

Legal Services Board  
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18 November 2015

Dear Sir/Madam

### **GC100's response to the LSB's Statement of Policy: section 15(4) of the Act**

#### **1. GC100**

This response to the Legal Services Board's ("LSB's") notice to invite representations on a draft statement of policy on s15(4) of the Legal Services Act 2007 (the "Act"), is provided on behalf of the Association of General Counsel and Company Secretaries of the FTSE 100, (the "GC100"). The GC100 was officially launched on 9 March 2005 and brings together the senior legal officers and company secretaries of more than 80 FTSE 100 companies. The main objectives of the GC100 are to:

- Provide a forum for practical and business-focused input on key areas of legislative and policy reform common to UK listed companies; and
- Enable members to share best practice in relation to law, risk management, compliance and other areas of common interest.

Please note that the views expressed in this response do not necessarily reflect those of each and every individual member of the GC100 or the companies they work for.

#### **2. In-house practice within GC100 entities**

The vast majority of GC100 members are lawyers practising as in-house solicitors (qualified in England and Wales) in the legal departments which they head. They are therefore regulated by the Solicitors Regulation Authority ("SRA") as individuals practising as solicitors in accordance with Rule 1.1 (e) or 1.2 (f) of the SRA Practice Framework Rules 2011 (the "SRA Practice Framework Rules") and practise in accordance with the provisions set out in Rules 4.1 to 4.11 and 4.25 to 4.26 of the SRA Practice Framework Rules. In other words, they – and solicitors in their legal departments – primarily act for their employer or for related bodies or (although this is rare) for work colleagues and do not advise the public or a section of the public, other than on a pro bono basis. Further, their employer is not, as an entity, regulated by the SRA.

#### **3. Comments on the statement of policy**

GC100 supports the LSB's decision to put in place a Statement of Policy setting out the high level principles it should consider when asked to approve regulatory arrangements (or an alteration to existing regulatory arrangements) that pertain to s15(4) of the Act. This is a proportionate and transparent approach which informs both regulators and those who are regulated as well as other interested parties of the regulatory context and likely limits of any proposed changes.

In respect of each of the specific elements of the Statement of Policy, the GC100 notes as follows:

**Requirement for rules to be evidence based.** A need for rules to be evidence based is essential in the context of a risk based approach. As has been previously noted in the response to the LSB's consultation paper "Are regulatory restrictions in practising rules for in-house lawyers justified?" (the "February Consultation"), the GC100's view is that, to date, there has been very limited evidence-based analysis of how the SRA Handbook 2011 both applies and should apply to in-house lawyers working in commerce and industry. As a consequence of this, the regulation applying to in-house lawyers is neither proportionate nor targeted (and is therefore contrary to the principles which the LSB should have regard to when promoting the regulatory objectives under the Act). For example, as already indicated in the GC100 response to the February Consultation, in-house lawyers do not hold client monies and yet the SRA Accounts Rules 2011 are expressed to apply to them. In addition, in respect of the SRA Code of Conduct there are many examples of Outcomes which do not translate well to the in-house environment and yet are stated to apply:

- Outcomes relating to duties to inform clients of their right to complain are inappropriate in the context of a relationship where the in-house lawyer is employed by the client;
- in-house lawyers do not as a general rule advertise their services to the public and yet the publicity rules in Outcomes 8.1 to 8.4 are stated to apply to them; and
- in the case of conflicts, whilst these may arise in the in-house context, they will often be eligible for the substantially common interest exemption under Outcome 3.7 SRA Code of Conduct. This, however, requires in-house lawyers to seek the informed written consent of both parties before proceeding, something that within the in-house context seems to be far too onerous.

It is therefore the GC100's hope that, going forward, a more tailored (principles based) approach to regulation may be adopted.

**Rules pertaining to s15(4) are considered in light of wider regulatory arrangements.** Understanding the wider regulatory arrangements is equally important. For example, whilst it is acknowledged that the SRA's restrictions on in-house lawyers' ability to provide advice to members of the public extend beyond s15(4) because they include unreserved legal activities, the impact on other regulatory obligations, such as those relating to conflicts of interest or confidentiality, should be taken into account before altering or removing these restrictions.

**Assessing the impact on consumers of any rules.** Undoubtedly the impact of any regulation on the consumers of legal services must be a key consideration for the LSB and any regulator of legal services and is one of the key regulatory objectives under the Act. However, the GC100's view is that others may also be affected by regulation, and that other regulatory objectives should also be considered, in particular objectives to protect and promote the public interest and improve access to justice (also key objectives under the Act). This is particularly the case when considering the effect that the restrictions both inherent in s15(4) of the Act and in its implementation by regulators have had on the ability of in-house lawyers to provide pro bono advice to members of the public in relation to reserved legal activities.

**Consistency in approach to regulating in-house lawyers has been considered.** Whilst the GC100 would encourage regulators to adopt a fair approach to regulating lawyers (and believes that the different regulators should adopt a consistent approach in regulating legal services) it is worth noting that many of the difficulties arising from the current regime come from a failure to understand the diversity of services provided not only by solicitors in general but also within the in-house community. Although consistency is a principle to which the LSB must, under the Act, have regard when promoting the regulatory objectives, it is not the only one – principles of transparency, accountability, proportionality and being targeted are others. Focusing only on the principle of consistency in the Statement of Policy favours a “one-size fit all” approach at the detriment of a proportionate and targeted approach (which in this context would seem more appropriate). For this reason, the GC100 would prefer the Statement of Policy to refer to the approach being proportionate and targeted rather than “consistent”.

#### **4. A need to reconsider the restrictions on in-house pro bono**

As already noted in the February Consultation, a key concern of the GC100 is that the current SRA rules discourage and, in relation to reserved legal activities, may prevent in-house lawyers from providing assistance to those who may be unable to otherwise afford representation.

The GC100’s view is that the SRA implementation of s15(4) goes beyond the “minimum requirement” under the Act. In particular the definition of what might amount to being part of an employer’s business (which is set out in the guidance notes to Rule 4.10 SRA Practice Framework Rules) is too broad and makes it difficult for general counsel to encourage their teams to engage in certain pro bono activities and to advocate that their employers consider pro bono legal work (and, in particular, work in UK law centres) within corporate social responsibility programmes.

Whilst it is hoped that the LSB’s Statement of Policy may address these points and encourage regulators including the SRA to adopt a more proportionate approach to regulation, it will not address the bigger and more fundamental issue, which is that the prohibition in s15(4) of the Act has restricted the ability of in-house lawyers to engage as fully as they might in pro bono legal activities.

At a time where access to justice is under threat and the Government is keen to encourage pro bono initiatives, the GC100 would very much welcome a review of s15 LSA to ensure that it meets the regulatory objectives of protecting and promoting the public interest and improving access to justice and which would enable general counsel and their employers to actively promote pro bono and encourage their lawyers to provide their time and resources in assisting the more vulnerable members of our society.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Mary Mullally', with a horizontal line underneath.

Mary Mullally  
Secretary, GC100  
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