Legal and responsible?

by Gary Lynch-Wood

INTRODUCTION

In Bleak House, Dickens famously declared "[t]he one great principle of English law is to make business for itself". Seemingly, such views are not consigned to history. Referring to this very quotation, the Right Honourable Jack Straw MP, Lord Chancellor and Secretary of State for Justice, said in a recent speech for the Law Society's campaign on Markets, justice and legal ethics: "That is still one view of the profession". Given the reputational implications of headlines like "Lawyers forced to repay millions taken from sick miners' compensation" or "Property lawyers sued for fraud" (*The Times*, February 8, 2008 and January 20, 2008 respectively), this is perhaps unsurprising.

Many law firms, however, are attempting to bridge the legitimacy gap by having policies on, and making commitments to, corporate social responsibility (CSR). This article considers how CSR is gaining impetus within the profession. Traditionally, CSR discourse has focused on large corporations in more conventional manufacturing and retail sectors whose environmental and social impacts are more noticeable. CSR is an underdeveloped area for law firms because they are not visible polluters, and their services do not exploit child labour or sweatshops. Nonetheless, as it gains momentum CSR *may* require firms to reassess their practices and relations with stakeholders, and is likely to provide an ongoing and fruitful source of debate.

A POLICY PERSPECTIVE

CSR is a vague concept and there are many views of what it involves. Some formulations are normative, defining corporate responsibility as the moral (or right and proper) thing to do. Despite their appeal, such formulations are diminishing, with other conceptualisations, especially those promoting social and environmental responsibility as good for business, gaining dominance. A shared feature of most conceptualisations of CSR, however, is that it represents a shift from the view that companies are principally providers of goods and services to society – an essentially Friedman-*esque* concept – to one where they are citizens that contribute to broader societal welfare. Also common is the view that CSR is the business contribution to sustainable development.

Dominant ideas on CSR have been debated most fervently in business literature. Indeed, there has traditionally been little regard for the role of law and policy. Given the need for social and environmental change, however, it was foreseeable that when considering the wider social and environmental responsibilities of companies the function of law and policy could not be fended off ad infinitum.

In terms of policy, particularly European policy, CSR most prominently surfaced in formal EU dialogue with the Conclusions of the Lisbon European Council of March 2000 when the Council set its new strategic goal of becoming, by 2010, "the most competitive and dynamic knowledge-based economy in the world capable of sustainable economic growth with more and better jobs and greater social cohesion". CSR was an important feature of this strategy, evidenced by the Council's special appeal to companies' corporate "sense of social responsibility regarding best practices on lifelong learning, work organisation, equal opportunities, social inclusion and sustainable development". The European Commission has since confirmed the importance of CSR in achieving the EU's strategy.

A key policy contribution was the Commission's 2001 Green Paper (COM (2001) 366 final). This consultation document published a widely used, if not altogether incontestable definition of CSR; namely, a state whereby firms "integrate social and environmental concerns in their business operations and in their interactions with their stakeholders on a voluntary basis". In a follow-up consultation (COM (2002) 347 final) the Commission outlined what it considered was a consensus on three aspects of CSR:

- it is behaviour by businesses over and above legal requirements, voluntarily adopted because it is in businesses' long-term interests;
- it is intrinsically linked to sustainable development, and;
- it is not an optional "add-on" to core activities, but about how businesses are managed.

The European conceptualisation raises a number of important issues. For instance, it embraces three essential components (society, environment and economy) and intimates that successful companies can balance each component as part of a healthy triple bottom-line. It involves the proper integration of social and environmental

issues, and is therefore more than one-off, sporadic or even regular charitable giving. It concerns activities over and above legal requirements, as confirmed by the Commission in the Green Paper: "Being socially responsible means not only fulfilling legal expectations, but also going beyond compliance". Possibly the most important point, however, is that the European formulation underpins a prevalent view that self-regulation is the apposite vehicle for stimulating CSR.

Notwithstanding the moot point whether anything is strictly voluntary – as many activities result in duties to something – a policy approach encouraging voluntary actions is significant for at least three reasons. Firstly, it encourages the types of innovative CSR practices that additional layers of regulation may impede. Secondly, it is considered suitable for all firms – irrespective of sector, size or context – as it accommodates organisational differences and thereby enables firms to develop suitable practices. Thirdly, since there are substantial business benefits from being socially and environmentally responsible there is no need to regulate in the first place: firms merely need information that such benefits actually exist.

This third reason is commonly known as the *business case*. It is the main justification for the self-regulatory approach and underpins both European and national policy. The business case relates to the rewards and penalties that derive from the way businesses are managed. Closer scrutiny, however, reveals its internal and external dimensions. The internal dimension emphasises internal organisational practices that can generate business benefits (eg investing in employees for a motivated workforce). The external dimension relates to organisational practices – investing in clean technologies to improve the environment – taken in response to societal pressures for responsible behaviour, and is most evident in new social and market pressures which are said to be changing business values (European Commission, COM (2002) 347 final).

PROFESSION RESPONSES

What is the relevance of CSR for the legal profession? Devising a suitable answer to this question may, as I argue in a different context (Lynch-Wood, G, and Williamson, D (2007) "The Social Licence as a Form of Regulation for Small and Medium Enterprises", 34 *Journal of Law and Society* 321) depend on several variables (eg company size, reputation, stakeholder power). Yet it is clearly appropriate, which reflects the way the profession has responded. The diversity of its response, however, reinforces the ill-defined nature of the CSR issue.

The Law Society of England and Wales (LSEW), in its 2002 report (*Corporate Social Responsibility: A View from the Law Society*), endorses Europe's formulation of CSR. Consequently, its emphasis is on the business case. It suggests, for example, that internal CSR integration involves responsible approaches to employees and human resources, health and safety, and company restructuring. Externally, it may involve consideration of local communities, business partners, human rights, and the environment. Additionally, the LSEW outlines the purported advantages and disadvantages of CSR strategies. It says, for instance, that effective CSR may generate client loyalty, enhanced employee quality, increased productivity, and reduced regulatory scrutiny. But CSR could also create additional costs with no obvious benefits. Moreover, it may eclipse the primary responsibility companies have towards shareholders and clients. To conclude, the LSEW clearly endorses CSR, claiming that if it is a process for developing stakeholder relationships then the case becomes apparent. In addition, the LSEW supports the familiar business case argument that ignoring CSR may not be in shareholders' interests.

The Council of Bars and Law Societies of the European Union first published CSR guidelines in September 2003, with updated guidelines in April 2005 (*Corporate Social Responsibility and the Role of the Legal Profession*). The approach is different to the LSEW, focusing predominantly on client-lawyer relationships. A key theme in the guidance is the need for lawyers to advise clients on CSR – to create "new legal solutions" – and the possible pressures law firms face to adopt appropriate standards:

> *"as companies increase their commitment to CSR, they will start to demand from their legal advisers that they are conversant with the area and able to give advice. A company might be reluctant to take advice from a lawyer if the lawyer is not familiar with CSR policies and CSR implementation. Furthermore, companies involved in CSR impose CSR requirements on suppliers. Law firms are also considered suppliers of services and could be asked to comply with the clients' code of conduct."*

In conclusion, the Council says a lawyer's role is to assist clients in positioning their business "successfully in this new legal landscape". With this in mind, it recommends lawyers to be aware of CSR and to undergo professional training to understand its significance.

The approach of The Law Society of Scotland (LSS) is somewhat narrower (see: http://www.lawscot.org.uk/). Its initial focus is support for charitable and voluntary work by providing information on related projects and organisations. It encourages *pro bono* and charity work, while a new web portal, launched in March 2008, created a resource for firms to discover more information about relevant projects. However, the LSS is developing its scope by considering wider CSR issues, such as the environment.

The responses of representative bodies suggest that the pressures for adopting CSR strategies are present and are gaining momentum. This could explain why a recent survey (http://www.legalweek.com) reveals that just 3 per cent of lawyers are against CSR policies (a figure that has fallen from 23 per cent in November 2006). It may also explain why many leading firms are starting to make CSR

commitments. For example, a particularly progressive firm is Freshfields Bruckhaus Deringer which has adopted an approach based on formal reporting. Its 2004/5 report was assessed against best practice standards. It was reputed to be the first CSR report of any international law firm and, "wherever appropriate", used relevant CSR guidance (eg the Global Reporting Initiative). The company's approach to issues of CSR is business case focused: "having strong CSR credentials will ultimately help us attract and retain the best people, have a positive impact on how our clients view us and assist in the efficient development of our business."

Its commitment to full sustainability reporting was achieved with its 2006/7 report, which expanded its scope to include international activities. Also, it uses GRI guidelines and the AA1000 standard, while data on *pro bono* are verified by the London Benchmarking Group. The report covers critical internal and external issues such as; law and ethics; people and diversity, and climate change and the environment. The company's commitment to progress is highlighted by its pledge to further report in 2009.

Addleshaw Goddard, also regarded a leader, appointed its first CSR manager and management team in 2006. Its activities are wide, covering human rights projects, work with the National Autistic Society and support for people with deafness (*The Times*, January 22, 2008). It is reported that 10 per cent of its workforce are on teams linked to diversity and community engagement, and that employees have two days' paid time for voluntary work. The firm boasts several CSR-related achievements; eg its ranking in 2008 as 40th in the Sunday Times 100 Best Companies to Work and its place in 2007 on the Times 50 Places Where Women Want to Work.

Also notable is Allen & Overy's stated commitments, particularly to *pro bono*. In global terms, 61 per cent of the company's lawyers engage in *pro bono* or community work, estimated to be worth £12 million in fees. In 2007, the company published a report on *pro bono* and community work – *Values into Community Action* – which outlines the extent of its activities worldwide. In addition, its new London office uses environmental technologies (eg solar panels). Finally, Linklaters have also made CSR commitments. In 2006 its Executive Committee and International Board agreed six principles that would provide a framework for managing CSR. These principles state, *inter alia*, that partners should be encouraged to take responsibility for ensuring the firm acts responsibly towards stakeholders.

Undoubtedly, there have been important developments within the profession. Nevertheless, recent events have raised deeper concerns about the role and status of CSR.

SHADOWS OF DOUBT

A recent survey reports that 75 per cent of lawyers believe CSR programmes are positive, but that most believe firms do not achieve their policies (http://www.legalweek.com). This, of course, reinforces the perception of CSR as image management. The survey also published a series of quotes that exposed insalubrious aspects of legal practice: "Some law firms even have a facility with the Priory for when their staff crack up." Indeed, recent events have raised important questions about the status of CSR within the profession.

An article in the *Independent* on August 21, 2007 gave the headline: "Law firm settles 'homophobia' discrimination case". The article described how Clifford Chance paid an undisclosed sum to settle what is thought to be the first claim against a law firm for discrimination on sexual orientation grounds. The claim was filed in November 2006 by a former partner who alleged to have suffered indirect and direct discrimination. Though there was no full hearing, it is believed the confidential settlement "could run into seven figures" (*The Independent*, August 21, 2007).

The timing of the case is interesting because in 2006 the Law Society published a report on the career experiences of gay and lesbian solicitors. This research was undertaken due to the Law Society's commitment to promoting equality and diversity. Although the report was not too critical, when commenting on the workplace it said interviewees who spent time in City firms spoke of "undertones of homophobia." The report recommended that law firms should ensure that "equal opportunities policies cover discrimination on the ground of sexual orientation" and that, surprisingly, "[l]egislation needs to be understood and implemented".

Clifford Chance's practices have more recently been questioned with a high profile race discrimination case being brought against it in New York. A former Haitian associate is suing the firm for $75 million, claiming her colour meant she was not given meaningful work (*The Lawyer*, March 31, 2008.). The firm is contesting the claim. However, it is not the first time a law firm has been questioned over its approach to discrimination issues (see *Bloxham v Freshfields* [2007] Pens LR 375).

Internal practices were recently exposed in a report in *The Times* in February 2008. This suggested firms that profited by exploiting sick miners were to be forced to repay money they had wrongly taken from clients' compensation. This followed an investigation by *The Times* into financial abuses relating to the DTI's coal health compensation scheme. Among other things, it said solicitors had improperly deducted money from clients' awards. Many claimants had suffered by losing part of their award because solicitors double-charged for services. A survey revealed that, of 3,600 claimants, 345 had money wrongfully deducted.

Events such as these indicate that firms may need to consider in-house practice in view of CSR principles. Much more problematic from a CSR perspective, however,

are instances where firms act with the backing of law, but where actions offend moral codes or are not necessarily in the interests of stakeholders: a dilemma which exposes the frailties of the formulation of CSR as behaviour that is "beyond compliance".

An unsavoury headline in the *Guardian* on October 17, 2007 read: "How top London law firms help vulture funds devour their prey". The article said several London law firms – some of which support the UN millennium goals of reducing poverty – profited by representing so-called vulture funds (which buy debt issued by poor countries at a fraction of the value and then sue for the full value and interest). As you might expect, vulture funds can offend moral codes as they hamper debt-restructuring work.

The issue came to prominence in *Donegal International Ltd v Republic of Zambia and ANR* ([2007] EWHC 197 (Comm)). By an assignment agreement in January 1999, Donegal – who were being represented by Allen & Overy – purchased Zambian debt from Romania for $3.2 million and then pursued Zambia for the full value (approx $44m), though it later agreed to accept a settlement of $16 million. Zambia defaulted after making three payments. Default, however, meant the full debt value plus back interest was payable, which totalled over $55 million. Smith J found the agreement legal, but key clauses in relation to default payments were penal and were struck out. He later set the award at $15.5 million (the original outstanding amount plus interest).

The report in the *Guardian* was not altogether uncritical of Allen & Overy, who "billed their clients about £2 million in fees" when the "average Zambian survives on less than $1 a day." Moreover, it revealed that several London firms had represented vulture funds or acted against poor nations' interests. While representing vulture funds, Allen & Overy is a member of Advocates for International Development (A4ID: http://www.a4id.org/); a development from the Oxfam 1,000 City Lawyers Initiative following the Asian tsunami which aims to support the Millennium Development Goals of reducing poverty. Allen & Overy publicises its work with A4ID in its 2007 *pro bono* report. Though representing Donegal was legitimate business, it may expose the firm to claims of insincerity.

Other cases highlight the dangers of failing to consider the wider implications of legal work, particularly for corporate clients. Such actions may be described as "value-destroying litigation" (IIED (2005) *Corporate Responsibility and the Business of Law*, September). In a costly action in the US, toymaker Mattel sued artist Tom Forsythe who, as a comment on the objectification of women, photographed and exhibited undressed Barbie dolls with kitchen equipment. Prior to the case, the pictures generated a few thousand dollars in sales but attracted little attention (*The New York Times*, June 28, 2004). Mattel, in an action for trademark infringements, attempted to prevent Forsythe from selling his pictures. In August 2001 the Los Angeles Federal District Court gave judgment for the defendant but did not award him legal fees. Both Mattel and the defendant appealed, and in March 2003 the United States Court of Appeals for the Ninth Circuit upheld the decision against Mattel but referred the issue of legal fees back to the Los Angeles court (*Mattel Inc v Walking Mountain Productions*, Case No 01-56695).

Following five years of legal argument, the judge finally ordered Mattel to pay $1.8 million in costs, calling the action "groundless and unreasonable" and, as Mattel's counsel should have determined, "frivolous". The case led one Harvard professor to say that companies may pause to consider "whether to simply reflexively unleash the hounds the minute they see somebody doing something that relates to their brand of which they don't approve….Maybe now when an angry CEO picks up the phone and says 'sue this guy' the lawyer may say 'I have to warn you, this could boomerang'" (*The New York Times*, June 28, 2004).

The McLibel case is one of the most notorious, and at 313 days the longest in English legal history. McDonald's sued activists Helen Steel and David Morris in libel for distributing leaflets ("What's wrong with McDonald's") containing allegations of poor employment practices, deforestation and child exploitation. To emboss this David versus Goliath encounter, Steel and Morris were refused legal aid.

Although McDonald's won, the victory was branded pyrrhic. Bell J found that while some of the claims in the leaflet were false, others were indeed accurate. McDonald's was awarded £60,000, but in 1999 the Court of Appeal, allowing the appeal in part, reduced the damages to £40,000. To compound matters, Steel and Morris appealed to the ECHR, contending that Articles 6 and 10 had been violated because of the denial of legal aid and interference with freedom of expression (*Steel & Morris v United Kingdom* [2005] EMLR 15). Their appeal was allowed and they were awarded damages.

Not only was McDonald's criticised for being heavy-handed, but it was reported to have spent £10 million on an action that did not prevent publication of offensive material (IIED (2005)). Furthermore, though the case did not measurably affect the company's stock market valuation (Vick, D and Campbell, K, (2001) "Public Protests, Private Lawsuits, and the Market: The Investor Response to the McLibel Litigation", 28(2) *Journal of Law and Society* 204), clearly poor publicity can induce negative investor reactions (Frooman, J, (1997) "Socially Irresponsible and Criminal Behavior and Shareholder Wealth", 36 *Business and Society*, 221). Lawyers, therefore, should be aware that, in an era of increasing corporate scrutiny, such litigation may do little other than attract damaging publicity. This may explain why McDonald's has since been less confrontational towards critics (Vick and Campbell (2001)).

The final case raising CSR issues involves apparel giants Nike. The case has implications for how companies

approach and communicate CSR, and suggests lawyers should scrutinise corporate clients' voluntary practices.

Following reports of poor working conditions in overseas factories, Nike released a series of statements claiming its products were manufactured according to strict codes and without using sweatshop labour. Marc Kasky, an activist, contested some of the statements, saying they were deceptive and not protected by the US Constitution's first amendment on freedom of speech. Though the action was initially dismissed, in May 2002 the California Supreme Court ruled against dismissing the action on first amendment grounds as the statements were commercial speech which does not have the same protection as political speech. This meant Nike's statements were subject to California's laws on unfair competition and false advertising. Nike appealed and in January 2003 the US Supreme Court said it would review the judgment.

In June 2003 the US Supreme Court dismissed the action on technical grounds (*Nike Inc v Marc Kasky*, Case No 02-575). The court had a jurisdictional problem because the California Supreme Court had not entered a final judgment. In an unforeseen development, the Supreme Court gave a single sentence ruling stating their decision to review the case had been "improvidently granted". Therefore, the Supreme Court avoided making judgment on the issue of free speech. Just as the case was set to go to trial in September 2003 the parties announced a settlement in which Nike, *inter alia*, paid $1.5 million to the Fair Labor Association in Washington, DC.

Though there was never a full hearing, the case emphasises the need for lawyers to monitor and ensure the accuracy of the CSR information their clients publish. Indeed, this need may increase with society's demand for greater corporate transparency and accountability. At the time, the case also raised fears that progress on voluntary reporting may be inhibited (IIED (2005)). Litigation, therefore, may have been counterproductive.

CONCLUSIONS

CSR was given a firm legal foothold with the much debated Companies Act 2006. This introduced new directors duties (s 172(1)) and an obligation on larger firms to consider social and environmental matters as part of a Business Review (s 417). Yet these provisions are just part of a complex CSR equation. Genuine integration may challenge current approaches to internal practices and external relations. It will require strong management as well as innovative thinking about the "new legal landscape".

There are myriad standards (eg ISO14001, SA8000, ILO standards) that lawyers may need to familiarise themselves with as part of a developing portfolio of reflexive law tools. Lawyers may need to consider beyond compliance responses when advising clients. They may also need to think carefully about litigation, and may need to monitor closely the promotional literature their clients publish.

Firms might have to re-examine management practices. Some may experience increasing pressures from stakeholders to consider CSR when managing activities (though this is probably more appropriate for larger practices dealing with larger clients). In addition, lawyers may need to review the type of work they undertake in light of the information they release about themselves. What seems apparent, however, is that if considered seriously and for the right reasons then the profession is well placed to make a significant contribution.

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