It is an independent body providing-this is the crucial word-oversight regulation of the frontline approved regulators. The approved regulators remain responsible for the day-to-day regulation of their members unless, of course, they are found to be failing in their regulatory duties, in which case the Legal Services Board has a number of powers to intervene to ensure that effective regulation is maintained.

The second key reform is the creation of the Office for Legal Complaints which administers the Legal Ombudsman scheme. Last year it dealt with over 80,000 inquiries, and of those some 7,455, close to 10%, were directly resolved. It acts as the single point of contact for consumers unhappy with the service they have been provided by a lawyer. I would add that there is an informal resolution procedure which sees around 35% of cases handled in this way.

The third and final key reform is the new alternative business structures regime which allows different types of lawyers to work together with other professionals and to accept external investment and ownership. This should allow them to explore new ways of structuring their businesses to be more cost-effective, efficient and innovative. We hope that it will lead to more choice, improved standards and more competitive costs for consumers. While we are happy to see a diverse range of alternative business structures emerging, we are not saying that you need to be an alternative business structure; we are saying that we have given you the flexibility to practise as a sole practitioner, traditional law firm or alternative business structure. So far, over 40 firms have taken the opportunity to become alternative business structures, and it is particularly encouraging to see the diversity of firms involved, ranging from a simple husband and wife partnership to the Co-op.

So much change in such a short space of time means that this has been a steep learning curve for all involved, and this has inevitably led to challenges which several noble Lords have talked about in the debate. Let me address first the issue of proportionate regulation. My noble friends Lord Gold, Lord Faulks and Lord Phillips all alluded to it in their contributions. What is important is that the Legal Services Board and the approved regulators work together constructively to ensure that regulation is proportionate, ensures that consumers receive excellent standards of service, and that the opportunities provided by the Act in terms of competition and innovation are realised. Indeed, the issue of being proportionate to the role of the Legal Services Board was a point well made by the noble Baroness, Lady Deech. The Legal Services Board has been one of the key drivers of the reforms, partly driven by its statutory duties. I appreciate that the pace over the past two years has meant that, as with most new frameworks, there has been a lot of consultation and change, and while the benefits of all of these changes have yet to be realised, we are well on our way to seeing the more competitive and innovative sector that the Legal Services Act first envisaged.

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My noble friend Lord Phillips talked about the eight objectives and said that he was not sure whether his contribution was going to be coherent and clear. I can assure my noble friend that he certainly was both coherent and clear. Perhaps I may draw his attention to one of the objectives, which is,

> "to promote and maintain adherence to professional principles",

which are defined in subsection (3)(a) as,

> "that authorised persons should act with independence and integrity".

The complexity of regulation is always an issue, and a key part of the new framework has been the separation of representative and regulatory functions as required by the Act. This led to the introduction of new bodies in addition to the Legal Services Board, the Solicitors Regulation Authority and the Bar Standards Board, which in turn has led to a comment made by several noble Lords that the new framework, rather than simplifying things, has actually added to the complexity. It is vital that consumers have confidence in the legal profession. To that end, regulation of the profession should be effective and not unduly influenced by its representative role. Without that, there is the risk of accusations of lawyers protecting their own. So while we have seen new regulatory arms emerging, that has been an important step in maintaining-that word again-the integrity of the profession. Also, before the new regime was established, a number of different organisations were involved in the regulation of the profession. While I take the point made by the noble Baroness, Lady Deech, about self-regulation, there was still some oversight. My noble friend Lord Phillips of Sudbury also mentioned this point. The Lord Chancellor used to approve rule changes, and in some cases rule changes had to be approved not only by the Lord Chancellor, but by other bodies, leading to the criticism that the length of time taken to process such changes was unduly long.

The new regime streamlines this system by making all rule changes the responsibility of the Legal Services Board. Rule change applications must be dealt with in a timely manner and the Legal Services Board has the power to exempt certain rule changes, fast track rule changes and in more complex changes seek additional views. The latter is not aimed at redoing the work of the approved regulator, but rather at looking at the changes objectively and providing helpful and constructive feedback.

Baroness Deech: I appreciate what the Minister says, but he must accept that there is need to investigate this. Rule changes now go through an even more tortuous process than was the case before. If the front-line regulators have responsibility, then their rule changes ought to be accepted without the imposition of ideology and various approaches which are not necessarily seen as the right way forward for a branch of the profession. Examining the way that rule changes are approved or held up is really important and I am not sure we can wait three years for that.

Lord Ahmad of Wimbledon: I thank the noble Baroness for her question and I agree with her. It is important that those in the profession contribute to the effectiveness of how these rule changes are implemented. I take on board what she says and I hope that some of the

proposals we are putting forward will address the issues. I note the concerns expressed by my noble friend Lord Faulks and the noble Lord, Lord Hunt, about mission creep on the part of the Legal Services Board. As I said at the outset, the important issue is about the terms of reference: what was the Legal Services Board set up to do? Earlier this year, the Ministry of Justice conducted a triennial review of the Legal Services Board and the Office for Legal Complaints. Based on this, let me assure your Lordships that, on the responses received-including those from the approved regulators-the review concluded that, while it is still relatively early to assess the full impact of the Legal Services Board, its functions are still needed and should continue to be delivered in their current form.

This was a view supported by the Bar Standards Board and the Bar Council. We must remember that the Legal Services Board is independent of government and it is not for us to dictate how it operates. Its functions are clearly set out in the 2007 Act. However, it is clear that there has been a real need for an oversight regulator to drive the reforms set out in the Act. In doing so, it has fulfilled the important role that only an oversight regulator could have. Those who responded to the triennial review recognised the value it has brought. Following the feedback we have received, the chairman of the Legal Services Board wrote to the Ministry of Justice confirming that his board is also considering the responses made so far.

I am conscious of time, but turning to specific questions, my noble friend Lord Gold raised the issue of micromanagement and corporate governance. The Legal Services Board recognises that important challenges are emerging from the triennial review and accepts that there are things it needs to address. These will include more detail on its draft business plan for 2013-14, and proposals will include reviewing the approach to requests for changes to regulatory arrangements and designation processing, and refining the approach to

research funding. Priorities will be included in the draft business plan. Increased understanding of the cost of regulation, not just the cost of the LSB but the full cost of practitioners, will also be looked at. A further issue was raised regarding the value for money of the Legal Services Board. Since the board became operational, it has recognised the need to keep its costs proportionate, and we have seen its running costs reduced year on year, from just over £5 million in 2009-10 to £4.5 million in 2011-12. The combined running costs of the Legal Services Board and the Office for Legal Complaints were approximately £22 million, somewhat less than the cost of the complaint handling regime that was previously in place.

Various issues and questions have been raised in terms of accountability and the post-legislative review. We are confident that for the here and now, the regulation of legal services is appropriate, but that does not mean it will remain so indefinitely. Given that the new

regulatory framework was implemented only in 2010, we still believe that it is in its infancy. The next triennial review is due in 2015 and will provide another opportunity to assess how the regulatory framework is performing and whether the LSB's functions are still needed in an evolved legal services market.

In conclusion, it is important to remember that the new regulatory regime and governance arrangements are still in their early stages, a point acknowledged by respondents to the triennial review. I assure the noble Baroness, Lady Deech, my noble friend Lord Faulks and other noble Lords that the Government are fully engaged with the legal profession and other interested parties in carrying out that triennial review. During that process, we not only conducted a call for evidence but held round-table events and one-to-one meetings. We will continue to engage openly with interested parties as part of that. I also assure noble Lords, including my noble and learned friend Lord Mackay, the noble and learned Lord, Lord Goldsmith, and my noble friend Lord Faulks, as well as the noble Baroness, that we will carry out post-legislative assessment of the Legal Services Act. That will look at the original aims of the reforms and how far we have come in implementing them, and we will be seeking further stakeholder views. Finally-

Lord Faulks: Before the noble Lord concludes his remarks, can he help the House by saying whether one possible outcome of the review will be that the Ministry recommends that the LSB does not have any further function at all?

Lord Ahmad of Wimbledon: I thank my noble friend for the question. That is a matter that will come up. As I have already alluded to, this organisation is in its infancy and came about only in 2010. It is right that we look at this again at the time of the review in 2015.

Finally, I also assure my noble and learned friend Lord Mackay, who talked of his Green Papers-and being green in your Lordships' House, he was my very own personal parliamentary *Companion*-that I heard what he said about the importance of education and his particular question about universities and the College of Law. I shall certainly refer that to my right honourable friend the Universities Minister.

The reforms enabled by the Legal Services Act have provided a proportionate and effective regulatory regime that remains, currently, fit for purpose. All those with an interest in the legal services market have an interest in ensuring that this continues. I thank the noble Baroness-and indeed all noble Lords-for their contributions this evening, with the assurance that we will continue to look at this particular function and its effective regulation, with all interested parties contributing to future reviews.

House adjourned at 9.27 pm.