First, do no harm

Will changes to the regulation of solicitors fracture the consistent assurance of client protection? John Gould reports

IN BRIEF

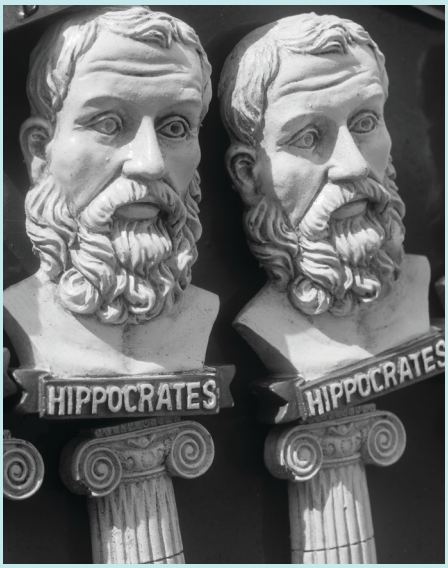
- Changes to regulation could erode public confidence that if a solicitor defaults there is some system of redress.

If there were a 'Hippocratic Oath' for regulators, the first promise to the gods of legal services ought to be to abstain from doing harm. Sometimes, however, something may be broken and need fixing or a compelling vision of the future cries out for reform. After all, times change.

Innovation often requires risk, which is why major legal changes are usually preceded by 'impact assessments'; a cynic might say that such assessments have more in common with Mystic Meg than the application of the laws of gravity. It may turn out that changes do not have the predicted impact because they have no substantial impact of any kind—good or bad.

On 14 June 2018 the Solicitors Regulation Authority (SRA) announced changes to the regulation of solicitors following four years of development. The headline objectives of the changes present as things only old-fashioned professional protectionists would question. What's not to like about focus, simplification, flexibility, better access to justice, lower overheads, transparency and brevity? The vision is of a free-wheeling entrepreneurial profession freed from having to be familiar with long complex legal codes and able to apply and act on the best ethical principles. They will be able to provide 'non-reserved' services to the public in dynamic unregulated organisations or as 'freelancers'. The burdens of scrutiny of law firms and who can run them will be reduced or abolished. Accounts Rules which don't focus on keeping client money safe will be removed. It will be possible to give client money to a third party so that they can keep it safe. The price information to be given to internet searchers and would-be enquirers will become a matter of regulation rather than simply competition. A new enforcement strategy will make it clearer when and how regulatory action would be taken against a solicitor or firm. Solicitors will have a new reassuring badge.

But will what is proposed undermine the reassurance that the public gets from their usually imperfect understanding of what a solicitor actually is? Will there be erosion of the solid, but vague, public confidence that if a solicitor defaults there is some system of redress? Will more forms of practice and potentially confusing



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hypothetical information about prices create more of a muddle with nothing more than a presentational advantage? Do short (as opposed to clear) rules really help anyone?

Although I do not base the assertion on extensive evidence or consultation, I would tentatively suggest that clients don't generally read solicitors' codes of conduct or regulatory rules. They make purchasing decisions on the same basis as we all decide to buy something we think of as expensive. Even for services which can to some extent be 'productised', such as residential conveyancing, the benefit to individual clients of price information before any contact with a solicitor is limited. Few clients choose wholly on price, most residential conveyancing is provided at a fixed price for the specific transaction anyway and pricing the permutations of transactions hypothetically on a website may lead to even greater complexity.

I would expect that the more prescriptive the published price information requirement, the stronger the commercial pressure will be to shoe-horn services into product packages and to quote seemingly attractive prices subject to small print and 'extras'. If you are one of the few would-be clients for whom price is the only determining factor and content a matter of indifference, a kind of Ryanair law could be attractive. The trouble is that if you had Googled 'cheapest conveyancing' anytime this century, you would have been presented with suspiciously low prices apparently covering anything and everything.

This aspect of the SRA's plan comes fairly directly from a report of the Competition and Markets Authority (CMA) who, appeared to me, to have produced a template analysis (perhaps drawn from one they had made earlier based on some market other than legal services). The roving consumer wants to compare prices even if they often can't know what it is they need to buy.

This is not to say that better price information is not needed. In my view providing much greater cost certainty to clients by ever greater use of fixed prices is one of the greatest opportunities to provide the additional value of certainty to clients without simply trying to give more for less.

In my view the main problem of complexity is not that of regulatory codes but the complexity and variety of provision. Most of it is irrelevant to real consumer choice. The failure to make the complexity of the choice of legal services sufficiently clear for clients to make informed choices easily is a failure of the system of regulation rather than the unwillingness of solicitors or other providers to innovate.

It is not much of an insight to say that solicitors prefer the potential clarity of complexity to the potential uncertainty to the gloss of brevity. Codes and rules should be about the positioning for solicitors of uncertain expectations and boundaries not a dissection of obvious ethical requirements. I don't need a rule to know that I can't steal client money, but I may not have such a clear ethical map in my head always to know where the lines of client and regulator expectations lie. Even if I did, who is to say that my map is right. Is a solicitor to be criticised for behaviour which she thought was the right side of the line? In the absence of sufficiently precise rules, can dodgy solicitors avoid being called to account by the purported use of their own flawed ethical judgement?

As a general rule, brevity is not an end in itself but it may mark the absence of needless prolixity. In practice regulatory requirements are like a balloon, if it is correctly inflated and you press at one point the pressure pushes out somewhere else. If the Code of Conduct does not give the answer, guidance will grow or enforcement policies will enlarge to clarify what actions will lead to material consequences. Alternatively (as has happened over the years) pro-active regulatory decision making will be outsourced to the discretion of compliance officers in firms. I suspect that compliance officers are by their very nature risk adverse and conservative and not prone to a buccaneering entrepreneurial spirit. If none of these fill in the gaps, the Solicitors Disciplinary Tribunal and the courts may be expected to accrete a coral reef of practice and precedent.

The objective of allowing clients to make better informed choices is rather at odds with the desire to allow ever more regulatory

opportunities for different ways of providing legal services. Non-reserved activities can be provided by anyone provided they don't use the title solicitor, unless they fall within some other regulated service such as immigration. Reserved activities are not limited to solicitors but may be provided by an increasing number of other regulated professionals. The CMA seemed to be unsettled by the fact that the public still find the title of 'solicitor' recognisable and reassuring and that many clients chose a solicitor on the recommendation of someone they trust. This seemed to appear to them to be anti-competitive. It might be thought that, given the complexity clients have to face, this beacon of hope was a good thing to be preserved. The proposal for some official badging of solicitors may help clients work out what is going on.

A solicitor may say let other providers earn their own reputation. The preferred model, however, seems to be to let non-solicitors get in on the act as non-regulated employers. This, together with the creation of the concept of a 'freelance solicitor' means the further fracturing of consistent assurance of client protection. A counsel of despair may be that it doesn't matter because most clients don't understand what's going on anyway. If the title no longer provides enough assurance, then the power of the trusted brand may shift from 'solicitor' to firm level. If that happens why should a trusted brand subsidise firms without such a brand by payments for regulation and a compensation fund that does little for them? Public confidence in solicitors is not a by-product of regulation, it is the core purpose of regulation.

Which brings me at last, to the assumption underlying the SRA's view, namely that there is a large unmet legal need because regulated lawyers don't want to provide inexpensive services. This doesn't refer to the shrinking provision of access to justice by public funding which represents a major challenge for the maintenance of the rule of law. It means solicitors providing advice, resolving disputes or effecting transactions where people are prepared to pay what they can afford for it. The CMA analysis seemed like concluding that the existence of do-it-yourself meant that there was a lack of competition in the market for building services. Many services which might be loosely described as 'legal' do not require a regulated lawyer at all. I would hope to resolve an argument with my neighbour over the dustbin area using my own diplomatic skills rather than legal representation.

There's no doubt that for most people many legal services are expensive and in some contentious cases unaffordable. Solicitors, like other providers of services, tend to work for people who can pay them. The sector needs more 'frugal innovation' by which new types of useful but simple and inexpensive services are provided to more people. In many cases this need has increasingly been met by non-solicitors in areas such as wills and employment advice. That's a good thing because it provides the public with a clear choice. If they can, for example, employ less expensive people or make use of technology to offer a lower cost for a solid product why try to push the solicitors' brand into those areas? Some solicitors have not been worth a premium over other providers and have had to choose to either lower prices or stop providing certain services. This isn't because of the cost of having a long code.

Time will tell whether the risks and benefits of the changes have been well judged. The public may benefit from easier access to affordable legal services or may become ever more confused as the assurance provided by regulation is lost within an induced and unnecessary complexity in the legal market of the future. **NLJ**

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