

**The Legal Services Board consultation on Regulatory Independence:
Legal Services Commission's response
11 June 2009**

1. Introduction

1. The Legal Services Commission (LSC) is a non-departmental public body sponsored by the Ministry of Justice (MoJ). The LSC is the biggest single purchaser of legal services in England and Wales with an annual spend of £2.1 billion; we are responsible for the delivery of civil and criminal legal aid and the development of community legal services.
2. The LSC welcomes the opportunity to feed into the consultation paper on section 30 and section 51 of the Legal Services Act 2007 (the Act) and outline our thoughts and comments with regard to the future of regulation in the context of the legal profession.

2. Overview

1. The LSC has a responsibility for contracting and funding providers of publicly funded services and, for assuring quality services. The LSC's vision is "*legal aid – fair access to justice*". The LSC is committed to ensuring that clients have access to quality legal services that meet their needs, and that providers deliver client focused quality services that represent value for money. As the discerning consumer commissioning high quality legal aid, we want to ensure that the future regulatory structure of legal services protects clients whilst encouraging innovation, competition, new entrants and diversity.
2. The LSC sees the Legal Services Board's (the Board) approach as a big step forward and strongly supports the approach to ring fencing responsibilities for truly independent regulation. The LSC considers that such a structure is lacking in the current system. We strongly believe there should be real independence and that regulation should be in the public interest.
3. This is especially true with regards to Section 21(1) (a) to (J) of the Act that defines regulatory arrangements. The LSC requires that for regulation to be in the public interest, running schemes to oversee qualifications, either for the purpose of authorising individuals to carry on reserved legal activities or to allow recognition of competence to manage client's cases to defined and assessed standards, should be a role of the regulator. This should include both voluntary and mandatory schemes and management of Continuous Professional Development (CPD) requirements. The Board will play an important role in ensuring that the regulators have the independence to adhere to their duties described in section 21. The LSC believe that only by embracing section 21 in this way can regulation be shown to operate in the client's best interests, rather than in the interest of promotion of the profession.

4. We also note that this consultation makes it clear that the Board is not seeking to comment on the suitability of current regulatory arrangements but is setting out the rules that Approved Regulators and regulatory arms will need to adhere to in order to meet the requirements set out by the Board.

3. Response to Consultation Questions

Question 1 – How might an independent regulatory arm best be ‘ring fenced’ from a representative-controlled approved regulator in the way we describe (i.e. requiring a delegation of the power to regulate processes and procedures; and the power to determine strategic direction)?

1. The LSC agrees that an independent regulatory arm should be ‘ring fenced’ from a representative-controlled approved regulator (AR). We agree with the measures described by the Board in that the regulatory arm should determine its own processes, procedures and strategic direction. It is right that the representative arm’s involvement should be restricted to lobbying the regulatory arm and exert pressure in this form as any other stakeholder would.
2. The separation of functions is key to ensure that public confidence is maintained. The proposals represent an important move away from the perception or appearance of ‘self regulation’ by the professions. In the context of publicly funded legal work, the LSC has no preference in relation to choice of regulator only that the regulator be truly independent. This will enhance greater confidence amongst consumers and demonstrates synergy with other professions such as the medical and financial service sectors.
3. The Board has an important oversight role to play and should become involved if it becomes clear that the delegated functions or powers of the regulatory arm are not free from representative interference or control.

Question 2 - What do you think of our proposals in relation to regulatory board appointees, set out under paragraph 3.15?

4. The LSC agrees with the requirements set out under paragraph 3.15. All appointments to regulatory boards should be made through a fair, open and transparent application process and decisions on appointment should be made on the basis of the qualities listed in paragraph 3.15. The Board may wish to put measures in place to ensure there is a diverse representation on the regulatory board. The panels charged with selection of members should be independent from the representative arm in order to remove any ‘perception’ of bias or unfair influence. However, the representative arm should not be excluded from participating in this process.
5. We agree that the regulatory board should be constituted with an in built majority of non lawyers in order to further the Board’s desire to promote and protect consumer and public interest. A majority of legal professionals would perhaps be subject to previous criticisms of self regulation of the professions and the criticism that the regulatory board represents or advocates on behalf of sectional interest.
6. Looking at the financial sector for a comparator, the Financial Services Authority (FSA) Board consists mainly of representatives of the financial services industry. This has invoked criticism because the FSA was created as

a result of criticism of the self-regulating nature of the financial services industry. Having the Authority consisting of individuals who are in the main from the same industry creates a perception that consumers are not at the heart of regulation.

7. The legal services market ranges from multi-national companies to sole practitioners, legal aid solicitors to private firms. The diversity of the profession needs to be reflected in the regulatory board to ensure that the appropriate expertise and insight exists.
8. The Board may wish to consider whether the regulatory board should include appropriate representation of the user community to ensure their views and needs are represented. Alternatively, they should work with the Board's Consumer Panel and other bodies such as Which? to seek their views and input into their work.

Question 3 – Is it necessary to go further than our proposals under paragraph 3.15, for example by making it an explicit requirement for the chairs of independent regulatory boards/equivalents to be non-lawyers?

9. The chairs of regulatory boards should be appointed based on the principles set out in paragraph 3.15 and if, following an open and competitive recruitment process this individual is a non-lawyer, they should be appointed. If the individual who is appointed is a lawyer; the regulatory board may have to address any potential imbalance of overrepresentation of lawyers if there is a disproportionate majority.

Question 4 – Management of Resources

10. The LSC agrees with the Board's approach to the management of resources as set out in paragraphs 3.16-3.19.

Question 5, 6, 7 – Balance between formal rules and less formal rules and the concept of dual self-certification

11. The LSC suggests that the Board may wish to transfer some of the guidance to sit as formal rules so that it is enforceable.
12. The LSC agrees with the principle of dual self-certification but we have concerns about whether the process is sufficiently robust when self-certification is not achieved.
13. The LSC suggests that clear, decisive action should be taken by the Board to determine certification if self-certification cannot be agreed in the required timeframe. A period of non-compliance, however long, puts the public and consumer at risk and goes against the principles of regulation. The Board should also consider the actions or sanctions it will take when the self-certification process is repeatedly delayed or there is a serious transgression by either party.

Question 8 – If a dual self-certification model were adopted, how should it work in practice? Or would alternative arrangements be more appropriate, either in the short or longer term?

14. It is important that the Board use the consultation period to discuss issues with the AR and others in order to develop a robust and proportionate scheme that has appropriate monitoring and review systems in place. The Board will have an important role to play in monitoring the arrangements, investigating issues where certification is not achieved and ensuring compliance from all parties. It is important to ensure that monitoring and enforcement arrangements are adequately resourced.

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”?

15. The LSC agree that the Board should widen the mandatory permitted purposes currently listed in statute to include regulatory objective (g). This supports the Board’s medium term aim to put consumers and public interest at the heart of regulation and will go some way to support access to legal services through increased public awareness.

Question 10 – Should any other (general or specific) purpose be permitted under our section 51 rules?

16. The LSC do not propose any further (general or specific) purposes to be permitted under section 51 rules.

Question 11 – What do you think about our proposal to seek evidence that links to the regulatory objectives in the Act?

17. The LSC agrees that it would be necessary to seek evidence from an AR that links proposed practising fees to the regulatory objectives in the Act and the Board should act as an arbiter if agreement cannot be reached. The Board’s work with its Consumer Panel to determine how those objectives should be interpreted will play an important part in this process. However, the Board may need to act ahead of the establishment of the Panel to properly consider where standards setting and client facing services sit alongside regulation.

Question 12 – What criteria should the Board use to assess applications submitted to it?

18. The Board should work with ARs during the consultation period to consider appropriate criteria for assessing applications. In doing so they may wish to consider the following:
- a) Regulatory Objectives – the Board should seek evidence that the budget required is necessary to meet the regulatory objectives.
 - b) Proportionate – the Board should consider if the AR and regulatory bodies have considered whether the fees are likely to have a disproportionate impact on different groups. The Bar Council and Law Society have mechanisms in place to reduce the fees for low earners and individuals who require long periods of absence from practice.

Question 13 – If they are adopted, what should Memorandum of Understanding between the Board and approved regulators contain?

19. If adopted, the Board should work closely with each AR to consider the content of a Memorandum of Understanding (MoU). The LSC suggest that as a basic requirement, the MoU should contain the following:

- Roles and responsibilities of each party to the MoU
- General principles of communication and consultation
- General principles of co-operation and collaboration
- Process for exchange of information, statistics and research
- Confidentiality agreement
- Termination of MoU

Question 14 – Should there be a requirement on approved regulators to consult prior to the submission of their application each year – and if so, who should be consulted and on what? Should there be a distinction drawn between approved regulators with elected representative councils or boards; and those which have no such elected body?

20. The ARs should agree an ongoing process of information sharing with the relevant committees and stakeholders groups who represent the profession when considering fees. Work may need to take place to involve certain groups in discussions to ensure that impacts have been identified and accommodated where practicable. It is particularly important to ensure that those AR without elected bodies are required to consult with their members prior to the submission of their application. In all circumstances, appropriate consideration should be given to the needs of specific groups and statutory duties.

Question 15 – What degree of detail would be most appropriate to require when seeking to maximise transparency but be proportionate in terms of bureaucracy? Have we got the balance right?

21. Whilst transparency is important, proportionality is key here. The Board should not overburden the AR or regulatory arm but must seek sufficient evidence to justify the required budget. The proposals set out in consultation appear fair and proportionate. In addition to these rules, the Board may wish to include a provision to request further evidence or clarification from an AR or regulatory body where necessary. Guidance for the ARs with details of what information and data may be required and the circumstances of when a request could be made should be available.

Question 16 – Any there any issues in respect of practising certificate fees that you think we should consider as part of this consultation exercise?

22. As outlined in paragraph 19, the Board should ensure that proper account has been taken of equality and diversity issues for different groups on an ongoing basis, who may be impacted by the payment of fees. Work to engage and involve them in the consultation and decision making process should be undertaken by the AR and/or regulatory bodies.

Question 17 – Please comment on our draft proposed rules, both in terms of the broad framework and the detailed substance.

23. The LSC supports the proposed rules detailing the process and protection for 'whistle-blowers'. In addition, the Board may wish to consider the process for

other organisations or bodies to report concerns about the independence of regulatory arms functions.

Question 18 – Are there any comments that you wish to make in relation to our draft impact assessment, published at Annex C alongside this consultation paper?

24. The LSC has no further comments on the Board's draft impact assessment.

Question 19 – Are there any other issues that you would like to raise in respect of our consultation that has not been covered by previous questions?

25. The LSC has no further comments in respect of the consultation.

I hope you will find this response useful. If you have any queries about its contents, please do not hesitate to contact Sinead Reynolds, Quality Assurance for Advocates, at sinead.reynolds@legalservices.gov.uk.

Yours sincerely

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