

Mr Craig Robb
Legal Services Board
7th Floor
Victoria House
Southampton Row
London WC1B 4AD

26 June 2009

Dear Sir,

Regulatory Independence

We comment on issues raised by your Consultation Paper on proposed Rules to be made under ss.30 and 51 of the Legal Services Act 2007.

General

A. Composition of the board of the regulatory arm.

We agree that the appointment to the board of a regulatory arm must be, and be seen from the published criteria to be, on merit only. Appointments must not be of persons which the approved regulator simply decides to appoint. Appointment panels must themselves be constituted on similar principles.

However, we do not agree that the regulatory arm should itself be responsible for the appointment process for its own board members. This would be inconsistent with the fact that the Law Society, as the approved regulator in the case of solicitors, has the responsibility for the regulatory function and for ensuring appropriate separation of the representative and regulatory functions reflecting procedures and guidance established or approved by the LSB in its oversight capacity.

Recent criticism of aspects of the SRA's ability to regulate certain types of law firms or their work (whether or not that criticism is justified) illustrates why it may be necessary for the Law Society to be able to ensure that any changes to the regulatory arm are made to reflect its ultimate responsibility for this regulatory function.

We also strongly disagree with the proposal that a majority of the members of the regulatory arm should not be solicitors. This is not a requirement of the legislation. Parliament did not require an independently controlled regulatory arm to be set up but chose to proceed with the division of functions under the approved regulator. Nor is there anything in the speeches in Parliament, which you quote, to suggest that a majority of non-solicitors was envisaged.

In paragraph 14 on page 57 of the Consultation Paper, you state "The reality and perception of regulation being managed independently from the profession will be

important". Similar comments appear elsewhere in the paper suggesting to us a view that the regulatory arm should be independent of the solicitors' profession. This could be misinterpreted. There should be no misunderstanding. The legislation and the history behind the changes do not require or envisage regulation independent from the profession. You are of course well aware that the effect of the changes is that the profession should remain involved in its own regulation but through satisfactory separation of the representative from the regulatory function.

A significant non-solicitor presence on the board of the regulatory body is appropriate both to give public confidence in the process and to keep the solicitor appointees "on their toes". The independent members can voice their concerns to the LSB, if necessary, if they consider that the solicitor majority on the regulatory arm is unduly influenced by the representative arm. However, as demonstrated by the way the division of the SRA from the Law Society's representative function has worked in private, the risk of undue influence is in our view more theoretical than real. If more comfort was required an LSB member might be one of the independent members on every regulatory body.

In professions generally, not just solicitors, those who are experienced in that profession and have the qualities that the independent appointment process should ensure, are (supported by their independent colleagues on the board) well able to promulgate the professional Rules and regulate the activities of members of that profession in a manner entirely consistent with the public interest. They should not be regarded, just because of their professional qualification, as necessarily influenced by the representative interests of the profession. We note that the Council for Licensed Conveyancers, an existing separate regulatory body to which you refer, has a majority of licensed conveyancers on its board.

- B. As to support services for the regulatory body that are shared with the representative arm of the Law Society, we fundamentally disagree with any proposal that the regulatory arm should be able to opt out of these on its own initiative and set up separate functions. This is not required or envisaged by the legislation, or the Clementi Review. The latter acknowledged that such services as IT, HR and Finance could be provided by the approved regulator to both the representative and regulatory arms so as to reduce overall cost, and encourage efficiencies without prejudicing the regulatory arm's independence. As you suggest, service level agreements can be put in place to ensure the provision (or lack of provision) of support services does not undermine the independence of the regulatory body. These can include arrangements for resolving disputes between the two functions over such services similar to those that we understand the Law Society has already established.

Other comments on specific questions in the Consultation Paper.

Our general comments address points in some of the specific questions you raise but we make additional comments as follows:

Question 1

How might an independent regulatory arm best be "ring fenced" from a representative controlled approved regulator?"

1. By the quality of the appointees to the regulatory arm.
2. By a sufficiently detailed protocol prepared by the approved regulator, within the Rules/Guidance proposed by the LSB, setting out how its regulatory and representative functions are to operate.

3. The regulatory arm cannot, consistent with the legislation and the ultimate responsibility that remains with the approved regulator, be totally independent and ring fenced from the approved regulator. Much of the regulatory arm's processes and procedures should (if its board members are up to the job) be left to it. But aspects of strategic direction (such as how to regulate particular types of firms doing particular work) requires discussion with the approved regulator. Undue influence by the approved regulator can be identified by independent members of the regulatory arm's board if not by the LSB itself, but the approved regulator should not cede complete responsibility for strategic direction of its regulatory arm. The approved regulator needs to be able to influence and direct changes to the systems, strategy and procedures of the regulatory arm that are required to fulfil the regulatory obligations if the regulatory arm fails to do so. Obviously the approved regulator must not be involved in day to day operational decisions of the regulatory arm. In our view it is a matter of getting the right balance through discussion, working experience and the calibre of the individuals involved, as much as establishing procedures.

Whilst the regulatory arm alone should have day to day responsibility for the management of staff undertaking regulatory functions, it should not have the unilateral right to vary any common terms of employment. It is the function of the approved regulator to get the balance right following the LSB Rules and Guidance and for the LSB to intervene, if the approved regulator's systems and procedures to achieve this are unsatisfactory – ie systematic failures, not in individual or particular circumstances.

Question 2

Regulatory Board Appointees

See general comments

Question 3

Should chairs of regulatory boards always be non-lawyers?

There should be no explicit requirement that the chair should be or not be a lawyer. The most suitable person from time to time according to the appointment criteria should hold that position.

Question 4

Management of shared services

See general comments

Question 5

Principle based rules plus non-enforceable guidance

This seems appropriate

Question 6

The oversight role for representative-controlled approved regulators over their regulatory arms

See general comments.

We agree (para 3.30) with your proposal that the approved regulator should require LSB consent to replace (prior to the normal expiration or termination of their appointment and for reasons that

are not straightforward breach of duty (eg fraud or dishonesty) regulatory board members who are considered to have “failed”.

But we do not agree that LSB consent should be required for intervention (ie beyond monitoring performance) in the regulatory board if the approved regulator wishes to take action to address systematic failure in the regulatory processes or activities. We think it is necessary for the approved regulator to be able to call for information from the regulatory arm in this connection and this cannot be prescribed in advance. Nor do we consider (para 3.37) that the approved regulator should be bound to delegate to some other body the management and discharge of its supervisory functions. It needs to keep the powers to discharge the responsibility that it retains. The proposed new Rules should enunciate principles in this connection eg to prohibit undue influence by the approved regulator over its regulatory arm.

Questions 7 & 8

Self-certification of compliance by the regulatory and representative arms of the approved regulator

We agree with this proposal. In practice, the LSB may wish to look at the arrangements in more detail until the arrangements have “bedded down”.

Questions 9 & 10

Practising Fees

We do not consider that the mandatory permitted purposes for charging practising fees currently listed in statute should be widened to include explicit provision for “increasing public understanding of the citizen’s legal rights and duties”. This is not a regulatory function, though it may be one for public authorities or government or for the representative arm of the Law Society.

Nor do we consider that any other purposes should be added to those for which practising fees should be raised or used.

Question 11, 12, 13 & 14, 15, 16

We have not formed a view on arrangements for the LSB to sanction Law Society’s (or other approved regulator’s) proposals for the level of practising fee. We leave this to the Law Society.

Question 17

The proposed Rules

For framework comments, see above. We would be happy to comment on the detailed Rules as part of the continuing consultation process but have not been able to review them in time to comment in this letter.

Question 18

Your impact assessment

No comments

Question 19

We have no other issues we wish to raise at this stage, save to say that as you point out in para 2.8 of the Consultation Paper, it is not in the public interest for confidence in the rule of law to be put at risk. It is also important in formulating the Rules not to send any signal to those in

territories where the rule of law does not exist or is under threat, that lawyers in this country cannot be trusted to regulate their own members tasked with upholding that rule of law.

We hope these comments are helpful

Yours faithfully

Norman Starritt
For and on behalf of himself and Patrick Russell