

**Lord Neuberger at a conference of the Bar Councils of Northern
Ireland and Ireland, Belfast
The Future of the Bar
20 June 2014**

Introduction¹

1. It is a great pleasure to have been asked to speak to you today. I do so at a time of what is extraordinary change in the legal world. As the English and Welsh Solicitors Regulation Authority (the SRA) described it in recently,

‘The legal services sector is in a time of unprecedented change with consumer demands, technology and the regulatory system fundamentally changing the ways that legal services are delivered.’²

That is clearly as true in Northern Ireland and the Irish Republic as well.

Lawyers are advising, advocating, judging, writing, teaching and researching, training and learning against that backdrop, and we must do our best to cope with and anticipate these changes. Our experiences of the law and practice have changed over the past twenty years and are likely to be even more different twenty years from now.

2. When I started at the Bar, for instance, there was no United Kingdom Supreme Court, and court proceedings could not be photographed never mind televised. All we had was court artists who had to draw outside court based on their notes made in court, as drawing in court was strictly forbidden. Indeed, that rather

¹ I wish to thank John Sorabji and Zahler Bryan for their help in preparing this lecture.

² SRA, *Training For Tomorrow – Ensuring the lawyers of today have the skills of tomorrow*, (October 2013) at 4.

archaic rule may still be in place, although it makes little sense in an age when people may tweet and text from court. So, unlike judges in the past, judges today are far less likely to enforce such rules. This sensible and pragmatic, if perhaps less principled, attitude is, I believe, characteristic of modern British judges.

3. Judges today are rather different from our predecessors – or so we like to think.

That is perhaps in part because we are more likely to be observed, and commented on. That is how it should be: open justice is vital in a healthy democratic society, and what open justice requires must in part be governed by the practical realities, including the technological capabilities, of the contemporary life. For instance, in the United Kingdom, not only do we have a Supreme Court because of the importance of the perception of separation of powers, but its proceedings can be watched by everyone on Sky. We read out what we hope is a reasonably accessible summary of our decisions onto YouTube, and we have a hard copy hand-out for journalists and the public explaining our decisions a little more fully. And now you can also watch the Court of Appeal in London on TV.

4. Televising proceedings, and permitting tweeting in court (not by the judge) is just one of many ways in which the present situation differs from that which existed when I embarked on my legal training nearly forty years ago. This

evening, I would like to discuss some of the principal features of change in the legal world, and how that world might develop in the future.

The Rule of Law

5. It is right to begin by reminding ourselves that legal practice has an important context not shared by other occupations. Lawyers have a special position in society not because they are loved or because they are particularly admirable people, but because they are responsible for the rule of law. That is true whether they administer law as judges, advise on law as legal advisers or act as advocates in courts and tribunals, whether independent, or employed. The rule of law is fundamental to a modern democratic society. The rule of law requires laws which satisfy certain criteria: they must be clear and accessible, they must protect society, and they must recognise the fundamental rights of individuals against each other and against the state. However, such laws are valueless unless they are also a practical reality, and therefore the rule of law also requires that all citizens have access to justice, and by that I mean effective access to competent legal advice and effective access to competent legal representation.
6. The special function of lawyers carries with it special responsibilities, which we should never forget. A lawyer has a duty to society, most obviously in the form of a duty to the court in connection with litigation, and that duty, whether or not to the court, is of a greater order than the duty owed by other professionals

in the commercial or quasi-commercial world. As the great Lord Bingham put it, a lawyer has to be capable of being trusted to the ends of the earth.³

Duties

7. The fact that lawyers have such a duty carries with it privileges and responsibilities. Thus, the fact that citizens have a fundamental right of access to legal advice and to the courts, means that lawyers have a sort of indirect expectation to be paid by the state, and a fundamental right to have their independence respected, but it also means that lawyers have a duty to their clients to be honest and competent, and a duty to the court. It also means, I suggest, that they must ensure that their services are provided as cheaply as is consistent with their other duties – at least when they are acting for ordinary people whether or not they are relying on government funding. It may be different when lawyers are acting for large corporations and very rich individuals, who can look after themselves.

8. Self-interest cannot be ignored, as it is a fundamental human characteristic, probably an aspect of Darwinian survival. Indeed many people might think that a lawyer who has no feeling of self-interest and does not fight hard for himself may well be a lawyer who does not fight hard for his client. However, for a

³ *Bolton v The Law Society* [1994] 1 WLR 512 at 519.

lawyer, self-interest has to take a very clear second place to professional and public duties.

The structure of the legal profession

9. When I started practice in London, lawyers who were not employed lawyers were either solicitors, who worked in partnerships, and had direct access from clients and conducted litigation, or barristers, who worked in chambers, and appeared in court and gave specialised advice to solicitors. Things are rather different now. With the advent of what are known in England and Wales as alternative business structures in 2012, solicitors can enter into partnership with barristers, barristers can enter partnership with other barristers, any lawyer can also enter into partnership with non-lawyers, and non-lawyers can hold shares in legal practices.

10. In the Republic, there is the The Legal Services Regulation Bill (“the LSR Bill”), which has been described as “the biggest set of reforms to the legal services industry in the history of the [Irish] State”⁴. It was broadly aimed at reducing costs in the legal sector. The LSR Bill was, I understand, approved by the cabinet in October 2011 and introduced to the Oireachtas shortly afterward, but then spent over a year at the committee stage, before refined reform proposals were approved in January this year. The Bill proposes a six month

⁴ [Http://www.thejournal.ie/legal-services-bill-one-stop-shops-lawyers-1286970-Jan2014/](http://www.thejournal.ie/legal-services-bill-one-stop-shops-lawyers-1286970-Jan2014/)

consultation on the establishment of multi-disciplinary panels (MDPs), one-stop shops with barristers, solicitors and accountants would be available under one roof, and how they might work in the Irish marketplace. And, although the proposal may now be abandoned, the new Legal Services Regulatory Authority set up by the LSR Bill will make recommendations on the unification of the solicitors' and barristers' professions⁵

11. The aim of such liberalisation of the market is to increase competition and, ultimately to reduce the cost of legal services. It may well have those consequences, and it is to be sincerely hoped that it will help to reduce costs. I certainly have concerns, not least because of that most reliable of virtual statutes, the law of unintended consequences. The proposals will certainly make lawyers' work environment rather different from that which lawyers experienced in the past. One possible consequence is greater likelihood of the fusion which is contemplated by the LSR Bill, or at least greater similarity between the two traditional branches of the profession. However, in the four main jurisdictions in the British Isles, we have resisted fusion, and the strict demarcation between barristers and solicitors still applies. However, over the course of the last thirty years solicitors have gained rights of audience in all courts in England and Wales, and barristers have increasingly been able to carry out aspects of the conduct of litigation, and even to advise members of the

⁵ 'Courting favour at the Bar', <http://www.irishtimes.com/news/crime-and-law/courting-favour-at-the-bar-1.1817893>

public direct. In addition to this, Chartered Legal Executives have also, again over the recent past obtained more and more rights traditionally reserved other legal professionals.

12. The increased flexibility in the legal profession has been justified as being in the name of consumerism. It is hard to quarrel with the notion that legal advice and legal representation are intended to be as cheap and as accessible as possible to everyone. However, we must be careful of invoking consumerism to justify legal advice and representation, which is not properly independent, or which is second rate – or worse. As I have tried to explain, access to justice cannot be equated to any other consumer commodity. Legal advice and legal representation can only be properly given by those who are qualified to give it, and it is essential that the legislators and policy-makers appreciate this. There will inevitably be some lawyers who are better than others, but there is an irreducible acceptable minimum of competence. And lawyers and judges must always stand up for that. And it is what education and regulation should ensure. As I explained, I will deal with education later, but now for ...

Regulation

13. This convergence between the professionals has to a large degree been reflected by regulatory changes in England and Wales. Rights of audience were the preserve of the Bar, and the barristers' professional body, the Bar Council, was

responsible for their regulation and discipline. It did a good job. The conduct of litigation and direct access from the public were the preserve of solicitors, and their professional body, The Law Society, regulated such matters. It did a less good job, but it had a much harder task. The changes in the professions have come at the same time as disapproval of self-regulation, and so the current regulatory environment is very different. Multiple regulators, separate from the professional bodies, all regulate the same activity. Thus, the three professional regulators, the Solicitors Regulatory Authority (SRA), the Bar Standards Board (BSB), and the CILEX Professional Standards (CILEXPS), all regulate advocacy, and they all regulate the conduct of litigation. They are all supposed to do so to the same standard. And this patchwork quilt of regulation is supposed to make it easier for the consumer to complain to the appropriate regulatory authority if they receive sub-standard service.

14. This regulatory patchwork is rendered more expensive and confused by the existence of an over-arching regulatory body, the Legal Services Board (LSB), which is meant to simplify things, but inevitably makes things more confused and more expensive. If you create a body whose job is to regulate, that body will always seek, perhaps only subconsciously, to turn regulation into an end in itself. That's human nature: the more regulation it does, indeed the more of anything it does, the better it justifies its existence and its significance. And if you have a regulatory supervisor, it will similarly find supervisory actions and other initiatives to justify its existence and increase its powers. So the present

convoluted system leads to more expensive regulation and more lawyers' time consumed in regulatory compliance. Both the time and the expense are very significant as the lawyers pay for the cost of regulation, and then, inevitably, have to take into account the expense, as well as the loss of their time, when working out their costs, and, therefore their charges.

15. In Northern Ireland, the bar has, I understand, managed to retain self-regulation, but there is to be an independent supervisor. Provided the supervisor approaches his or her task in a moderate and balanced manner, in a practical way without grandstanding, and maintains the confidence of the public and of the bar, that seems to me to be, in many ways, a more satisfactory model. It is less revolutionary, less doctrinaire, and less expensive than the change which was made in England and Wales

16. In the Republic, I understand that a rather different model is proposed. The LSR Bill proposes to set up a new Legal Services Regulatory Authority which would take over the existing legal functions of the Law Society (which regulates the enrolment, conduct and business of solicitors) and the Bar Council, which regulates barristers. This new authority's board will feature a majority of members appointed by the minister. Ken Murphy, Director General of the Irish Law Society has said this: "[t]o be a truly independent regulator, the proposed new authority must be made free of the potential for control by the Government, in addition to being free of the potential for control by the

profession”⁶. The Irish Council for Civil Liberties has also expressed alarm about the proposal⁷.

17. Such observations mirror some of the comments which have been made during the recent dispute in England between the Lord Chancellor and the criminal bar. Considerable scepticism is inevitable when one hears expressions of concern about threats to the rule of law from lawyers when their fees are under attack. Indeed, considerable scepticism is justified: the ability to equiparate the public interest with one’s own self-interest is a striking and constant feature of humanity. However, that does not by any means justify disregarding those expressions of concern, which have to be carefully examined on their merits.

18. I have neither the knowledge nor the legitimacy to criticise specific proposals in another jurisdiction to regulate the legal profession, and I have no wish to do so. However, I can say this. No sensible person would dispute the proposition that the independence of the judiciary is fundamental to the rule of law in a free society. In general, this is because judges must try cases fairly, so they must be and be seen to be impartial; in particular, judges have no more important function than to protect citizens against the excesses of the executive, and so they must be, and be seen to be, free of any control by, or influence from, the executive. It does not take much thought to see that, particularly in a modern system with complex substantive and procedural rules of law, it is almost

⁶ Ibid

⁷ The Journal, <http://www.thejournal.ie/readme/column-‘this-is-a-blueprint-for-government-control-of-the-legal-profession’-343423-Feb2012/>

equally necessary to have a legal profession which is similarly free of executive control and influence. Access to justice is effectively as important an ingredient of the rule of law as an independent judiciary. Without a legal profession which is genuinely independent of the executive, there is a real risk of justified concern about proper legal representation of defendants in criminal proceedings and of applicants in claims against the state.

19. More generally, regulation is necessary and important, but it must be kept to a minimum, it must be targeted, and it must be effective. Regulation in the financial world failed to stop the rather obvious abuses of LIBOR fixing and PPI selling by UK banks, and it failed to catch the rather obvious frauds practised by Enron and Madoff in the US. Where regulation fails, a standard response is that we need more of it, whereas the correct response is that we need different regulation not more regulation.

20. Further, if it is too intrusive and prescriptive, regulation can be positively self-defeating. If a profession is subjected to detailed rules of behaviour with a box-ticking approach and targets, people in the profession will quickly begin to feel that anything which is not forbidden by the rules is permitted. Any sense of what is right and wrong will start to dissipate, or at least to shrink. We therefore are at risk of losing a culture which enforces general standards of honesty, through understanding legal ethics and observing peer group behaviour. And a clear, correct and generally observed culture is very precious: it can do more for

the public good, and costs far less, than almost any set of regulations. But such a culture cannot be enough on its own: one needs regulation. But we should not be obsessed with it. After all it is only a control on the means, not the end. What ultimately matters is the quality of the legal advice and representation, whereas regulation is almost always concerned with controlling who provides the advice or representation and how the advice or representation is provided, rather than whether the advice or representation are any good.

21. I therefore hope that regulation of the legal professions in England will become more realistic and less expensive. The existence of multiple regulators regulating the same activity seems to me questionable at best and quite possibly unsustainable. A rational approach is called for. One possibility is a single regulatory body for legal services with a number of discrete divisions: litigation, advocacy and advisory. That may well be where the proposed Irish model will end up. At the very least moving to activity-based regulation ought to bring with it efficiencies and easily secure common standards. Given however the liberalisation of legal practice, with various different types of lawyers moving more flexibly than previously between different regulated activities in the course of their practice, a single regulatory approach would perhaps be better. It would, amongst other things, have the virtue of simplicity both for lawyers and for the public.

Fusion and specialisation

22. Having said that, the regulatory system may well provide further impetus towards a *de facto* fusion in the legal profession. If we in England and Wales proceed further along the road of convergence I have described, it will lead to the position where barristers, solicitors and CILEX members all carry out the same regulated activities. Whether this leads, as such replication did in the 19th century, to a formal merger of professions is an open question. One thing this will not mean will be the end of independent barristers, or of legal specialisation. In those countries where they have a single profession, some lawyers specialise in advocacy, some even specialise in very specific forms of advocacy such as appellate advocacy, while others specialise in advisory work. Expertise and specialisation will always be needed. I think this point highlights a subtle distinction which the independent bar in jurisdictions such as ours sometimes seems to affect not to appreciate. A fearless, independent, and outspoken group of specialist advocates can exist and thrive perfectly well within a larger, single legal profession: it does not need to be a separate profession. In the USA, the very effective Association of Trial Lawyers of America, although a sub-group of a single lawyers profession, is every bit as effective as the Bar Council in England. But I am not advocating fusion: emotionally as a former barrister, I would regret it. Nor am I speaking against it. There are two important questions which those in, and concerned about, the legal profession have to consider, namely: is fusion the way we are going and is fusion in the public interest.

23. Just as there is a move towards coalescence of the legal profession, so is there an even more effective tendency towards so-called silos within the profession. This is as a result of increased specialisation. The ever-increasing volume and ever-increasing complexity of the law renders specialisation inevitable. When I started studying law in the early 1970s, professional negligence was dealt with in part of a chapter on negligence in textbooks on tort. By the late 1970s, professional negligence merited a chapter on its own. In the 1980s, there were, for the first time, a couple of text books devoted to the topic of professional negligence. By the late 1990s, one could find textbooks devoted to solicitors' negligence. And now, there is a textbook dealing solely with the issue of solicitors' negligence in relation to trust and wills. There is increasing pressure on practising lawyers, like lawbook writers, to specialise, as we seem to be living in an increasingly specialised world.

24. Whether the trend of the past half-century towards increased specialisation continues is unclear. Some trends are like a spaceship travelling intergalactically: they continue relentlessly in the same direction, perhaps until they explode on hitting a star. Other trends are more like a pendulum – they reverse direction, and often, having gone too far one way they go too far the other. In many ways, I hope specialisation is a pendulum not a spaceship. In the present era, specialists tend to develop their own areas of law without regard to what is happening in other areas. This has the risk of producing lawyers with a rather

narrow focus, and the law becoming incoherent and complicated. And, I may add, it emphasises the need for appellate courts with a non-specialist outlook, which can take a holistic view of the law and ensure that it develops coherently across all areas.

25. One reason for the increased specialisation among lawyers is the increasing complexity of the law in almost every field, which has been an ever-growing challenge to those practising law. In a lecture last month, I expressed concern about the ever-increasing quantity and often poor quality of legislation over the past thirty years, which, as I explained, is not conducive to justice and brings Parliament, and even the rule of law, into disrepute.

26. Some of our legislators appreciate this. Consider the Financial Services (Banking Reform) Bill, which was considered in the House of Lords last month. Lord Higgins, a Conservative, said that “*the way that the Bill is drafted ... makes it extremely difficult for the House to work out what is happening from moment to moment on an unbelievably complex matter*”⁸. Lord Phillips of Sudbury, a Liberal Democrat, described “*the complexity of both the Bill and the amendments*” as “*quite barbaric*”⁹, and Lord Barnett, Labour, agreed with the view of Lord Turnbull, a cross-bencher, “*that he has never seen such a shambles presented to any House*”¹⁰.

⁸ Hansard; HL Deb 8 Oct 2013, Column 22

⁹ ditto

¹⁰ Ditto, column 29

27. So here we have a Parliamentary debate on a Bill whose importance could scarcely be greater, a debate which is condemned from all sides of the political divide as plainly unsatisfactory. Examples abound. Successive Governments promise a simplified tax regime; with each outgoing Chancellor of the Exchequer since, I believe, Nigel Lawson, the already enormous and convoluted volume of revenue statutes and SIs has increased. The state of criminal statute law is remarkable in its extent and complexity. Ten years ago, the recently retired Law Lord, Lord Steyn, referred to there being “*an orgy of statute-making*”¹¹, and it’s got worse, not better, since then.
28. I appreciate that as life gets more complex, a degree of complexity in legislation is inevitable, but that reinforces, rather than undermines, the need for a self-denying ordinance by the law-makers. The same applies to judges, who have the task of interpreting statutes and developing the common law. In the same speech, I referred to the fact that many judgments are much too long, adding this “*Reading some judgments one rather loses the will to live – and I can say from experience that it is particularly disconcerting when it’s your own judgment that you are reading.*” We need to make our judgments leaner and clearer – more accessible. If I ever had a mission statement for the Supreme Court, which I certainly will not, it would to ensure that the law was as simple, as clear and as principled as possible
29. So far I have been referring to the laws of this country, but there is another factor which has rendered legal practice more demanding than when I started practising in 1975. It is....

¹¹ First Brice Dickson lecture, published in *European human rights law review*, vol. 9, no. 3

The international dimension

30. The enormous increase in the international, or even global, nature of legal practice has three aspects, which are connected. The first is the growth of international, cross-border business; the second is the increasing internationalisation of solicitors' law firms and barristers' chambers; the third is the growth in international law, both in terms of harmonisation and in terms of international courts. These changes are, I think, largely attributable to the increased ease and speed of communication, of travel, and of movement of goods. They tend to make a lawyer's life more complex, but more exciting.
31. There is an increasing number of international arrangements - eg cross-border insolvency treaties, double taxation agreements and harmonisation of patent law, to take three commercial examples, as well as international criminal conventions. Multinational and even national companies manifest an increasing desire for advice on issues which straddle more than one country, often more than one continent. These developments are attributable to the increase in the globalisation, coupled with increased market liberalisation, which has already happened, and the desire to reduce barriers to trade which is what most people hope will happen. The international arrangements often involve a further layer of international law on top of the national law, which self-evidently renders the subject more complex for lawyers. Or it involves changing the national law, which means more to learn for lawyers. And the need for advice which involves the law of more than one country also increases the task for lawyers.
32. It has, of course, been commonplace for the larger City of London law firms to have global practices for quite some time now. A changing market place is however now beginning to see other law firms following suit and expanding into new areas. You may well have read how the Australian law firm, Slater & Gordon, has recently been expanding into the English and Welsh market. Other firms will no doubt do the same, and I equally have no doubt that our

firms will do the same in other markets around the world. Not only will such inward expansion go a significant way towards increasing regionalisation of legal practice here, but equally it will lead to its increasing internationalisation. For UK, and particularly central London-based, lawyers, this internationalisation has a special significance, because of the importance of the UK as a global service hub, and, above all for present purposes, an international dispute resolution centre. This represents another, rather different, way in which lawyers contribute to the well-being of the UK over and above to the rule of law.

33. But the international side of things has two other very important aspects for the UK and Ireland and for lawyers in the four jurisdictions: namely the devolution dimension and the European dimension. Devolution means that there is an increasing amount of Northern Irish, Scottish and Welsh law, and that we are starting to have a little more constitutional law. It is difficult to say where it will lead, not least this side of the September 2014 referendum. Self-centredly, it may well lead to increased pressure for a Welsh Justice, as there is an ever-growing body of Welsh law, and if there is a Northern Irish Justice and two Scottish Justices, why is there no Welsh Justice? Still self-centredly, but perhaps more conceptually, I think that increased devolution will lead to an ever-growing constitutional function for the Supreme Court. The UK famously has no constitution and therefore it can have no constitutional court, but, some might say characteristically, in a rather half-baked and absent-minded way, we seem to be evolving, some might say sleepwalking, to evolving into a partly constitutional court. We are interested in, and have much to learn from, the Irish experience of having a constitutional judicial role engrafted onto a common law system

34. Our membership of the EU since 1973, and our signing up to the European Convention on Human Rights in 1953 have added to the interest and the challenge of being a lawyer in the UK. The influence of EU law has increased,

perhaps particularly since the Maastricht and Lisbon Treaties in 1992 and 2007, and the influence of Human Rights law on our law has increased dramatically with the passing of the Human Rights Act 1998. Both have had a profound effect, not merely in areas where they directly impinge, but on our way of legal thought.

35. It is wrong to see this as an inappropriate foreign adulteration of English law. Part of the strength of our law is that it has taken what is good from foreign law. The common law developed out of Norman law; equity developed out of Roman Catholic common law; Lord Mansfield developed our commercial law by following European mercantile law. More recently, our notion of *forum non conveniens* was changed by adopting Scots law¹², and we have been ready to consider and learn from judicial approaches in other jurisdictions.

Information Technology

36. There is no doubt that IT has already had a significant effect on working practices and organisations generally and on legal practice and litigation in particular. Professor Richard Susskind, who has written extensively, expertly and perceptively on the influence of IT on the law¹³. I know that around six months ago, Richard gave a lecture at the Bar Council of Northern Ireland conference¹⁴, when he cited Alan Kay's observation that "*the best way to predict the future is to invent it*", and then reformulated it to: "*It's not what the future looks like, but what future are you going to invent?*" A month before Richard's lecture, the Lord Chief Justice of England and Wales gave a speech¹⁵, highlighting the way in which technological advances ought to have a significant effect on the way in which legal practices are structured. This is not the occasion to discuss the issue in any detail. First, we do not have the time. Secondly, it is always difficult to

¹² *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460

¹³ See eg R Susskind, *The End of Lawyers? Rethinking the nature of Legal Services* (Oxford 2008)

¹⁴ *Transforming Legal Practice Through Innovation* (15 November 2013)

¹⁵ J. Thomas, *Justice in One Fixed Place or Several?* (Birkenhead Lecture, Gray's Inn) (21 October 2013).

predict the future, but, when it comes to IT, it is particularly difficult, because we have so little experience (less than 25 years) and the changes so far have been difficult to predict, as the largest computer company of the 1980s, IBM, witnesses: they took the view that there would be no significant market for personal computers. But that difficulty should not make us scared of change: consider the experience of Kodak who, despite inventing the first digital camera in 1975, dropped the product because they were worried it would undermine their established, traditional camera business. It wasn't until the 1990s that Kodak began to rectify their mistake, having lost the opportunity to obtain first mover advantage

37. Having said that, computers have changed things enormously in the law already. When I started practice in 1975, the idea of every significant decision of the High Court, Court of Appeal or Supreme Court being instantly and freely accessible was unthinkable. As were ideas such as a paperless office, IT-led disclosure, video-linked evidence, instant sending of documents, and filming of court proceedings, to choose a few innovations almost at random. The prospects for legal outsourcing, near-shoring, off-shoring and all manner of new business arrangements are all likely to have a radical effect. We are just at the beginning, or in some ways at an intermediate stage, when it comes to IT. Thus, in the Supreme Court, we require all the papers in an appeal to be sent electronically on a memory stick, but we also require hard copies of all the papers.

38. All of us will have to be quick on our feet to adapt to electronic and other innovations which may very quickly alter our methods of working and many business models generally. And, of course, as Professor Susskind emphasises, IT is not an end in itself and it is by no means the sole driver for change. He may well be right in saying that the two most powerful forces are “*a market pull towards commoditisation and [a] pervasive development and uptake of information*

*technology*¹⁶”, and, while you should be thinking about those eventualities, you should also be planning for the unknown unknowns, or at least maximising flexibility to allow for them.

39. In his lecture, Richard Susskind suggested that disputes can be broken down into nine constituent parts (document review, legal research, project management, litigation support, electronic disclosure, strategy, tactics, negotiation and advocacy), and the demand for reduced costs will ensure the emergence of specialist providers in each of those parts. It seems unlikely that document review, for example, will still be located in countries where legal costs are so high. Which brings me to

Legal costs

40. Legal advice and representation cost significantly more in the UK than in almost any country in Europe. Four caveats should be made at once. First, this is a very broad generalisation indeed, and there are no doubt many exceptions, qualifications and explanations which could and should be made to this statement. Secondly, it is dangerous, and can be unfair, simply to compare the costs of lawyers between different countries. To take an obvious point, in the UK, a judge is largely an impartial umpire, whereas in much of Europe, the judge plays a much more proactive role, and therefore the judicial system in such countries is significantly more expensive than here. Thirdly, there is much to be said for the point that you pay for what you get: UK lawyers have a particularly fine reputation, as their presence and influence internationally demonstrates. Fourthly, any reform should be carried out bearing in mind the importance of retaining a high quality legal profession, and its importance to the rule of law and to the economy.

¹⁶ R Susskind *op cit* page 1

41. Having said that, there is a long-standing and justified concern about the level of cost of litigation: it will simply be out of all proportion to the amount involved in a small case, which means that fighting a small case (in a recent lecture I gave the example of a plumber suing a householder for £5,000 for work done and the householder counterclaiming for £10,000 for alleged flooding caused by the plumber's negligence) is either not worth it or is prohibitively expensive. This is a denial of access to justice and is therefore an offence against access to justice and therefore to the rule of law. I have referred on more than one occasion to the need for "quick and dirty" justice; it is not perfect, but it is better than no justice.

42. I hope we can do something about this. If we do, it is true that lawyers will make less per case, but there will be many more cases, as people will be prepared to fight. If we cannot do anything about costs, I hope you will. One solution may be the German system of fixed costs. Meanwhile in the Republic, one of the purposes of the LSR Bill is to reduce costs, but, again, I refer to the law of unintended consequences.

Diversity and a nascent career judiciary

43. In the UK jurisdictions, we now have a competitive, open process, albeit one which is more expensive, more time-consuming, more bureaucratic than its predecessor, and, to some, rather more demeaning. Thus, the new process, as was widely reported earlier this year, saw appointment to the office of Lord Chief Justice depend on, amongst other things, the candidates writing an essay with their applications. I am far from criticising this - I was a member of the panel. If we are to have a judiciary that is accountable and able to secure public confidence, indispensable if we are to maintain the rule of law, appointment by an independent Commission through a fair and open competition would be seen by many as an essential aspect of our constitutional settlement.

44. The creation of the JAC did more than place judicial appointments on a proper footing; it also created a basis upon which a judicial career could begin to develop. Under the old system, other than moving up from the High Court to the Court of Appeal and to the Law Lords, very few judges were promoted. And to be one of the few who were promoted, it was also by invitation. The JAC's creation has changed all that. First, judges no longer need wait to be called. They can apply, and take part in an open competition. A fair number of District Judges have been promoted to Circuit Judges, and a fair number of Circuit Judges have been promoted from the Circuit Bench to the High Court. Further, the possibility of part-time judges is now in statutory place for all courts – including the Supreme Court.
45. Taken together an open appointment process, the prospect that it provides for judicial promotion, and greater flexibility in judicial sitting arrangements seem to me to suggest that we are beginning to move towards a judicial career. We may not have adopted the position that is in place in other jurisdictions where law graduates have to decide whether they want a career as a lawyer or as a judge and, having made that choice, are effectively stuck with it. But we can see a degree of convergence between our system and those that have long-established career judiciaries. A nascent judicial career is developing here, or at the very least the conditions now exist for its development to take place.
46. Provided that we do not move to a preponderantly career judiciary, which I would emphatically not favour, this development is a positive one, both for individuals and for the judicial system as a whole. Perhaps its most important positive aspect is that it should provide a real boost for the development of a more diverse judiciary. As I have said previously, greater judicial diversity is important for three reasons. First, it is unjust if people have fewer opportunities because of, for instance, their gender, sexuality, ethnicity, socio-economic background or disability – especially in a job committed to justice. Secondly, if judicial positions are not in practice open to all members of society, it is

statistically inevitable that we will not be appointing the best and the brightest, which is against our national interest. Thirdly, public confidence in the judiciary risks being undermined if judges collectively appear to represent only a section of society.

47. We have been making progress in this regard. In England and Wales, in 1998, of 3174 judges, 10.3% were women and 1.6% were BAME, and in 2013 of 3621 judges 24% were women and 6.8% BAME¹⁷. The Court of Appeal now has seven women – the highest number it ever had – and recent High Court appointments saw an appointment rate of about 30% for women. In Scotland, as at March this year, just over 25% of the Senators of the College of Justice and 21% of sheriffs were women; in the Inner House, 4 of the 11 judges are women. The Supreme Court however still only has one female member. A lot more work needs to be done in other respects: the BAME representation among the senior judiciary is very low, and the socio-economic background of the senior judiciary is almost monolithic. In this regard it is not enough to say time will tell and will bring improvements. While you have to be patient, patience alone is not going to answer the problem.

48. Changes in the structure and nature of the legal profession have an enormous part to play in improving diversity among the judiciary, but it is also very much a desirable end in itself – for precisely the same reasons as why it is so important for the judiciary. So far as the Bar of England and Wales is concerned, in 2006, 33.4% of barristers were women, and 9.6% were BAME, in 2012 34.7% were women and 11.0% were BAME, so they are slowly going in the right direction. As to Ireland, it has one of the highest populations of barristers per capita in the world¹⁸ - there are 317 senior counsel and 1,956 junior counsel. According to a recent article on the Irish Bar, the “average

¹⁷ <http://www.judiciary.gov.uk/publications/diversity-statistics-and-general-overview-2013/>

¹⁸ David Nolan, ‘Bar Council favours reform – but let’s have a proper debate’, <http://www.independent.ie/opinion/analysis/bar-council-favours-reform-but-lets-have-a-proper-debate-30316152.html>

profile of an Irish barrister is now female, under 40 and struggling to make ends meet after years of study”¹⁹, and the current male to female ratio is approximately 60% to 40%, and women have accounted for more than 50% of entrants over the past five years²⁰. The Bar Council of Ireland states on its website that a “number of different nationalities and religious beliefs are represented”²¹, but they don’t have any diversity statistics available. As for Northern Ireland, enquiries made by my judicial assistant in the Supreme Court reveal that the Northern Irish Bar Council has no diversity statistics – other than telling her that there were around 125 women out of a total of around 700 independent barristers.

Education and Training

49. Having touched on various features of the present, and contrasting it with my past and your future, I turn finally to education and training.

50. It is essential that legal education takes into account, first the centrality of the rule of law; secondly the need for a very high standard of professional ethics (duties to society, the courts and clients); thirdly the need for lawyers to understand legal principles; fourthly the need to deal with practicalities of professional life; fifthly the need to allow for recent changes; sixthly, as far as possible, to cater for future. As for training, it is not only important that these factors are taken into account, but, particularly at a time of such fast change as the present, training after qualification, continuing professional development, is very important too.

¹⁹ Ibid

²⁰ http://www.lawlibrary.ie/docs/A_Brief_History_of_the_Irish_Bar__Contents/56.htm

²¹ <http://www.lawlibrary.ie/viewdoc.asp?fn=/documents/aboutus/irishbar.asp&CatID=1&m=2>

51. Many of you here this evening were addressed earlier on the topic of continuing professional education and training for advocates by Derek Wood QC, and nothing I say can improve on his contribution. I have to say that: in 1976, he was my pupil supervisor, and no budding barrister could have hoped for a better supervisor. And that has been borne out by the very substantial and very valuable work which he has done and continues to do in this very important area.

Supreme Court Advocacy

52. I end with a few words on Supreme Court advocacy, suggested by Lord Kerr, who is very sorry he cannot be here this evening (though he has heard quite enough of me). In a nutshell, we would benefit from two things. The first is shorter written cases. There's no point in setting out the detailed facts: they are in the Statement of Facts and Issues, and most of the details don't matter. Similarly, quoting large chunks of judgments is unnecessary and unattractive. Repetition is also to be avoided. The rapier is a better weapon in the Supreme Court than a bludgeon.

53. The second point is that your oral submissions should focus on the development of the argument in the written case, rather than a rehearsal of the written case – or at least a fresh approach from the written case. With a written case and an oral argument, you have the opportunity to make two sets of submissions: take advantage of it.

54. If I go on any longer, I will be taking advantage of you.

David Neuberger, 20 June 2014