MASTER OF THE ROLLS

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PROFESSIONAL DISCIPLINE – CHALLENGES FOR THE FUTURE

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(1) Introduction

1. Good morning, it is a pleasure and an honour to have been invited to give the keynote address at your conference this year. In today's consumer-orientated and expectation-orientated world, it is, to poach from Jane Austen, a truth which is universally acknowledged that any profession serving the public is in need of proper and effective regulation and discipline. While the principle cannot be in doubt, the devil, as usual, is in the detail. The higher level detail raises questions such as should we have light touch regulation or greater control, but it also raises questions such as precisely how we properly and effectively regulate our professions, how we strike various balances - practicality and aspiration, cost and value, the interests of the public, the clients, and the professions, and, above all, how we ensure effective regulation and discipline at minimum cost and interference. And then there is the real detail – the precise terms of the regulations, both substantive and procedural, and

how we properly approach discipline in the public interest, whilst affording due process to those subject to disciplinary proceedings.[1]

2. Historically, the Master of the Rolls has been closely connected to these questions through the role he (as it has always been a he, but I am sure that that will cease to be true in the course of the next decade or two) played in the regulation of the solicitors' profession. From the 1880s until January this year, my predecessors and I (albeit for a mere three months in my case) were responsible, variously, for issuing and concurring in the issue of the rules and regulations which governed the solicitors' profession. In some cases they both issued and concurred in the issue of the same rules and regulations. They did so where the rules were made under one statutory provision, and concurred in under a different one. Equally, the Master of the Rolls was responsible for admission to the profession, while also being the final, and independent, appellate tribunal from regulatory decisions taken by The Law Society in respect of individual solicitors. In rare cases, he also acted as the final appellate tribunal from decisions refusing readmission to former solicitors who had been struck off the roll, taken by the Solicitors Disciplinary Tribunal.

3. These responsibilities, as with much else, came under Sir David Clementi's scrutiny in 2003.[2] Consequently, the Legal Services Act 2007, the ultimate product of the Clementi Review, transferred them variously to the Legal Services Board, The Solicitors Regulation Authority and the High Court. The sole, and very narrow, responsibility which I retain is the appointment of Solicitors Disciplinary Tribunal members. I stand before you, therefore, with a keen interest in professional regulation and discipline, although shorn of any specific

[1] I thank John Sorabji for helping me to prepare this lecture.
[2] Clementi, *Review of the Regulatory Framework for Legal Services in England and Wales – Final Report* (December 2004)
(http://webarchive.nationalarchives.gov.uk/+/http://www.legal-services-review.org.uk/content/report/report-chap.pdf)

formal role. Insofar as the legal profession is concerned it is an interest underpinned by an appreciation that it must be properly regulated if our legal system is to operate in the public interest; an interest based in our commitment to the rule of law and effective access to justice for all.

4. With this interest in mind, and the importance to us all of what underpins it, I turn to consider what challenges seem to be facing those involved in professional discipline. Plainly, the most important function of, and therefore the most significant challenge facing, all forms of professional discipline is to maintain justified public confidence in their fairness and efficacy. I say "justified", because I would eschew the notion that there should be any question of merely seeking to maintain public confidence. The standards which the regulatory and disciplinary bodies should be aiming for is like the justice which we judges are trying to administer: our justice must be both done and seen to be done, and the professions should both have high standards and effective regulation and be seen to have high standards and effective regulation.

5. This challenge is particularly pertinent where, as is the position in the legal sector, a new regulatory landscape is in place and new legal vehicles, such as LDPs, MDPs and ABSs can operate, and external non-legal investment in such vehicles can take place. New regulatory structures almost inevitably give rise to new regulatory and disciplinary challenges. In meeting those challenges those involved in regulation and professional discipline will have to ensure that public confidence is maintained. I intend this morning to look, rather briefly, at three principles to which any regulatory and disciplinary process must maintain a firm and unblinking commitment, and three things which should be avoided by those involved in such regulation and discipline, if public confidence is to be maintained in our professions. Each of these three principles and three problems relate to the "product" which the

disciplinary bodies “deliver” to their “stakeholders”, to use three expressions which so many of my colleagues cordially detest, and which they will probably get round to adopting just when they go out of fashion. The three vital characteristics which should be borne in mind at all times are quality, efficiency, and justice.

(2) Maintaining Public Confidence – Quality

6. The primary challenge facing those involved in the disciplinary field is to ensure quality. This has numerous facets. In the first instance, disciplinary tribunals must ensure that their membership remains of the highest calibre. Without high quality members, there will be no high quality decisions and no credibility. Only with high quality members can your tribunals ensure that they command the respect and confidence of the public, and also, as is equally important, of the profession whose interests they also protect, and whose confidence and support is so essential. If they are unable to command the respect of both the public and the profession, through the quality of their membership and the quality of their decisions, they will leave the profession ill-served and we will all suffer as a result.

7. It seems to me that to ensure both public and professional confidence professional disciplinary bodies will have to ensure, in some cases more rigorously than they have done in the past in other cases with continued rigour, that they draw their membership from all areas of the relevant profession and from as diverse a field of candidates for appointment as possible. In this, professional disciplinary tribunals will have to follow the approach taken by the Judicial Appointments Commission and actively seek to broaden the field of applicants by encouraging increased diversity in applicants, whilst ensuring the maintenance of merit as the ultimate criterion for selection. Equally, it calls for, as with judicial appointments, open appointments processes with clear, publicised appointment criteria.

8. Maintaining, and enhancing quality will require more than this though. Tribunals are very much at the mercy of those bodies which have responsibility for considering and then referring or prosecuting complaints. If the referral, or prosecution, rate is unjustifiably low, a Tribunal's ability to fulfil its function will be hamstrung. This will have the inevitable consequence of lowering public confidence in the profession. It will also lower both public and professional confidence in the regulatory and regulatory regime. This point was put quite starkly in respect of the legal profession by Mark Davies, in an interesting article in 2005. Reviewing professional regulation of the solicitors' profession from 1985 – 2005 he drew this conclusion in respect of disciplinary proceedings before the Solicitors Disciplinary Tribunal:

> "*At a typical 1 per cent or so of [the total number of complaints [received], the referral rate to the SDT is staggeringly low. In such a climate, there is little deterrent against professional misbehaviour, and little wonder that consumer groups have lost faith in the commitment of the profession to self-regulation.*"[3]

Whether the 1 per cent referral rate was or was not justified, the essential point Davies makes is unanswerable: those responsible for referring matters to disciplinary tribunals must exercise their power to do so properly: the power to do so carries with it a duty to do so – only in appropriate cases, of course. They must not only ensure that disciplinary matters are properly and fairly investigated, but equally that all those that ought to be prosecuted before a Disciplinary Tribunal are prosecuted. Any failings here can only undermine, again as Davies' point suggests, public confidence in our professions.

9. This point leads me to the second challenge facing those involved in professional discipline: efficiency

[3] Davies, *Solicitors – The Last 20 Years of Self-Regulation?*, Professional Negligence (2005) at 7.

(3) Maintaining Public Confidence - Efficiency

10. It is another truth universally acknowledged that delays, like excessive costs, defeat justice. I referred earlier to *Pride and Prejudice*; I suppose that it is now appropriate to refer to *Bleak House*. Unacceptable delays and costs are as unacceptable in the disciplinary and regulatory process as they are in the more traditional legal process. An efficient and effective disciplinary process is as essential a feature of regulation as efficient and effective court process is an essential feature of criminal, civil or family justice. If disciplinary processes are not to undermine public and professional confidence they must operate efficiently and effectively as possible. This places a responsibility on the framers of the regulations and the members of the disciplinary tribunals to ensure that delay does not defeat disciplinary justice.

11. Unreasonable delay cause serious problems in the disciplinary arena. Delays in reaching a positive determination of a disciplinary matter mean that those who are unfit to practise are, unless suspended from practise in the interim, free to practise when they ought not to be doing so. This can only be detrimental to the public and undermine public confidence. Delays in reaching a negative determination mean that innocent professionals have the stigma of proceedings hanging over them for an unjustifiable length of time, with all that entails for them both professionally and personally. Equally, it again undermines public confidence. The regulations governing the procedures should be clear and simple, and they should contain time limits, and tribunals should abide by, and enforce, those regulations and any such time limits.

12. Disciplinary tribunals must therefore ensure that individual cases are properly managed so as to reach a determination in good time, indeed as quickly as is consistent with the proper preparation of the case. Regulatory and prosecutorial bodies must ensure that they

investigate disciplinary matters properly prior to bringing proceedings and that they prosecute all, but equally only, matters that properly call for prosecution. But the investigation must also be as speedy as possible and any resultant prosecution must proceed not only properly, but promptly and efficiently. Preparation, proper decision-making and judgment are of central importance here. They will become all the more important if, as some anticipate, disciplinary investigations and proceedings increase as a consequence of the current difficult financial times.

13. Any significant increase in such proceedings may well place resource pressure on the disciplinary tribunals, and, even the best will in the world and the most effective case management, such an increase might cause unreasonable delay. If this indeed happens, the professions will have to face up to the question of whether, and to what extent, they may have to increase funding of their disciplinary tribunals. The Legal Services Board and the frontline legal services regulators may well, by way of example, have to deal with the question of increasing the Solicitors' Disciplinary Tribunal's funding. While that may not be a live issue now, if there is a significant increase in disciplinary proceedings before it, or any other disciplinary tribunal, the funding question may well arise. If it does the question must be primarily addressed by reference to the public interest, to public confidence in proper regulation and discipline, but one should not lose sight of commercial and financial reality.

14. Reference to the public interest brings me to the final thing I wish to touch upon this morning: justice.

(4) Maintaining Public Confidence - Justice

15. One of my most illustrious predecessors as Master of the Rolls, Sir Thomas Bingham, as he then was, in the seminal case on disciplinary proceedings and striking a solicitor of the roll – *Bolton v The Law Society* – amongst many other things, said this:

> "*A profession's most valuable asset is its collective reputation and the confidence which that inspires.*"[4]

16. That asset and the confidence it inspires is not only entrusted to each individual member of our professions, but also to their regulators and to those responsible for the disciplinary processes which underpin effective regulation. It is a trust which all of us involved in the professions must always be mindful of. Whether we are engaged in providing legal advice, accountancy services, dispensing medical care or any other professional activity we must be mindful of this when we carry out those activities. There may well be other considerations that have to be taken into account, for instance, a solicitor's duty to the court, or, as perhaps now in the post-Clementi world, a duty to an external investor insofar as maximising profits is concerned. But the primary responsibility, and one which overlaps with that of the duty to the court and to further the rule of law, is to maintain public confidence in the profession as a whole. It is that which rightly underpinned Sir Thomas's observation that the profession's reputation is more important than the fortunes of an individual member of a profession.[5]

17. That is not to say that the fortunes of individual members of any profession are not to be taken seriously when issues of professional discipline arise. Justice needs to be done to individuals, just as it needs to be done to the profession as a whole. If justice is not done to individuals it cannot, in fact, be done to the profession. And down that road lies the undermining of public confidence. In practice this means that those responsible for

[4] *Bolton v The Law Society* [1994] 1 WLR 512 at 519.
[5] *Bolton* at [519].

discipline in the professions must carry out disciplinary investigations fairly, with due process, without partiality or bias, in reality or appearance. What is true of the correct approach by disciplinary tribunals is as true for those investigating disciplinary matters. Any appearance of injustice in any approach to the investigation of disciplinary matters, any improperly conducted prosecutions or investigations, cannot but undermine public confidence in the professions just as much as breaches of professional discipline and regulation by members of professions does. Justice, which is to say procedural justice by regulators and those responsible for the investigation of disciplinary matters, is in this area as important as the achievement of substantive justice in prosecutions before disciplinary tribunals.

(5) Conclusion

18. The problems or bugbears of court and tribunals are unjust outcomes, unjust procedures, unnecessary cost and excessive delay. The source of such problems is mistakes or weaknesses in the system, in the rules, in the people running the system. However, sometimes, with the best will in the world, such problems are simply unavoidable. No system is perfect, no set of rules can cater correctly for every eventuality, no individual, however hard-working, experienced and clever, is infallible. What we must do is to minimise the risk of such problems. That is why quality, efficiency and justice are so important.

19. I have only had a brief opportunity to address you this morning. I am sure that the remainder of today's conference, and others like it in years to come, can only help to improve the approach taken to disciplinary processes by those involved in carrying them out. As I am sure you are to find out during the rest of today there are many specific, practical challenges that you face. This conference aims to help you tackle those challenges. I am sure it will succeed and that in doing so you will all be better placed to ensure that our professions are

well-able to maintain the necessary level of public confidence in them. Equally, I am sure that you will all be better able to ensure that disciplinary procedures are properly able to deliver both procedural and substantive justice in reasonable time to the standard required by individual professionals, professions as a whole and the public in general. Thank you.
