

# **REGULATORY INDEPENDENCE**

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**A RESPONSE BY THE INSTITUTE OF LEGAL EXECUTIVES**

**AND ILEX PROFESSIONAL STANDARDS LIMITED**

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**CONSULTATION BY THE LEGAL SERVICES BOARD**

**ON PROPOSED RULES TO BE MADE UNDER**

**SECTIONS 30 AND 51 OF THE LEGAL SERVICES ACT 2007**

**Date: 26.06.2009**

## **INTRODUCTION**

1. This response represents the joint views of the Institute of Legal Executives (ILEX) an Approved Regulator under the Legal Services Act 2007 (the Act), and its regulatory arm ILEX Professional Standards Limited (IPS). The consultation was separately considered, in the case of ILEX by a working party consisting of the President and Office Holders together with a number of Council members; and in the case of IPS its Board. The results of those respective considerations were exchanged and with no difference of significance between the two organisations, a joint response is tendered.
2. ILEX as the Approved Regulator is proud of the progress that has been made to comply with the separation of regulation from representation as required by the Legal Services Act. ILEX Professional Standards Limited is a wholly owned subsidiary company of ILEX, and has been operational since October 2008. We are pleased to see the Legal Services Board's (LSB) confirmation that the use of a subsidiary company in this context is acceptable. The Board of Directors (the Board), are obliged by law to carry out their functions to meet the objectives of the company, which objectives relate to the regulatory responsibilities that have been delegated to it. The Board has complete independence in establishing its own strategy, its business plan, its governance and methods of operation. There are protocols that govern the relationship between ILEX and IPS. Work is now under way to devise service level agreements which will ensure that appropriate resources, particularly with regard to shared services, are made available to IPS.
3. Both ILEX and IPS are committed to the regulatory objectives and professional purposes set out in the Legal Services Act. Both organisations wish to emphasise, and will make mention of this in more than one place in this document, that higher professional standards are achieved through engagement with the profession and the involvement of members.

4. This approach is in line with the views expressed in Parliament during the debate on the Legal Services Act, and in the model for regulation that has been established by the Act. Parliament, taking its lead from Sir David Clementi, has recognised the importance of regulation continuing to be 'profession led'. Strong professional involvement aids effective regulation ; collaboration invariably results in higher standards than can be achieved by confrontation. It demonstrates commitment to regulation in the public interest. It is also important in demonstrating the continued independence of lawyers and their regulation from government involvement. Recent research has demonstrated that Legal Executives value regulation highly as one of the key benefits of ILEX membership – a view which is not widespread among the regulated professions.
  
5. ILEX and IPS are also mindful of the wording of Section 30 and Section 51 of the Act. As with other parts of the Act, the emphasis is on an approach that achieves that which is 'reasonably practicable'. Both ILEX and IPS therefore support the LSB approach. This endeavours to establish a framework to secure the regulatory independence that is described in the Act without being prescriptive of detail. It also strives to maintaining some flexibility so that structures and approaches can be tailored to the individual circumstances of the individual Approved Regulators. However, in several areas we consider the LSB's proposals to be too prescriptive and stray from the principle of proportionate regulation. Flexibility to enable the Approved Regulators to establish their regulatory arms and together define their relationships in such manner as they see fit should be the appropriate approach, subject only to satisfying the LSB to such arrangements demonstrably and transparently ensure the effective resourcing of the regulatory arms and independent in accordance with the Act. As such, the Rules imposed by the LSB should in all respects be the absolute minimum necessary to define those essential requirements. Or other matters which may be more akin to best practise should left to supplementary guidance. Where we have identified that the LSB approach has gone beyond this framework we will comment to that effect.

## **Defining the Arrangements**

### **Question 1**

**How might an independent regulatory arm best be 'ring fenced' from a representative controlled Approved Regulator i.e. requiring a delegation of the power to regulate processes and procedures; and the power to determine strategic direction**

6. In principle ILEX and IPS support much of what has been set out in the consultation documents at paragraphs 3.10 and 3.13. Under the arrangements made by ILEX for the establishment of IPS, we have ensured that IPS has the power to determine its own processes and procedures and to determine a strategic direction for its own work. It has established its own strategy and is developing a business plan free from interference by ILEX, whilst maintaining an appropriate respect for the views of the Approved Regulator through full consultation on both these key documents.
  
7. Both ILEX and IPS welcome the recognition by the Legal Services Board that the Approved Regulator should have a voice. We also support the clear acceptance that the experience of the Approved Regulator and the experience of its members are important. Our joint approach is one that involves formal opportunities for the two organisations to discuss the IPS strategy, business plan and budget, and to discuss ILEX's own strategy, business plans and budgets. The Approved Regulator itself is obliged to approach regulatory matters in the public interest. It is important that there is open, respectful and informed discussion on issues between the two organisations, conducted in accordance with both the form and the spirit of written protocols established for this purpose; and through other formal and transparent methods of operation.

## **Question 2**

### **Proposals related to regulatory board appointees**

## **Question 3**

**Is it necessary to go further for example by making it an explicit requirement for the Chairs of independent regulatory Boards/ equivalents to be non-lawyers?**

8. Neither ILEX nor IPS believes that it is an absolute necessity to have a lay majority on the Board of IPS. However, we believe that, as a driver for change, it is important for the time being that the Board of IPS has a lay majority. There is a clear message about embracing change and instilling public confidence in our arrangements. Enforcing a lay majority on the Board of regulatory arms for good and all might conflict with the principle of profession led regulation. Nor have we seen any evidence that a lay majority is necessary to secure independence of regulation. Likewise, both ILEX and IPS agree that the Chair should be the best person for the job, and not automatically a non-lawyer. However, we are also in agreement that at this particular moment, when the focus is on establishing public confidence in the regulation of legal services and on demonstrating a new phase in regulation, the IPS Chair should be a non-lawyer.
9. We entirely support the proposition that appointments to the IPS Board should be made on the basis of merit through open advertisement and competition. This was the approach that ILEX took to the appointment of the Chair of IPS, and his own approach to the appointments to the Board. ILEX also has no difficulty with IPS's proposals and arrangements for the appraisal and dismissal of Board members.
10. However, we would at this point remind the Board that higher professional standards are achieved through engagement with the profession and the involvement of members. We do not agree that there must always be a majority of non-lawyers on Appointment Panels. Where lawyers do not hold representative responsibilities, we see no reason why they should be

precluded from operating in the public interest in the recruitment exercise to appoint the best person to the job in accordance with clearly defined job descriptions and personal specifications. Rather, we believe that it is appropriate for the current Chair to establish the process that he or she wishes to use when recruiting Board members. Key to independence is having independent members whether lawyers are in the majority or minority of the Appointments Panel; very clear job descriptions and personal specifications; and a transparent process for ensuring that those appointed best fulfil the criteria of the job description and person specification.

#### **Question 4**

**Do you agree the LSB proposals in respect of the management of resources, including those covering 'shared services' models that Approved Regulators might adopt?**

#### **Question 5**

**Is our proposed balance between formal rules and less formal non-enforceable guidance right?**

#### ***Management of Resources***

11. ILEX and IPS agree that arrangements need to be put in place to ensure that the regulatory arm is free from improper pressure from the Approved Regulator. Our approach to the budget settlement process is to ensure, within a single budget setting and management process, that the regulatory component of each activity, at every stage and across departmental budgets is clearly recognised. However, we do not believe that this gives the regulatory arm complete freedom to override the legitimate views and concerns of the Approved Regulator. There is, we believe, a danger of moving too far towards a 'Model A' structure in giving full authority to the regulatory arm to solely determine the resources reasonably required by it. The LSB has draconian powers to intervene should there be evidence that the Approved Regulator is unreasonably restraining the ability of the regulatory arm from carrying out its work; and

the Board of IPS would have hesitation in drawing such a situation to the LSB's attention. The draconian power of intervention will act as a brake on the unreasonableness of any Approved Regulator.

### *Shared Services*

12. As we move forward, ILEX and IPS will be entering into a series of service level agreements governing the operational infra-structure and relationships across the two organisations. The focus of the Approved Regulator should be on satisfying the LSB that sufficient resources have been made available to the regulatory arm to deliver its published strategy and business plan. We agree with the LSB approach of using its rule making power to set clear principles, but then issuing guidance on how the LSB would best envisage compliance with those principles. However, we are concerned that the detail, particularly in paragraph 3.22, goes beyond the minimum required except by way of guidance.

13. For example, the suggested arrangements for shared services management would not be proportionate or necessary for ILEX and IPS. We agree that all members of the staff performing roles at the direction and control of IPS should be line managed through the Chief Executive of IPS, who himself should and does report directly to the Chair and Board of IPS. All of the core regulatory staff are now under the direct line management of the Chairman of the Board and the CEO. Where other staff, for example, the Awards Team, perform a regulatory function as well as an awarding body function, that staff member will perform to the direction of IPS for the purposes of any project or task that falls to IPS. IPS will have the ability to give direction and control to staff members responsible for finance, IT etc. in line with the service level agreements and on a project by project basis. Service level agreements will make it clear that staff with shared services functions are not to subordinate the interests of IPS to those of ILEX in any matter where a regulatory led project is involved.

14. We do not agree, in the context of ILEX and IPS, that IPS should have the freedom to vary common terms of employment. For an organisation such as ILEX this would be extraordinarily divisive and indeed would cut across the very collaboration and partnership which both ILEX and IPS believe is fundamental to successful regulation. If the need to recruit at a higher level or on more flexible terms than would be the norm is identified by IPS, ILEX would expect IPS to discuss this with the Human Resources Officer. With the support of the Human Resources Officer IPS would then put the arguments to ILEX. The support of the Human Resources Officer will be key.

15. Nor do we accept that the mechanisms to control the management of shared services should be demonstrably independent of the day to day control of the representative function. Taking literally this would place most of ILEX's functions either under the direct control of only one part of itself, or in the hands of a small group of independent people. It would remove accountability to those who are paying for the whole of these services. The mischief that this proposal seeks to address is the ability of the Approved Regulator to starve the regulatory arm of the resources it believes are reasonably necessary to do the job that has been delegated to it. We believe that appropriate resources for IPS can be achieved through the use of service level agreements and clear project by project requirements identified by IPS. Should negotiations prove difficult, or indeed break down, both ILEX and IPS would propose to use the services of a facilitator or mediator to move matters forward. IPS will be able to raise matters with the LSB if IPS considers ILEX has been unreasonable in its approach in the sharing of any particular service function. Although the LSB may not want this role, it is clear from the legislation that it is part of the LSB role. We would expect it to have to be exercised only in extreme circumstances when normal means of negotiation had broken down.

## **Question 6**

### **Views on the suggested permitted oversight role for representative controlled Approved Regulators over their regulatory arms; are practical modifications required to make it work?**

16. ILEX is already experienced in the use of shared services where one part of the organisation needs to demonstrate regulatory independence from another part of that organisation. ILEX is a nationally recognised Awarding Body, now regulated by Ofqual. ILEX as a whole is not in a position to deprive the Awarding Body Team of functions or the resources that it requires to meet its obligation as a nationally recognised Awarding Body. ILEX must also have in place processes to ensure that the potential for conflicts of interest is handled appropriately.
  
17. The starting point for ILEX and IPS is that we would like to avoid the use of the language of 'supervision' or 'monitoring'. As the LSB clearly point out, ILEX remains responsible for the performance of its regulatory responsibilities. ILEX needs to satisfy itself that the regulatory function is being performed adequately. It proposes to do this through protocols, service level agreements, information exchange, discussion and consultation. ILEX and IPS question the approach of the LSB which, we believe, goes beyond that which is 'reasonably practicable'.
  
18. We completely support the LSB statement that a 'one size fits all prescriptive approach is unlikely to work effectively'. We applaud the intention not to make rules that are overly detailed in their application.
  
19. We support the LSB's view that the Approved Regulator should be able to commission independent and occasional strategic reviews of the IPS structural framework. Any change resulting from a periodic review would need the approval of the LSB under the Act. We agree that the regulatory arm and Approved Regulator should co-operate constructively one with the other.

20. However, we do not accept that the management and discharge of any 'supervisory functions' might sit best with a separate body that is itself demonstrably independent of representational control. Practicable modifications through the permitted oversight role for representative controlled Approved Regulators are not required. We do not believe it is proportionate for there to be 'double regulation' as described in paragraph 3.26 'The question here becomes how to regulate the supervision by the Approved Regulator of the regulatory arms discharge of regulatory function'. First, ILEX and IPS are clear that 'supervising' is part of carrying out ILEX's role as an Approved Regulator. Otherwise the role of the Approved Regulator is meaningless, and this is clearly not what was envisaged by Parliament. Any 'supervisory' function would be exercised subject to the regulatory objectives in the Act itself. There is no need for 'supervision' to be carried out by yet another group of individuals (who themselves will need appointing by yet another group of individuals). ILEX accepts that in carrying out the 'supervisory' function it is doing so in the capacity of Approved Regulator and is thus subject to the regulatory objectives in the Act. This means above all that it will be carrying out this part of its role in the public interest.

21. If any individual Approved Regulator and its regulatory arm wish to establish such a mechanism, that is well and good. However, we again remind the LSB that higher professional standards are achieved through engagement with the profession and the involvement of members. We refer again to the mechanism of appointment of a facilitator or mediator in the event of any protracted disagreements.

### **Question 7**

#### **The concept of dual self-certification**

### **Question 8**

**How should a dual certification model work in practice? Would alternative arrangements be more appropriate either in the short or longer term?**

22. These questions are addressing the issue of demonstrating compliance with the rules made by the LSB. We support the efforts to ensure that such compliance is conducted in an effective and also proportionate way. In principle ILEX and IPS agree the Board's approach, using the concept of 'dual self-certification', based upon the Board's prior approval of the governance arrangements. In the first instance we are attracted to the model that would make the annual dual self-certification a part of the general review of arrangements in place for each Approved Regulator that would be undertaken by the LSB. This would be proportionate, placing significant responsibility on the Approved Regulator and its regulatory arm. It would utilise existing processes for communication between Approved Regulators, regulatory arms and the LSB, rather than adding on additional layers of inspection and meetings. Clearly, neither party would want to wait for problems to happen, and therefore use must be made of existing and on-going forms of communication. All of this needs to be seen in the context of the flows of information available from ILEX and IPS in terms of their strategies, business plans, budgets, and annual reports.

#### **Question 9**

**Do you agree that the mandatory permitted purposes currently listed in statute should be widened to include explicit provision for regulatory objective (g) i.e. increasing public understanding of the citizen's legal rights and duties?**

#### **Question 10**

**Should any other general or specific purpose be permitted under our Section 51 rule?**

23. ILEX and IPS agree that the mandatory permitted purposes should be widened to include explicit provision for regulatory objective (g) i.e. increasing public understanding of a citizen's legal rights and duties.

24. It remains unclear to us whether permitted purpose (d) would enable the Approved Regulator to apply funds raised through mandatory practice fees, and acting in the public interest, to utilise those fees for the

development of new practice rights and to enable members to become relevant authorised persons of reserved legal services. We assume that such a purpose is contained in (d); if not, we would suggest that should be a permitted purpose.

25. In our experience, the vast majority of Pro Bono work is advice work; and not reserved legal services. We would be in favour of extending permitted purpose (d) to cover all legal services work, and the promotion and development of pro bono legal services.

26. The Council Members of ILEX form the Board of Directors of the Approved Regulator. It is unclear whether any part of the cost of Council meetings and other governance activities can be considered a regulatory cost or permitted purpose. It should be borne in mind the Approved Regulator cannot operate without its Board of Directors.

27. We assume these activities are included?

**Question 11**

**What do you think about our proposal to seek evidence that links the regulatory objectives to the Act?**

**Question 12**

**What criteria should the Board use to assess applications submitted to it?**

**Question 13**

**If they are adopted, what should Memoranda of Understanding between the Board and Approved Regulators contain?**

#### **Question 14**

#### **Should there be a requirement on Approved Regulators to consult prior to the submission of their application each year?**

28. ILEX and IPS agree that there should be a flexible process in relation to timetable for approvals of practising fees, and that these should strive to meet the Approved Regulators normal budget process and decision making structures. We also have no objection to the linking of any proposed practising fee back to the requirements of the Legal Services Act and the regulatory objectives.

29. We believe that this can be done quite straightforwardly by linking the practising certificate fee to the strategy setting, business planning and budget setting processes undertaken by the respective organisations. As far as possible any process required by the LSB should seek to utilise existing information and not require the Approved Regulator and its regulatory arm to produce new or differently analysed information.

30. Utilising existing information through normal processes should provide sufficient information to the LSB to ensure that the collection of the fee receipts is neither too high nor too low. It seems to us that the focus of the LSB should be on ensuring that the fees are not too low, thus preventing the Approved Regulator and its regulatory arm from carrying out its functions appropriately in the public interest. Whilst we understand the argument that placing a fee too high could act as an undue barrier to market entry, we would point out that one of the underlying purposes of the Act is to encourage competition between Regulators. That must mean that to some extent the market itself will be used as a regulator of fees and needs to be trusted to do so.

31. That said, we also point out that the LSB should not seek to control the way in which ILEX carries out its non-regulatory work or the permitted purposes under the Act i.e. law reform or human rights work that fall to the Approved Regulator. ILEX has no objection to the principle that it should be transparent about the proportion of practising fees allocated to the

different activities covered by the fee i.e. regulation, law reform, LSB and OLC levies etc.

32. ILEX and IPS do not see the need for consultation prior to proposed fees being submitted to the Board for approval. This would be a disproportionate cost and constraint on the process. ILEX does not currently consult the membership or anyone else with regard to the business of the professional association. In relation to the element of the fee attributable to regulation, the matter will either have been agreed between ILEX and IPS, or the LSB will have representations made to it. We believe that a single 'certificate' signed by both ILEX and IPS, certifying that the practising certificate fee is sufficient to enable IPS to carry out its regulatory functions, should suffice for the oversight responsibilities of the LSB. ILEX and IPS are considering some kind of 'signed off' statement to the effect that both sides are content that the regulatory functions are being performed adequately and in accordance with the regulatory objectives, and supporting the professional principles. This could be supplemented with a formal meeting between the representatives of ILEX, IPS and the LSB where particular issues can be explored.

#### **Question 15**

**What degree of detail would be most appropriate to require when seeking to maximise transparency but be proportionate in terms of bureaucracy?**

#### **Question 16**

**Are there any issues in respect of practising certificate fees that you think we should consider as part of this consultation?**

33. For the most part ILEX and IPS agree the approach to maximising transparency that is set out in the consultation. However, we do have some concern over the suggested requirement that there needs to be set out the proportion of the sum that will be applied for any shared service/corporate functions that cannot be categorised as either falling directly

under the regulatory arms' costs or the costs of the Approved Regulator. This does not seem necessary or proportionate. Indeed, for an Approved Regulator that has significant commercial interests in delivering commercially based services, ILEX would be concerned if too much detail were to be required, particularly where shared services are contributed to not only by the Approved Regulator and its regulatory arm but also by the commercially based parts of the ILEX Group.

## **DRAFT RULES**

### **Rule 1**

34.No comment

### **Rule 2**

35.We do not feel it is practicable to try to define criteria to be applied in determinations on whether an act or omission with respect to independence is 'reasonably practicable'. Whilst it is right that there should always be a focus on preventing misunderstanding and dispute through the clarity of rules, we fear that the LSB would either be limiting itself or find itself with an unwieldy and unworkable 'belt and braces' list.

### **Rule 3**

36.This rule is too detailed. The rule could be shortened to sub-sections 1 and 2, leaving the remainder to guidance. We refer to comments made above.

### **Rule 4**

37.We agree with sub Clause 1. We find sub Clause 2 to be unnecessary in terms of a rule. This seems to us to be very much a 'belt and braces' sub Clause, at best one that is emphasising to regulatory arms that communication between and with the Approved Regulator is acceptable, is an understandable and good thing. However, this can very clearly be put in guidance.

**Rule 5**

38. We agree with sub paragraph 1. The remainder of the Rule is designed to implement the view taken by the LSB in the substantive part of the consultation which places all decision making for financial resources, accommodation, staff or Information Technology services with the regulatory arm. We do not accept the position as we have explained earlier.

**Rule 6**

39. We have no comment.

**Rule 7**

40. We would like to think that this Rule is not necessary and that, like sub Clause 2 to Rule 4, it is very much by way of a 'belt and braces' Rule. However, to the extent that it is 'belt and braces' we have no objection to it.

**Rule 8**

41. No comment.

**Rule 9**

42. We have no comment on the Rule over and above comments made in the body of this response.

**PART B : THE PRACTISING FEE RULES****Rule 1**

43. No comment

**Rule 2**

44. No comment.

**Rule 3**

45. Our only amendment would be to reflect the additional points on permitted purposes which we have made in the text.

**Rule 4**

46. Please see our earlier comments in relation to 4.10 to 4.21.