

Consultation response

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Regulatory Independence

Submission by Which?

INTRODUCTION

Which? is an independent, not-for-profit consumer organisation with around 700,000 members and is the largest consumer organisation in Europe. Which? is independent of Government and industry, and is funded through the sale of Which? consumer magazines, and books.

A) GENERAL COMMENTS

Thank you for this opportunity to respond to this important consultation. We are very supportive of the work that the Legal Services Board is doing to reform the regulatory arrangements for the legal profession.

We consider it to be in the interests of lawyers as well as consumers that the legal services market has a regulatory structure that is 'fit for purpose' for the 21st century. The foundations were laid when Parliament passed the Legal Services Act in 2007 following the Clementi Review and now it's the job of the Legal Services Board (LSB) to make it happen.

Consumers will not understand a system in which a legal representative body can continue to influence its regulatory arm, whether this is in reality or perception.



Now is the time for all of the legal profession to back changes that will help ensure consumer confidence is retained or, for some consumers, regained. We are particularly keen to ensure that these arrangements are implemented in full at the earliest opportunity and in any case not later than April. Our primary concern is that a robust regulatory system is put in place from the outset. There may well be a need to refine some aspects of detail in the future, however best efforts should be made to put in place the best conditions for success at the start.

B) DETAILED 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

We fully support the proposals to completely separate the regulatory and representative functions of approved regulators. This must be done in such a way that separation is meaningful both in reality and in the way in which it is perceived. We share the view that the concept of ‘ring-fencing’ the control of the regulatory function is a meaningful description of what is required.

We fully support the interpretation of ‘ring-fencing’ that has been set out in the consultation document. In particular, we agree that the entire responsibility for managing the discharge of the regulatory functions defined in the Act should be delegated to a regulatory arm within the approved regulator’s structure. This arm should have complete autonomy over its strategy and its operations and we agree that the whole body should be ‘ring-fenced’ rather than just its power to make decisions in specific cases.

We agree that this separate arm should have a series of independent powers that include the freedom to determine its own rules and procedures and the freedom to decide on the internal audit functions necessary to ensure operational effectiveness. The independent regulatory arm should also have the power to deploy its financial and human resources in the way in which it sees fit.

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

We strongly support the proposals set out in paragraph 3:15 with respect to governance. In particular, we agree that it is important for the board to have a lay majority. In an ideal world, we would also like to a proportion of direct consumer representatives amongst the lay members.



We agree that appointments should be made following open competition, with posts advertised in the national press to encourage applicants from a diversity of backgrounds and sectional interests. Their selection should be according to agreed and defined criteria and competencies, and the rules that govern all public appointments.

In this respect, we have significant concerns about the Law Society's recent efforts to appoint the new SRA board. From 2010, the SRA board should be appointed on the terms set out by the LSB rather than the current pre-Legal Services Act 2007 arrangements. We suggest that the SRA maintain its current board until the LSB reaches a decision on this consultation.

All board members should have obligations to promote the public interest and safeguard consumer interests. Board members should be supported in acquiring good understanding of consumer concerns and issues through training, support and information. Consumer and lay representatives should have appropriate training, resources and support to enable them to undertake this role effectively, including contributing to complex and technical issues.

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?

With respect to the chair, we recognise that there is likely to be debate about this position. However, our clear preference is for the Chair to be a non-lawyer as is already a legal requirement for the LSB and which the Bar Standards Board and ILEX have already done voluntarily. A preference for a lay chair is a position that we would take with respect to all industries. The personality of the chair can have a considerable influence on whether the regulator takes a pro-consumer stance.

Question 4 - Do you agree with our proposals in respect of the management of resources, including those covering shared services models that approved regulators might adopt? What issues might stand outside such arrangements as suggested in paragraph 3.22?

We broadly agree with the proposals on management of resources. We recognise the concerns that may arise as a result of the fact that the representative functions of the approved regulators ultimately control the purse strings. As such, we would urge the Legal Services Board to be extremely vigilant in policing this area and ensuring that the regulatory arms of the approved regulators are never put in a position where they are unable to properly fulfil their functions.



The provisions in paragraph 3.22 sound reasonable.

Question 5 - Is our proposed balance between formal rules and less formal (non-enforceable) guidance right? In what ways would further or different guidance be helpful?

The balance between rules and guidance seems broadly workable. However, it is possible that problems may arise in the future, either in terms of interpretation of the principles or in terms of enforcement. Across sectors, we have given a cautious welcome to principles based regulation. The particular problems we caution against are the lack of clarity of principles (which can be as much of a problem for firms as it is for consumers) and secondly the difficulties that can arise in enforcement.

In this case, the guidance should help with the issues of clarity but the Legal Services Board should not shy away from making future revisions to its rules where necessary, especially if there is a need for more clarity up front. Similarly, if there are problems in ensuring compliance because something is in guidance rather than in the formal rules then there should be no hesitation in making the arrangements more formal.

Question 6 - What are your views on our suggested permitted oversight role for representative-controlled approved regulators over their regulatory arms? Are practical modifications required to make it work?

In light of the fact that the approved regulator, rather than its regulatory arm, is ultimately responsible for the discharge of regulatory functions under the Act, it is reasonable that they do have some permitted oversight role. However, this does hold risks as outlined in the consultation. In particular, the risk that exercising this oversight role could under some circumstances be construed as interference in the regulatory arm's ability to carry out its responsibilities.

As such, we would urge the Legal Services Board to do as much as possible to ensure that any monitoring and supervision is done at arms length from the representative function and is completely transparent. The proposals for an independent body to conduct this seem sensible. However, this should be kept under review and the Legal Services Board should not hesitate to mandate changes (including possibly an enhanced role for itself) if there are doubts about genuine independence.

We agree that if there was ever a need for a constitutional or structural change (or indeed any other change that could be seen as interference in the operations of the regulatory arm) that this should only take place with the full approval of the LSB.



In terms of transparency, to avoid the need for action further down the line, we would suggest that as much is done as possible to ensure that the regulatory arm's activities are open and transparent from the outset. This could include ensuring that board members have clearly defined remits and terms of reference, which set out their responsibilities and are in the public domain. There should also be openness and transparency in meetings and decision making to ensure that all decisions are publicly available and their underlying rationale explained.

Question 7 - In principle, what do you think about the concept of dual self-certification?

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?

We would share the Legal Services Board's wish to minimise the costs of the new system. As such, we support the proposals for dual self-certification. However, we would urge the Legal Services Board to be vigilant in their oversight of the process. In this respect, we would like to see periodic 'checks' to ensure that the arrangement is working. This will be especially important in the early stages of the process. We can see the merits of 'Board to Board' meetings and we would have thought that both targeted checks and random checks could have merit. It may even be worth exploring the possibility of an occasional more formal external audit (at an unexpected time if possible).