The Bulletin April 2017_North West 04/04/2017 07:19 Page 17

Regulation Report

The independence of the profession

"Where there is no independent legal profession there can be no independent judiciary, no rule of law, no justice, no democracy and no freedom"

These are the words of The Hon Michael Kirby, the international jurist and former judge, used to introduce the recent report of the International Bar Association ("IBA") on the independence of the legal profession.

The report identifies areas where legal independence is under attack across the world including in the UK. Whilst we usually consider ourselves to be immune from such pressures here in the UK, the condemnation of the judiciary by the press and MPs over the Article 50 decision brought this issue into sharp focus. There are also developments closer to home that warrant concern.

First, one cannot describe the legal profession's oversight regulator, the Legal Services Board, as free from government interference. The Legal Services Board is a non-departmental public body whose majority lay board is appointed by a government minister (the Secretary of State for Justice) and whose Chief Executive Officer has a reporting role as the accounting officer for the organisation ultimately to the Secretary of State for Justice. The Legal Services Board in turn oversees the operation of the SRA.

Second, complaints to the SRA by government departments about solicitors appear to be being used as a method of curtailing the activities of the clients themselves. An example is HMRC. Without the resources to challenge all the individual taxpayers using Stamp Duty Land Tax avoidance schemes, it seems that HMRC encouraged the SRA to investigate the law firms undertaking this type of work in the hope that without solicitors willing to take on this work the schemes themselves would perish. A Warning Notice published by the SRA in 2012 had the immediate effect of reducing the pool of solicitors to nil.

We can see this strategy being further developed with the announcement in the Spring Budget 2017 that *"enablers"* of tax avoidance schemes that are later defeated by HMRC will be subject to *"tough new financial penalties"*. With the definition of an *"enabler"* being *"any individual or entity who has enabled another person or business to use a tax avoidance arrangement"*, one can foresee specialist tax solicitors and the tax Bar being loath to recommend anything other than cast iron schemes.

More curiously, the SRA has during the last 6 months been investigating law firms who deal with holiday travel claims because it received a complaint from the Foreign & Commonwealth Office which had in turn received a complaint from the Spanish government.

Whilst not a government department, the judiciary is showing increasing tendencies to complain publicly about solicitors before there has been any investigation by the SRA. The Guardian reported on 2 March 2017 that the SRA was investigating allegations by Mr Justice McLoskey (President of the Immigration & Asylum Chamber) that a firm of solicitors in Nottingham acting for a *"Rochdale grooming gang"* had deliberately obstructed an immigration tribunal with *"sustained and marked disrespect"*. The law firm concerned refused to comment (quite rightly in my view) citing that it did not want to do so at this stage in order to avoid prejudicing any ongoing action. The same restraint was not exercised by the local MP commenting on behalf of child victims of the gang or the Chief Executive of the SRA in agreeing to meet with the Judge.

Thirdly, there was a time when the prosecution work before the SDT was dealt with by an external panel of solicitors all in private practice. From January 2017, the panel now comprises one single law firm which will be paid (it is rumoured) not by the individual case but by a substantial annual retainer. Any remaining work is undertaken by the in-house legal team at the SRA assisted by Counsel. One might question whether either arrangement would result in wholly independent (and if necessary unpalatable advice) advice to the SRA about what does and what does not constitute professional misconduct.

The IBA Standards for the independence of the profession (adopted in 1990) state clearly that *"the lawyer in discharging his or her duties shall at all times act freely, diligently and fearlessly in accordance with the legitimate interest of the client and without any inhibition or pressure from the authorities or the public"*. The Standards further provide that *"the lawyer is not to be identified by the authorities or the public with the client or the client's cause, however popular or unpopular it may be"* and that *"no lawyer shall suffer or be threatened with penal, civil, administrative, economic or other sanctions or harassment by reason of his or her having legitimately advised or represented any client or client's cause"*

We should remind ourselves of these standards when we go about our daily work and remain independent of political and media pressure in the interests of our clients. More importantly we should ensure that our young solicitors understand what it means to be a member of the legal profession.

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Jayne Willetts is also a director of Infolegal - a law firm compliance and risk management consultancy - www.infolegal.co.uk

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