LSB discussion paper: are regulatory restrictions in practising rules for in-house lawyers justified?

The Law Society Response

April 2015

Introduction

This response has been prepared by the Law Society of England and Wales ("the Law Society").

The Law Society notes Legal Services Board's discussion paper seeking views on regulatory provisions relating to in-house lawyers. This is a complex topic and the regulatory framework for in-house lawyers has evolved over many years. A review of this area is probably necessary but, given the vast array of organisations and working arrangements in-house lawyers operate within, any changes will need to be well thought out and the full impact of any recommendations will need to be considered.

The Society would not support changes which would lead to a third category of firms - in addition to traditional firms and ABS firms - where unregulated solicitors would provide unreserved services to the public. The Law Society is of the view that if organisations with in-house lawyers wish to provide services to the public, then this should be done through an Alternative Business Structure (ABS). It is important that there is a level playing field for firms operating in the legal services market. The introduction of ABS has enabled non-lawyer owned firms to provide legal services by employing solicitors and has established appropriate regulation and client protection. This appears to the Society to be a suitable approach.

The Society would support efforts to review the exemptions in rule 4 of the Practice Framework Rules. These exemptions have developed in a piecemeal fashion over many years and are not necessarily in tune with the Legal Services Act 2007. It would be reasonable to review these to re-establish the correct principled approach, within the wider principle that in-house lawyers' services are not provided to members of the public.

The Society is also puzzled by what appears to be a suggestion that in-house lawyers should not be regulated if they undertake unreserved work. It is important to remember that integrity and trust are crucial for solicitors whether they are undertaking reserved work or not. The point about the qualification is that the rules apply irrespective of the legal work undertaken and this is essential for third parties when dealing with in-house lawyers.

In addition, the relationship of employer and employee is inherently different from that of a firm in private practice and client. Lawyers have duties in the public interest which extend beyond those to their employer and may conflict with them. In most cases these are well respected by both sides, but it can be much more difficult for a lawyer to manage the tensions inherent in the relationship.

The Law Society has some concerns regarding the LSB's view stated in the paper that regulators need to justify, with compelling evidence, restrictions on in-house lawyers. It may not always be easy to provide sufficiently compelling evidence to support regulation until after a restriction is removed.

The Law Society is also concerned that endeavours to allow more innovation in the market by reducing regulation may, in the long-term, contribute to an overall loss of standards and ethics in the legal services market; thus gradually undermining the reputation of the legal profession in England and Wales, both within the UK, and globally.

LSB concerns

The LSB is concerned that unnecessary restrictions in relation to in-house lawyers could limit innovation in the market, impact access to justice and create unnecessary 'red tape'. The discussion paper states:

"Where a regulator places restrictions on in-house practice over and above the minimum required by the Act, we expect it to be able to demonstrate this is necessary with compelling evidence in terms of risk to the regulatory objectives. We also expect that the absence of specific restrictions on in-house lawyers should be an active decision taken in light of an appropriate risk assessment."

The approved regulators take different approaches to in-house lawyers. The LSB have set these out in their paper and highlight the inconsistencies relating to what kind of services authorised persons can offer, and who they can offer them to.

Regulators are invited to explain their approaches and the evidence for any restrictions on in-house lawyers as well as consider areas which may be improved. The paper asks other interested parties about their experience of the current regulatory arrangements and what could be improved.

The Law Society's view

The existing rules governing in-house solicitors place no restrictions on the activities that in-house solicitors can undertake but they do restrict the individuals to whom they can provide legal services. The ABS regime has provided much greater scope for employers wishing to offer legal services to the public; enabling in-house lawyers to do so. The Law Society would have significant concerns if restrictions on in-house solicitors were weakened to allow legal activities, including unreserved work, to be provided to the public without the organisation first being licensed as an ABS.

It is essential that there should be appropriate protections for the public; without authorisation as an ABS, the organisation - which is likely to be managed by non-lawyers - would not be regulated. This would create unfair competition between in-house lawyers and other (regulated) firms and the potential for poor consumer outcomes. It is important that consumers have choice but they should also be adequately protected. It is also in the public interest for there to be a robust and credible legal services market and standards should not be eroded.

The Law Society's concerns in relation to restrictions on in-house lawyers centre on the exemptions. It has been suggested that the regime can cause problems, particularly in the public sector where the changes in provision of local authority and police services can mean that the relevant employment arrangements do not fit well with the Code.

We are aware of one particular recent problem which arose following the Police Reform and Social Responsibility Act 2011 which changed the governance of police forces. It was anticipated that the majority of police staff previously employed by Police Authorities would transfer to the employ of the Chief Constable by statutory transfer. If transferred, police lawyers would no longer come within the rules on local authorities and the restrictions on in-house lawyers in Rule 4 would operate to restrict practice to the provision of legal services to Chief Constables. This would affect all those arrangements where there were shared legal services between Chief Constables, Commissioners, and police forces. Following discussions with the SRA, a waiver was granted to cover the scenario, but we are aware that the discussions were lengthy and caused uncertainty.

Similarly, as local authorities are increasingly privatising their work or having schools convert to academy status, questions arise about how far lawyers employed by those authorities can supply services to the new bodies.

It has also been suggested that there is a continuing problem with lawyers employed in advice agencies and charities. At the moment, charities are able to provide legal services to the public without being authorised as an ABS as they are protected under transitional arrangements in the Legal Services Act 2007. The Law Society has previously commented on this issue[1]. There is an argument for delaying the removal of this transitional protection on the basis of access to justice for vulnerable people unable to afford legal services through another route. However, where these providers compete with others in the market for work, then the question becomes less clear-cut. It must be remembered that their existence affects

the market in that they are providing services that could be provided by others at a

commercial rate.

In its paper the LSB appears to be concerned about the following questions:

1. The differences in approach between different regulators;
2. The different types of work that are undertaken and, in particular, the restrictions that are place on lawyers undertaken unreserved work;
3. The people to whom the services are offered.

<u>Different regulators</u>

[1] See Law Society response to LSB consultation on the regulation of special bodies for more information - https://www.lawsociety.org.uk/policy-campaigns/consultation-responses/documents/regulation-of-special-bodies-and-non-commercial-bodies---law-society-response/

The Law Society considers that it would make considerable sense for the rules on what is and is not permitted to in-house lawyers to be consistent between all the regulators. It is well recognised that in practice the distinction between professional qualifications is barely recognised in in-house practice. Assuming that a lawyer has achieved the relevant level of qualification to do the work, the circumstances in which he or she is permitted to undertake it should not differ.

Different types of work

The Law Society does not consider that there is any justification for limiting the work that in-house lawyers can undertake, simply because they are in-house. However, we are not persuaded that the distinction between reserved and unreserved work is helpful here. Lawyers' duties do not differ according to whether or not the work is reserved. They owe duties of good faith to third parties and they owe duties to the court even in those courts where rights of audience are unrestricted. It is on that basis that third parties will deal with lawyers and trust them. If there are good reasons for prohibiting lawyers from undertaking reserved work in particular circumstances, those reasons are likely to apply in respect of unreserved also where that work is clearly "legal" in its nature. There may be some scope for clarifying the ambit of the definition of such services but we are not aware that, in practice, this gives rise to significant problems.

The people to whom services are offered

In many ways this is the most complex area and the Law Society accepts that this needs review.

The landscape has changed significantly. In particular, local authorities' services are now provided by a widely differing group of bodies and, in many cases, it will remain appropriate for the authorities' lawyers to continue to provide legal services to them. We also recognise the very important work undertaken by non-profit making advice agencies.

In both cases, however, it needs to be recognised that the lawyers will continue to owe duties to the people receiving the advice and will be liable for any negligence. Clients in that position are entitled to the same level of protection that they would receive if they were using a law firm in private practice. This seems to us to be particularly the case if local authorities and advice centres are considering offering services for profit, potentially competing with firms in private practice.

However, it needs to be remembered that the wider the group of people to whom in-house lawyers are able to offer services, then the more they will be competing with private practice law firms. It would be wrong, particularly if those services are being provided for profit (as opposed to recovery of actual costs), for the regulatory burdens on in-house practitioners to be lower than those for private practice firms. We would suggest that any review should take account of the following points:

1. The risk of conflicts between the interests of the employer and the person to whom the service is provided needs to be assessed closely and appropriate safeguards implemented.
2. Where services are being provided to people other than the employer there needs to be a level playing field in regulatory terms between the requirements on in-house lawyers and those in private practice who may well be in competition to provide those services.
3. The level of sophistication of the people to whom services are offered may be relevant: safeguards in providing services to sophisticated public sector

clients may be legitimately less onerous than those where the lawyer is providing services to private clients. However, those safeguards should be, so far as possible, equivalent to those in private practice, particularly if those services are being offered for profit.

4. The provision of pro bono advice by in-house lawyers should not be discouraged – they should, again, be subject to equivalent regulatory requirements to those which apply to lawyers in private practice offering pro bono services.

In relation to pro bono services, the Society has particular concern that the recent changes to the regulation of consumer credit activities have had an adverse effect on the ability of in-house lawyers to advise in relation to this area of law on a pro bono basis. Consumer credit/debt related activities undertaken by solicitors were formerly regulated by an OFT group licensing regime under the Consumer Credit Act 1974. From 1st April 2014 the provisions of the Consumer Credit Act permitting this were replaced by provisions in the Financial Services and Markets Act 2000 (FSMA) and responsibility for regulation of these services transferred to the Financial Conduct Authority (FCA). The SRA has consulted on whether it should continue to be a designated body for the purposes of the Act.

An example of the effect of the removal of the group licensing regime would be solicitors volunteering at LawWorks clinics to provide debt and consumer credit advice. The FCA have granted not-for-profit organisations limited permission authorisation due to the fact that these not-for-profit organisations held their own group licence prior to 31 March 2014. This limited permission authorisation allows them to operate under a reduced regulatory regime for debt adjusting, debt counselling and credit information services but it is not clear that such licences permit individual lawyers to provide such advice on a pro bono basis. In the case of the LawWorks example, it is also a not-for-profit body, but did not hold its own group licence prior to 31 March, because advice was being provided by individual solicitors able to operate under the group licence issued to the Law Society, as such LawWorks clinics were not granted limited permission authorisation from the FCA. All LawWorks therefore ceased offering this advice from 1st April 2014. The provision of pro bono advice generally has therefore been affected negatively and on in-house lawyers in particular it is even more questionable that can offer such free advice to the most vulnerable consumers. This needs consideration.

Conclusion

The ABS regime was intended to deal with cases where entities which were not owned or managed by lawyers were offering services directly to clients, with particular arrangements for special bodies. That regime was intended to provide safeguards to ensure that consumers had proper protection and that the firm respected the ethical obligations of lawyers. We do not understand why firms which wish to enable their lawyers to offer legal services to clients should not use the ABS regime.

The risks and benefits of deregulatory measures need to be assessed against all of the regulatory objectives. Reducing restrictions pertaining to in-house lawyers may promote competition and increase access to justice; however, it may negatively impact consumers if they are insufficiently protected and also on the public interest if the reputation of legal services in England and Wales diminishes as a result of the erosion of standards.