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Are regulatory restrictions on practising rules for in-house lawyers justified?

Interested Party Comments

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ARE REGULATORY RESTRICTIONS ON PRACTISING RULES FOR IN-HOUSE LAWYERS JUSTIFIED?

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Introduction

This document is intended to set out the comments of Peninsula Business Services Limited in response to the Legal Service Board's discussion paper "Are regulatory restrictions in practising rules for in-house lawyers justified?"

Peninsula Business Services Limited is a consultancy firm supporting 28,000 business clients who are predominantly from the SME sector. The contracting relationship with these clients is based on a contractual period, rather than dealing with specific matters. The advice principally relates to HR advice in keeping with current employment law.

Peninsula has developed as a business due to the lack of appropriate support available to companies within the SME sector. Most companies find that a situation of being charged by the hour for any matter that occurs can result in a prohibitive cost and they will often not have the resources immediately available to deal with unexpected legal costs.

Moreover, companies within the SME sector often find themselves at a disadvantage when it comes to employment litigation because while claimants are able to obtain contingency fee arrangements ("CFAs") these are not available to businesses who can find themselves facing significant legal costs, even if they succeed, as these can often not be recovered. The traditional legal services model, of being charged by the hour, does not generally meet the needs of employers when dealing with workplace matters.

Our experience within the Legal Services sector focuses on working with companies with a view to resolving ongoing matters that occur within the employment relationship. Wherever possible, the aim is to avoid matters becoming litigious by ensuring that issues are dealt with fairly and reasonably but with a view to helping our clients to defend their actions in the event that they find themselves in litigation not of their choosing.

The Employment Tribunal system is set up in such a way that employers can feel disadvantaged, if a Claimant has been able to submit a claim, because the employer is expected to have the resources to defend a claim and write off the costs of doing so. It is rare that an unsuccessful Claimant will be expected to pay the costs, or part of the costs, of the Respondent so companies need to be able to enter into agreements which will protect them against the legal costs of defending a claim. Without this companies can find themselves faced with a situation where they simply cannot afford to defend an unmeritorious claim as the legal costs in addition to the company's own costs, in relation to time for preparation and the attendance of witnesses, are prohibitive.

Unlike large companies, most companies within the SME sector cannot afford to hire a specialist HR department and a company solicitor so they rely on access to external sources for advice and support which is provided in such a way that the cost is fixed and can be budgeted for.

By way of this response we wish to provide our general comments on the sector, how it is affected by the current legal services options available to consumers, particularly business consumers, and the restrictions put in place by the approved regulators as well as answering the questions posed directly.

Employer response

We welcome the review of the current regulatory restrictions on practising rules for in-house lawyers and the opportunity to provide comments on this matter.

The discussion paper refers to restrictions placed on in-house lawyers of non-authorised employers. As the largest UK employment law consultancy firm, providing legal services that fall under this definition, we believe that we are extremely well placed to provide constructive commentary.

We would like to be in the position where employees who are solicitors or barristers would be able to hold themselves out as such where they have a valid practicing certificate and to be able to hire new employees in that specific capacity. When employed in such a way we would wish these employees to be able to provide the full range of services that their colleagues provide where such work is on an unreserved basis, both in the provision of advice and in the conduct of proceedings. The current restrictions mean that this would only be possible if we were granted ABS status.

We can currently find ourselves in situations where the other party's representatives are acting in what is ostensibly a non-profit capacity so are able to hold themselves out as solicitors. We cannot be treated as working at the same level, even if the consultant with control of the case is equally qualified and may have greater experience, despite carrying out identical work. This also means that our client who is having their matter handled by a qualified solicitor with a valid practicing certificate cannot rely on full legal privilege because the solicitor cannot hold themselves out as such.

The restrictions that we face are those imposed by the Solicitors Regulation Authority and the Bar Standards Board. It is the restrictions put in place by the SRA that impact on us the most.

We have provided our general comments on the issues that we think are relevant to this discussion in relation to the questions put to the approved regulators and have then given our specific comments on questions (iv) and (v) directed at interested parties.

ABS Considerations

The introduction of the option to become an ABS was intended to allow other providers to enter the legal market who did not follow the traditional law firm route or allow other providers already in the market to be able to operate on an equal footing with those law firms by providing the service through a regulated business. This would give consumers a true choice on how to obtain legal services with the option of obtaining advice from a solicitor without having to go to the traditional law firm. We reviewed this development with interest and explored, as far as we could from the available documentation, the possibilities that this provided.

We have considered applying to become an ABS in order to work as an authorised provider but have run into some difficulties with the various options. Again, it is the restrictions placed by the approved regulators that have caused us these problems. Our preference would be to obtain regulation through the SRA but it is their rules that create the most significant barriers to us becoming an ABS.

Legal Activities

At the moment, all of the work that we do is classed as unreserved legal activities. There is some confusion with the SRA on this issue as they appear to believe that representation at the Employment Appeal Tribunal requires "rights of audience" and so should be reserved. This is incorrect, no rights of audience are needed at the EAT.

The vast majority of the work we do for our clients involves advice work on matters that may or may not become litigious. Where matters do become litigious the work involves the conduct of proceedings and representation at the Employment Tribunal where no rights of audience are required.

When matters become actively litigious, either through early conciliation starting or a case progressing through the Tribunal system, the matter moves to the Legal Services Department and the assistance changes from *advice* to the conduct of the matter up to and including representation at the Employment Tribunal and/or the EAT.

Options

We had considered converting the entirety of the company to become an authorised ABS but we have concluded that that was simply not feasible.

We have considered separating out the litigation function of the business into a separate company and having that company apply for ABS status. However, the separate business rule currently creates a barrier to that because the SRA rules classify the work that would continue to be carried out by the parent company as prohibited separate business activities even though this work is unreserved. This is the same work identified in the discussion paper as being a restriction which is beyond that imposed by the Legal Services Act 2007.

Further restrictions

Additionally, the SRA have indicated that they would not be looking to grant ABS status to a company unless it was planning on carrying out reserved business activity. This would mean that unless we are willing to go into areas of law where we do not currently work, and for which we would have to employ people specifically as solicitors, we would not be able to obtain ABS status even if the separate business rule was waived. This has the effect of making the legal services market a 'closed shop' in respect of our current services.

Impact of the Restrictions

Working for clients

While we are willing to hire people as in-house lawyers, the current rules restrict what work they can do for clients. The rules in place at the moment mean that we cannot currently hire anyone as a solicitor to carry out work in our litigation department to conduct cases for clients, even though that work is unreserved. We could hire that individual as a consultant to do the work, and they would undertake all the work that they would do as a solicitor, but they cannot hold themselves out as a solicitor and as they are not acting in that capacity, their work would not fall under the regulatory remit of the SRA. This means that our client does not have the added protection of an overseeing body who can become involved in the event of a dispute, a protection we would be willing to allow but which is removed from them due to the current SRA rules.

An in-house lawyer can prepare a direct access instruction form for a client who wishes to instruct counsel, for example where a matter has reached a level where rights of audience are required, but cannot sign it on a client's behalf. However, the same in-house lawyer could sign the form if the instruction was being given on our behalf or for an individual connected with the company.

The work is identical but it is not allowed if it is to be carried out on behalf of a client. The only difference is whether or not the work is being done on a commercial basis which suggests that the concern is not about protecting the consumer but rather protecting a possible income stream for law firms. This runs contrary to the intention of the act and the role of the approved regulators.

Commercial –v- Non-profit work

In our view, it makes no sense that an in-house lawyer is not able to have conduct of cases or provide advice in writing or in person to a client of their employer where the service is being provided on a commercial basis but they could do so in the exact same circumstances if the work was being provided on a non-commercial basis.

If the concern is about the ability to do the work then that will apply equally no matter whether the work is being done commercially or not for profit. If anything, where the work is being provided on a non-profit basis this requires greater protection for consumers because they, in all likelihood, cannot shop around as they do not have the resources to pay for legal advice. The market place will not provide the options, most non-profit organisations are oversubscribed and there is rarely a choice of non-profit providers.

This differentiation between commercial and non-profit work indicates that the reason for the restriction is not in any way connected to the ability of the person to provide the work competently at this level, and to provide suitable protection for consumers, but to prevent competition from commercial companies in order to protect the interests of traditional law firms. This goes against the principles of the Legal Services Act and indicates that the approved regulators are putting the needs of their member firms ahead of the needs of the consumer.

Allowed work

We are able to hire in-house lawyers to work within our Advice Service providing telephone advice only to clients, with a follow up letter when necessary. However, that in-house lawyer could not give the identical advice to that client in person or in writing. Leaving aside the potential discriminatory nature of this rule in respect of clients with hearing impairments for whom advice in person, by letter or via email would be a reasonable adjustment to remove the barrier to accessing the service, it does not make any sense for the in-house lawyer to be restricted in this way.

The absurdity of this rule can best be demonstrated by this example:

> A client could come in to visit our office but would be unable to meet the in-house lawyer to discuss an ongoing matter that they have been discussing by telephone. However, that client could sit in a meeting room within our offices and speak to the same in-house lawyer, sat in another room, by telephone to discuss the case.

The purpose of the Legal Services Act

Consumer choice

The purpose of the Legal Service Act was to increase competition and innovation and give those seeking legal services greater options for accessing the services of a solicitor, should they wish to, while maintaining their statutory protections. The restrictions on the work in-house lawyers can do commercially denies those service users that choice and removes the protections from them that they would otherwise have, including privilege and the right to complain to an overseeing regulatory body.

Protecting consumers or law firms

Where an individual has qualified as a solicitor or barrister and has a valid practicing certificate entitling them to act in that capacity they should be allowed to do so for their employer's commercial clients where that work is of an unreserved basis or does not require rights of audience. Anyone holding themselves out as a solicitor or barrister would need to act in accordance with the rules of their overseeing bodies. Preventing them from being able to hold themselves out in this capacity only protects traditional law firms, not those using the service.

Implementing the principle

The principle behind the Act was to give a broader range of options to individuals in how they access legal services without losing the statutory protections if possible. The aim was to protect and support the consumer and to place the public interest higher than the sectional interests of particular consumer or professional interests. Any organisation authorised as an approved regulator should be placing the duty to the public interest above that of their members.

The Act is clear on what it believes is necessary to protect the public, and has reserved those activities that it believes can only be carried out by a person with valid rights of audience. The Act does not require that anyone carrying out legal activities that are not reserved can only do so as a solicitor or barrister unless working for an authorised company.

The reason for opening up the legal market was to allow competition and to give consumers options as to how they will obtain legal assistance. Consumers were to be given the choice of being able to obtain legal advice without having to use the traditional law firm. This gave the consumer the protection of using a solicitor, such as by having privilege and having a right to complain to what is effectively a legal ombudsman, but in a manner that best suited them which may not be that of a standard solicitor firm. The restrictions put in place by the approved regulators remove that choice and work in contradiction to the principle of the Act.

Practicing certificates and trust

The principle behind a practicing certificate is that the overseeing body, such as the SRA, is confirming that the individual holding the practicing certificate is fit to practice as a solicitor. The rules on professional conduct mean that anyone acting as a solicitor must act in their client's best interest and uphold the rule of law. It would be expected that any qualified solicitor would act this way irrespective of whether or not they are employed as a solicitor.

It is a sad state of affairs when an organisation is effectively saying that it does not trust its own members to conduct themselves properly and professionally if they are not within the confines of a law firm unless they are acting in a non-profit capacity. The added restrictions put in place by the approved regulators beyond the requirements of the Legal Services Act effectively make that statement.

If a solicitor or barrister's own regulating body is saying that it does not believe that their members will act with integrity and in accordance with their code of conduct if their employer is not regulated and there is a chance to make a profit then why should the public have any faith in the legal profession? The regulators are, in essence, saying that their members cannot be trusted to act properly unless they are being watched by a regulated firm.

If that is the case then the view would appear to be that it is the job of the law firm to ensure that individuals act properly, rather than them having individual responsibility. In those circumstances individual practicing certificates are unnecessary and potentially misleading. If that is not the case then the regulators should trust their members to act with integrity unless they receive information to the contrary.

Protecting the Consumer or Members interests

The most telling aspects of the restrictions imposed on solicitors by the SRA is the difference between how they treat work done commercially with that done not for profit. As this work is identical there is no reason to decide that a solicitor can hold themselves out as such in one instance but not the other if the concern is the service to the consumer.

The only logical reason for this difference in treatment is the protection of their members' financial interests. Traditional law firms are not in competition with firms offering a free service and, if anything, the availability of free legal advice and assistance to some consumers increases the likelihood of other solicitors obtaining paid work to defend against such action.

The traditional law firms are in competition with alternative providers in respect of consumers who are willing to pay for legal services. By preventing solicitors working as solicitors for those alternative providers the SRA protects the traditional law firm because this means that the alternate provider cannot rely on privilege for pre-litigation matters and the authorised firm can offer official access to a solicitor and the protection of the SRA. This allows the traditional law firm to offer any paying consumer a stark choice, namely do they wish to wish to use a solicitor or not.

This goes against the principle of allowing the consumer different routes of access to the services of a solicitor and does not meet the consumer's needs. Instead this appears to be a protectionist approach in relation to the traditional law firm.

The needs of the consumer

The SRA and BSB tend to view the needs of the consumer as being those of an individual with a single specific issue. This completely overlooks the growing sector of support services for organisations and companies who are looking to enter into a longer term relationship to deal with any issues that crop up, often alongside an internal HR function, over a period of time.

In the area of employment law, many companies are looking for a service that is available for a fixed fee, no matter the frequency with which it is used, and which can be accessed by multiple means at all times with a quick turnaround. Many employment matters cannot wait for a solicitor to be available and, where the consumer is a company from the SME sector, costs are a significant concern. What these companies also seek is some sort of protection against further fees if the matter on which they have taken advice becomes litigious. That is not an option generally available from traditional law firms to companies within this sector.

The restrictions put in place mean that a business consumer has to choose between having a service that is tailored to their needs and being able to access a solicitor. Consumer choice is being restricted to accessing a solicitor or getting the service that meets their needs rather than being able to access a solicitor via a service that meets their needs. That works against the principle of consumer choice and denies consumers the option of being protected by privilege if the traditional model does not suit them.

Business consumers have as much of a right to be able to access legal services in a way that suits them as individual consumers and particularly when they are trying to resolve a situation where they are facing a drop in income and are trying to keep the business afloat and retain as many staff as possible. At times of such difficulties, companies cannot afford to incur unexpected legal charges for advice. Responsible businesses should be able to plan for access to such services by having a longer term contracting arrangement while still being able to access a solicitor.

Having given our general comments on how the sector currently operates and the restrictions put in place by the approved regulators we would like to address directly the discussion questions posed to interested parties.

Specific Discussion Questions

iv. What is your experience of current arrangements for in-house lawyers?

We have found the current arrangements to be overly restrictive and prevent our ability to offer our clients access to solicitors. It also places our clients at a disadvantage in respect of privilege.

We have employees working for us who are trained as solicitors, having completed their training contracts, and who hold valid practicing certificates. They are providing services to clients that they could offer as a solicitor. However, we cannot employ them as solicitors and they cannot hold themselves out as solicitors, although they could do if they were carrying out the identical job in an authorised firm or in an unauthorised non-profit firm. This is unjustified unequal treatment placing us at a specific disadvantage in the market place.

We can employ people as in-house lawyers but they cannot carry out any work for our clients. The only exception to this is that they are able to offer telephone advice to clients. The restrictions mean that they cannot give that identical advice in writing or in person. We are aware that, for some of our clients, the ability to discuss a matter face to face or to receive the advice in writing would assist them to better understand the issues and offset any difficulties they have due to language or disability. The restrictions prevent these clients from accessing the service of an in-house lawyer even though they would be obtaining the identical advice.

We cannot currently employ qualified solicitors as Solicitors within our Legal Services Department to carry out work for clients, even though the work is unreserved, because the SRA will not allow solicitors to have conduct of proceedings and hold themselves out as such unless they are employed within a regulated firm. There is simply no basis for this when the proceedings are of a kind where rights of audience are not required.

We can currently employ these people as Consultants and they can carry out the conduct of proceedings in that capacity but they cannot hold themselves out as solicitors while doing so. This means that the client does not have any of the protections of having a solicitor, and a qualified solicitor with a practicing certificate has to be treated as a lay representative at hearing. The consumer in these circumstances is denied the full benefit in getting the service of someone who is qualified as a solicitor or barrister because they are not able to have the protection that comes from getting that service.

There is no question that these individuals are competent and capable to meet the clients' needs. They would be able to carry out the exact same job as solicitors if we were a regulated firm or if they worked for another firm to whom the restrictions did not apply. The implication of this restriction is either that solicitors are considered inherently untrustworthy and cannot be relied on to act properly outside of an authorised company or that a non-traditional law firm cannot act with integrity and will corrupt anyone who works for them unless they act on a not for profit basis.

We have seen and encountered the regular comments made by solicitors about non-traditional firms with the unfounded criticism that they are simply out to take all the money they can from clients without giving a quality service in return. It is this knee-jerk prejudice against non-solicitors and protectionism of the traditional law firm that seems to be behind this rule and it cannot, in our view, be justified.

v. What in your view could be changed?

Remove the restrictions on an individual only being able to hold themselves out as a solicitor, if they have a practicing certificate, if they work for an authorised firm. Put the restrictions in line with the Legal Services Act 2007 and allow non-standard models of firms to be able to recruit solicitors to act for clients in full competition with the traditional law firm for non-reserved work.

Have faith in the training of solicitors and trust that they will act in accordance with the code of conduct where they have a valid practicing certificate. If they can be trusted to act this way in an authorised firm or as a sole practitioner then they should be trusted to act this way wherever they work.

Allow solicitors and barristers to be employed as such if they have a valid practicing certificate and trust that they will act in accordance with the rules in exactly the same way as they would as sole practitioners. If the work is unreserved then there should be no restriction on a solicitor or barrister with a practicing certificate holding themselves out as such and carrying out any of the work that is required.

Give consumers true freedom of choice and let them choose the model of service that suits them best without forcing them to have to go to a traditional law firm if they want to use a

solicitor. Consumers should not be faced with the choice of using or solicitor or not, but rather do they wish to use a solicitor and, if so, how do they wish to access that service.

The choice over whether or not to use a solicitor needs to be put back in the hands of the consumer rather than the approved regulators. If the concept of direct access to solicitors or barristers is to be truly embraced then that requires the consumer to have the choice of how to access those services rather than if they wish to do so.

The current restrictions on carrying out unreserved work outside of a traditional firm need to be removed. They are not in keeping with the Legal Services Act 2007 and need to be removed so that there can be true competition within the market place as to what best meets the differing needs of consumers.

Systems could be put in place to check that in-house lawyers working in unauthorised firms are complying with the relevant code of conduct for their profession. These systems should be no more restrictive, and reviews should be carried out with equal frequency, as the checks applied to regulated firms. The regulators would need to be monitored to ensure that they are not dealing with in-house lawyers working for unregulated firms more harshly than those working in sole practice or for regulated firms to ensure that the market remains truly competitive.

If a regulator is not prepared to act in accordance with the Legal Services Act 2007, and instead of putting measures in place to encourage competition and widening access to legal service is in fact putting in place measures that restrict that competition, then they should have the right to act as a regulator removed.

We believe that if a truly level playing field was created for legal services then this would result in a properly competitive market place that would allow consumers to choose the legal services that best meets their needs rather than having to choose from a restricted number of options.

We thank you for the opportunity to provide our comments on this matter and would be happy to provide further information if that would be of assistance in researching this matter. We would welcome the opportunity to be involved in any further discussions if possible.

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