LEGAL SERVICES BOARD

Regulatory Independence

Consultation on proposed rules to be made under sections 30 and 51 of the Legal Services Act 2007 (c.29)

This consultation will close on **26 June 2009**

Contents

Foreword

1. The job of the new Legal Services Board is wide-ranging, challenging, and important. At its core, it's about putting the interests of citizens and consumers at the heart of the system. Open consultation and constructive engagement with all stakeholders – including consumers, legal professionals and those who represent both of them – will help us collect our evidence. Robust analysis and continued dialogue will then be central to ensuring that our proposals are honed and implemented as effectively as possible.

2. As our first major policy act, we are consulting on the issue of regulatory independence. This may seem an academic – or even arcane – subject to be at the top of our agenda. I make no apologies.

3. The separation of regulation from representation was a key plank of the reforms that led to the Legal Services Act and to the creation of this Board. The issue was at the heart of the Clementi Review, the subsequent Government White Paper and Parliamentary debates on the draft and full Bill prior to enactment. The reason was simple: the clear evidence was that the system was out-of-balance. There was a perception of self regulation operating in the interests of the regulated parties, not the wider public.

4. Our work now is about ending, once and for all, any perception that lawyers run the regulatory system for themselves. It is about entrenching a regulatory agenda that is in the public and consumer interest.

5. Regulatory independence is not a matter of prescribing details, for example about how disputes on funding IT systems are resolved. It is about ensuring that the public has confidence that the best professional standards are developed. This means a process of rigorous constructive challenge from both within and outside the profession and enforced fairly and consistently. Unless approved regulators act – and are seen to act – in the public interest, they will not carry the confidence of the public, policy makers or other professionals. 'Regulatory capture' is a recipe for regulatory impotence and public distrust. Regulatory and representative functions need to be defined and separated.

6. It is important to get the framework for regulatory independence right – and to ensure that it is implemented effectively. This is not a matter of the LSB empire building: if the framework is properly implemented, the need for detailed intervention and target-setting by the Board will be significantly reduced. We have our formal powers in reserve if they are ever required, but a framework defined and operating as we propose should lessen that likelihood.

7. It is the importance of this issue which has led to the Board giving it early priority. Last summer, we conducted an informal fact-finding exercise with the current approved regulators to gather information on current arrangements. Then, in December, we wrote to approved regulators to give guidance on our provisional – pre-consultation – thinking about appointment procedures for their regulatory arms. We have since tested the more

developed thinking in this paper with a number of stakeholders. I am grateful to all of those who have given their time as part of this process. And I want now to explore the detail of our proposals with all stakeholders. As this work falls so clearly within the regulatory objectives, shared by all regulators under the 2007 Act, it is our priority to advance it as effectively and as smoothly as possible.

8. I want to stress two points in particular about our proposals. The first is that we are focusing in this document on setting rules for the future. We are not passing judgement on how far any organisation's current arrangements do or do not meet them. We will finalise the rules in light of the outcome of this consultation and the challenge will then be to the approved regulators to amend their current arrangements as necessary in the light of the final version. I anticipate giving significant priority to assessing how well they are doing this in the reviews of the effectiveness of the performance and governance of individual approved regulators discussed in Section 5.d of our draft Business Plan.

9. Second, the Board is determined to avoid a one-size-fits-all approach. Many of the bodies we oversee are small and what is appropriate for them may differ from what is necessary for the larger organisations we oversee. The proposals in this paper therefore aim to be principle-based, rather than theoretical or prescriptive. We are open to persuasion about the proportionate way to *apply* principles in the light of individual organisations' circumstances. However, we are clear about the precise ends that need to be achieved. We now want to test our ideas.

10. I want to thank again the many stakeholders who have engaged so constructively on our regulatory independence work to date. We look forward to engaging with the widest possible group during the consultation period and beyond.

DAVID EDMONDS

Chairman

Executive Summary

1. This Paper seeks views on a set of statutory rules to be made under the Legal Services Act 2007 (c.29)[1]. Rules need to be made under two provisions. The first is section 30, which deals with the internal governance of approved regulators. The second is section 51, which deals with the control of practising fees charged by approved regulators and paid for by regulated practitioners.

2. In setting out proposals for consultation, we are building on – not seeking to reopen – the Legal Services Act. The existing front line bodies that have been involved with the regulation of legal services to date should remain recognised in statute as approved regulators for as long as the function of regulation is carried on with sufficient separation from any representative and/or promotional function that they undertake. Without this clear separation, the evidence suggests that the public, and in particular consumers of legal services, would view regulation as being prejudiced by representational or professional interest.

3. In terms of the internal governance (section 30) rules, the proposals we make would see:

    - the discharge, management and control of the "regulatory arrangements", defined in Section 21 of the Act , being separated from – and independent of – representative control in those cases where an approved regulator is controlled by a representative arm;

    - each approved regulator that has representative functions ('applicable approved regulator') establishing a separate regulatory arm (an 'independent regulatory authority') with the power to control its own structure, processes and procedures, and to determine the strategic direction for its own work. "Ring-fencing" of the regulatory arm therefore would go significantly wider than simply the power to make decisions in specific cases;

    - all appointments to regulatory arms being made solely on the basis of merit through open advertisement and competition, taking full account of diversity issues and the Seven Principles of Public Life[2]. Except in cases where statute explicitly dictates otherwise, we propose to require a lay majority on the board/equivalent of the regulatory arm. We also propose a requirement for appointment selection panels which are demonstrably independent of representative control and a similarly independent arrangement for appraisal and (if and wherever appropriate) dismissal of individual members;

    - the regulatory arm having line management responsibility for all members of staff performing roles under its direction and control, including the freedom to vary any common terms of employment;

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1 http://www.statutelaw.gov.uk/legResults.aspx?LegType=All%20Primary&PageNumber=3&NavFrom=2&activeTextDocId=3423426

2 The seven principles that underpin the Commissioner for Public Appointment's code of practice are set out at: http://www.publicappointmentscommissioner.org/Code_of_Practice/ef8446f3551.html. They derive directly from the so-called "Nolan principles".

- mechanisms to control the management of all shared services other than staff line management, such as accommodation, HR, finance and IT, which should be demonstrably independent of the day-to-day control of the representative function; and

- the legitimate exercise of an approved regulator's supervisory functions in respect of its regulatory arm itself being conducted in a way that is clearly independent of representative control.

4. To monitor compliance, we propose to place a requirement on each approved regulator to certify its compliance with the section 30 rules at regular intervals, and for the independent regulatory arm to certify, separately, its agreement with that self-certification. Ultimately, it would be for the Legal Services Board to endorse that self-certification. However, by placing the onus on the bodies themselves to evaluate compliance against the rules, with a clear audit trail in place, the need for oversight regulation should be significantly lessened.

5. The synergies between sections 30 and 51 are clear. The discharge of regulatory functions must be resourced reasonably and so the mechanism to fund that regulatory activity must be clearly linked to those functions.

6. Our proposals in relation to the control of practising fees set out in this paper include:

    - the addition of limited "permitted purposes", which determine the purposes for which monies raised through practising fee levies can be applied, to ensure that approved regulators can fund any work under or in connection with the regulatory objectives established in the Legal Services Act;

    - a flexible process to require each approved regulator to agree arrangements with the Board to ensure that applications for the approval of practising fee levels are made in good time for the relevant budget cycle; and

    - a requirement to observe the regulatory objectives and the principles of better regulation entrenched in the Act (in particular the principle of transparency) when seeking to agree the level of practising fees for the relevant time period.

7. We welcome views on the specific questions below and any more general comments or observations on the issues discussed in this paper.

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)?

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

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?

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?

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?

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?

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?

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"?

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

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

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

Question 13 – If they are adopted, what should Memoranda of Understanding between the Board and approved regulators contain? For approved regulators in particular, are there any particular implications for your organisations?

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?

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?

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

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

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?

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?

1. Introduction

1.1. This consultation paper sets out proposals to make rules under sections 30 and 51 of the Legal Services Act 2007 (c.29)[3]. We invite representations during the course of our consultation exercise, which will end on Friday 26 June 2009. Details of how to respond are set out at paragraph 1.15 onwards.

1.2. Our consultation exercise is aimed at anyone with an interest in the regulation of legal services in England and Wales. In particular, copies are being sent to bodies representing consumer interests; to the regulatory and representative arms of each of the eight approved regulators that we oversee; and to the UK Government and Welsh Assembly Government. We hope that others, including Parliamentarians, individual consumers and regulated lawyers themselves, will also be interested in the issues raised in this paper.

Issues tackled

1.3. **Section 30** of the Legal Services Act deals with the exercise of regulatory functions by approved regulators. It provides that the Board must make internal governance rules to require approved regulators to ensure that the exercise of their regulatory functions is not prejudiced by any representative functions they may also have; and, that they must, so far as reasonably practicable, ensure that decisions relating to the exercise of their regulatory functions are taken independently from decisions relating to the exercise of any representative functions.

1.4. Most of the approved regulators that we oversee have a mixture of regulatory and representative functions. For example, the Law Society and Bar Council have always been self-regulating bodies, overseeing the professional activities of their solicitor and barrister (respectively) members as well as representing and promoting the interests of those respective professions. Rules requiring the separation of regulatory and representative functions will, of course, apply to such bodies.

1.5. Two approved regulators are different. First, the Council for Licensed Conveyancers is a statutory regulator and has no representative functions. The profession of licensed conveyancers has an institutionally separate body – the Society of Licensed Conveyancers – which represents and promotes the interests of the profession. Second, the Master of the Faculties, who regulates the notarial profession has no representative functions. Representative or promotional work for the profession is carried out by entirely separate bodies, the Society of Scrivener Notaries of London and the Notaries Society.

[3] See footnote 1, above.

1.6. We would not envisage section 30 rules having significant application to such bodies. However, they would clearly be under a duty not to allow any ancillary representative functions to interfere with their regulatory responsibilities. To that extent at least, section 30 rules would still apply.

1.7. **Section 51** provides for the control of practising fees charged by approved regulators. Under the provision, the Board must make rules that specify for what permitted purposes approved regulators may apply amounts raised by practising fees paid by their practitioner members. Because we have the responsibility of approving the level of any practising fees charged by approved regulators, we must also make rules about how applications for approval are to be made, considered and decided upon.

1.8. We envisage section 51 rules applying in full to each of the approved regulators, because each of them will be levying a compulsory fee from their regulated professionals as a condition of being authorised to practise.

Annexed documents

1.9. The relevant statutory provisions, including sections 30 and 51 in full, are reproduced in ***Annex A***.

1.10. ***Annex B*** sets out the background to the reforms that led to the Legal Services Act and its requirement to make these rules.

1.11. In line with the commitment given in our draft Business Plan[4], which we published in January 2009, we also include a Provisional Impact Assessment at ***Annex C***. That paper assesses our proposals in light of likely consequences on, for example, equality and diversity and regulatory impact more generally.

Proposed consultation timeline

1.12. In our draft Business Plan we made clear that we will work with independence and integrity, at all times being open, accessible, clear and innovative in the way that we engage.

1.13. We are committed to that vision. This consultation exercise is an important one and we do not want it to remain a paper-based exercise where we publish a document and then sit back waiting for a trickle of submissions. We want to engage. We want to find evidence. We want to utilise expertise across the full range of our stakeholder base to help to analyse that evidence so as to provide positive outcomes for the legal profession and the public alike.

[4] http://www.legalservicesboard.org.uk/what_we_do/consultations/index.htm. See para 39, 4th bullet.

1.14. To that end, we intend to engage in accordance with the following plan:

Timeline	***Engagement***
25 March 2009	Launch consultation. Post consultation document on our website and send consultation paper to stakeholder organisations. Publicise launch in consumer, legal and mainstream media, and start working with stakeholders to set up meetings and events.
April and early May 2009	One-on-one meetings with stakeholders about the thrust of our proposals (leaving the detailed responses to come later in the consultation cycle).
May 2009	Consultation workshop, with focus groups dedicated to proposals on dual self-certification, practising certificate arrangements, and the position of smaller approved regulators; and with an open forum to discuss wider proposals in the round.
26 June 2009	End of formal consultation period – deadline for detailed written submissions from stakeholders.
Late July/early August 2009	Publication of consultation response summary, including publication of all written submissions received and workshop minutes. Alongside that publication, we plan to publish the proposed final version of the rules we intend to make under sections 30 and 51 for formal consultation under section 205 of the Act.
October 2009	Deadline for representations on draft proposed rules
November 2009	Publish rules, which will come into force in January 2010.
2010 and beyond	We will work with the approved regulators on implementation issues to satisfy ourselves that the rules made are being met.

How to respond

1.15. In framing this consultation paper, we have posed specific questions to help develop our proposed statutory rules. We would be grateful if you would reply to those questions, as well as commenting more generally on the issues raised.

1.16. We would prefer to receive responses electronically (in Microsoft Word format), but hard copy responses by post or fax are also welcome. Responses should be sent to:

Email: Consultations@LegalServicesBoard.org.uk

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

Fax: 020 7271 0051

1.17. If you need advice on how to respond, please contact our Board Secretary at BoardSecretary@legalservicesboard.org.uk.

1.18. We intend to publish all responses to this consultation on our website unless a respondent explicitly requests that a specific part of the response, or its entirety, should be kept confidential. We will record the identity of the respondent and the fact that they have submitted a confidential response in our decision document.

1.19. We are also keen to engage in other ways, and we would welcome stakeholders offering to meet or to attend the workshop event which we propose to hold during the consultation cycle.

2. The need for rules

Guiding principles

2.1. Our proposals are shaped by the Legal Services Act's regulatory objectives[5]. We are committed to furthering the public interest; the rule of law; access to justice; the interests of consumers; competition across the sector; an independent, strong, diverse and effective legal profession; citizens' understanding of their rights and duties; and adherence to the professional principles.

2.2. As guiding principles, they are unarguable. They underpin our mission to put the interests of consumers and citizens at the heart of the regulatory system. The evidence that has already been collected by Parliament, Government and others means that we can start to apply the regulatory objectives to tangible proposals in specific areas. The issue of regulatory independence is no exception to that general rule.

The reform agenda

2.3. When Sir David Clementi conducted his independent review[6] into the regulatory framework of legal services in England and Wales, he drew specific attention to the strengths of the legal sector, but also highlighted serious flaws that called for reform. The Government agreed. Its Regulatory Impact Assessment[7] to the draft Legal Services Bill[8] identified a perceived if not real risk that the legal services regulatory framework as it stood was open to potential conflict of interests in that:

> "most of the regulators of legal professionals [are] also performing a representative role, acting as advocates for their members. This raises a concern as, arguably, there is a risk that the regulators' judgements might be unduly influenced by putting the interests of members above those of consumers of legal services, undermining public confidence in the legal services sector. Even when this is not the case, the *perception* of undue influence on regulators' considerations may be damaging to the image of the profession"[9].

2.4. The Regulatory Impact Assessment added that the creation of separate arms to deal with regulation, which should be ring-fenced from any representative interests, would mitigate this risk.

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[5] The regulatory objectives, set out in section 1(1) of the Legal Services Act 2007 (c.29) are recited in ***Annex A*** to this consultation. See page 41 *post*.

[6] *Review of the Regulatory Framework for Legal Services in England and Wales* – Final Report (December 2004). Sir David Clementi.

[7] http://www.justice.gov.uk/docs/ria-legal-services.pdf ; and also see supplement to Full RIA at: http://www.justice.gov.uk/docs/RIA-Supplement-v021.pdf.

[8] http://www.official-documents.gov.uk/document/cm68/6839/6839.pdf.

[9] Paragraph 1.24.

2.5. A central message of the scrutiny process of the Legal Services Bill could be described as a perception of lack of trust in genuinely independent regulation – and the need to address it. If the regulation of legal services does not command the confidence and trust of the public and practitioner alike, it can only undermine confidence in the legal system and hence the rule of law itself. In our view, that level of risk cannot be sustained.

Developing our policy

2.6. Legal services regulation therefore has to be independent of providers and of Government. Our oversight role removes the necessity for Government to have any direct regulatory role. The duty imposed by the Act on approved regulators to ensure adequate separation of regulation from representation should also ensure appropriate independence from the profession.

2.7. In making our rules, we propose to ensure that any reality and perception of regulatory decisions being compromised or led by representational interest – whether directly or indirectly – is completely removed. It is, we think, beyond argument that those with representational functions should not make or control regulatory decisions directly. Nor should they pull potential levers of regulatory control 'behind the scenes'. In our consultation, we therefore want to test a model statutory framework for an "independent" regulatory arm, free of control by a representative-led body, to meet the purposes of the Legal Services Act.

2.8. The regulatory objectives underpin this approach. It is not in the public interest for confidence in the rule of law to be put at risk. Consumers and the public at large are unlikely to trust any regulatory framework unless and until they are satisfied that it is demonstrably separate from (and independent of) representative self interest. Nor is a lack of confidence in independent regulation in the interest of the profession and industry. Market confidence will enable providers to innovate and succeed. But a profession that is not trusted will lose credibility and respect and fail to maximise its commercial potential.

3. Section 30: Internal Governance

3.1. At a strategic level, focus on the separation of regulatory and representative functions is not new. Indeed, to their credit, some approved regulators have already done a lot of work to split their own functions. Until now there has been no consistent legal basis for such separation.

3.2. Recognising the diversity of legal regulation, Parliament consciously decided not to impose prescriptive and inflexible requirements in primary legislation. Instead it placed a duty on the Legal Services Board to make internal governance rules under Section 30 of the Act to govern implementation of the statutory requirements, giving it discretion to determine the necessary detail.

3.3. Our rules must ensure that the exercise of approved regulators' regulatory functions is not prejudiced by any representative functions (section 30(1)(a)). They must also ensure that, so far as reasonably practicable, decisions relating to the exercise of regulatory functions are taken independently from decisions relating to the exercise of representative functions (section 30(1)(b)). We must also make provisions concerning communications with certain bodies (section 30(2)) and resourcing (section 30(3)).

The separation of functions: ring-fencing

3.4. In seeking to comply with our duty under section 30, we therefore propose to make rules to oblige each of the approved regulators with dual regulation/representation responsibilities to separate their regulatory functions from any representative ones by ring-fencing control of the former. As already highlighted, such rules would probably not impact significantly on the Council for Licensed Conveyancers or the Master of the Faculties because of their lack of any representative role.

3.5. The terms "regulatory functions" and "representative functions" are given meaning by the Legal Services Act and in this paper, they are to be construed in accordance with it. The relevant definitions are set out in section 27. Effectively, this provision acts as a cross-reference to the section 21 (which defines "regulatory arrangements"), by saying that reference to such functions is to any functions the approved regulator has under or in relation to its regulatory arrangements (section 27(1)(a)); or in connection with the making or alteration of those arrangements (section 27(1)(b)).

3.6. Section 21(1) (a) to (j) of the Act defines "regulatory arrangements". The list includes:

- authorising persons to carry on reserved legal and/or immigration services;
- maintaining and controlling practise and conduct rules;
- managing disciplinary arrangements (including the conduct of specific disciplinary cases);
- running any scheme(s) to oversee qualifications for entitlement to practise;

- managing any scheme(s) for indemnification and/or compensation; and/or
- any other rules, regulations or arrangements that apply to or in relation to regulated persons other than where those rules/regulations/arrangements are made for the purposes of any function concerned with representing or promoting the interests of regulated persons.

3.7. Where an approved regulator has a dual regulation/representation role, we propose that it is the discharge, management and control of these functions and arrangements that need to be separated from – and independent of – the representative-controlled approved regulator (i.e. be ring-fenced) if consumer confidence is to be improved[10]. We think that this is what Parliament intended, as we set out in ***Annex B***.

3.8. The phrase 'ring-fencing' is not employed in the Act, nor is it a term with any specific or static legal meaning. But, as a concept in the real world, it is easy to understand. It was used by Clementi[11], by Government[12], by Lord Hunt's Joint Select Committee[13]; and in Parliamentary debates[14]. In this specific context, it means that, while constitutionally the regulatory arm of an approved regulator might be a subsidiary company, board or committee of the overarching approved regulator, in all practical respects that regulatory arm should control and manage the discharge of the approved regulator's regulatory functions. It should also be insulated under the terms of the constitutional arrangements from the risk or reality of prejudice or other undue interference from those in post for representative purposes.

3.9. The approved regulator must remain ultimately responsible for the overall discharge of regulatory functions: it is designated by statute as the body vested with the power to regulate. However, we propose that the responsibility for *managing* the discharge of those regulatory functions (as defined in the Act) should be entirely delegated to a regulatory arm within that approved regulator's structure. We deal with the issue of the supervisory role of the approved regulator in relation to its regulatory arm from paragraph 3.25. First, we set out our proposals on what delegation to a ring-fenced regulatory arm should entail.

[10] In line with broad construction of the relevant legislative provisions, it is possible to envisage circumstances where the representative (rather than the regulatory) function should be ring-fenced. However, in view of the structure of the relevant approved regulators to which section 30 rules would apply, it is difficult to conceive that the representative/elected councils and boards presently in place at the top of the organisations could realistically be ring-fenced away from the main structure of the body. Therefore our work is being developed on the premise that regulatory functions must be ring-fenced.

[11] Clementi report (footnote 6 above) – see Chapter B, page 37, paragraph 35.

[12] See e.g. White Paper (*The Future of Legal Services: Putting Consumers First*), Department for Constitutional Affairs, October 2005 – paragraph 5.7, page 105.

[13] Joint committee Report on the Draft Legal Services Bill, Volume I, July 2006 – see page 36, paragraph 113, and the subsequent affirmation at paragraph 118.

[14] See for example, Hansard (House of Lords) 23 Jan 2007: Column 1047, per Lord Kingsland.

Defining the arrangements

3.10. We propose that the approved regulator should, under the arrangements it makes, delegate to the regulatory arm the powers (free from representative interference, control or veto) to determine its own processes and procedures and to determine strategic direction for its own work. In effect, we suggest a requirement to ring fence the regulatory arm, not simply its power to make decisions in specific cases.

3.11. Under our proposals, the regulatory arm's control over strategy would mean freedom to determine and pursue a business plan to meet the approved regulator's statutory responsibilities[15] in relation to the delegated regulatory functions. Under the internal governance arrangements we would expect to be put in place, a representative-controlled approved regulator would be bound in practice not to *require* its regulatory arm, for example, to alter the business objectives it sets for itself, or the method(s) chosen to achieve those objectives.

3.12. A representative-controlled approved regulator should of course have a voice. It is right that such a body should lobby the regulatory arm and seek to apply its experience (and the experience of its members) before policy decisions are made. In accordance with the arrangements in place under our draft rules, however, decisions should be taken by the visibly separate regulatory arm as the delegated organ of the approved regulator – and the necessary oversight of its strategy will primarily be for the Legal Services Board.

3.13. Where we talk about the power to determine processes, we refer, for example, to freedom for the regulatory arm to implement its regulatory roles in the way it sees fit. The delegation should itself respect the definition of regulatory functions as set out in the Act and the requirement of independence, as entrenched in our rules when made. We envisage such powers including, for example, the freedom to determine, without fetter, all rules and procedures to be adopted for the discharge of its delegated responsibilities; and the freedom to decide what (if any) internal audit functions are required to ensure operational effectiveness. We would welcome views on whether any further examples should be set out; and on what we have already suggested.

> ***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)?

3.14. More specifically, we propose that certain explicit requirements should be met in the governance arrangements made by each of the approved regulators.

[15] The Legal Services Act applies to each approved regulator, however organised and constituted, so regulatory arms would be bound just as much by the regulatory objectives etc as any other person or section within a designated approved regulator.

Regulatory board appointees

3.15. On the assumption that each ring-fenced regulatory arm would be controlled and managed by a regulatory board or committee, we propose that, as a minimum:

- all appointments to regulatory boards should be made on the basis of merit, independent scrutiny, equal opportunities, probity, openness, transparency and proportionality, after an open advertisement and competition. There should be no element of election to office; nor of nomination (without open competition) on the basis of sectional interest or background. Furthermore there should be no limitation on the selection of any chair/equivalent of the regulatory board on the basis of professional qualification(s) held or not held, although it would be acceptable to make broad provisions about the balance of (for example) lawyers and non-lawyers to sit on the board. Here, unless statute requires otherwise, boards should be constituted with an in-built majority of non-lawyers;

- except insofar as statute explicitly provides, no member of a regulatory board should be appointed to "represent", nor in any event should they solely advocate once appointed on behalf of, any sectional interest, but should instead act at all times in furtherance of the regulatory objectives of the Act;

- panels charged with the selection of members of regulatory boards must be demonstrably independent of the representative arm of an approved regulator. Representative organisations should be able to participate in the process. But under our proposals that voice should not allow the perception or reality of control. In particular, chairmanship of appointments panels should be independent and there should always be a majority of non-lawyers on the panel. We propose that, other than at the point of initial establishment, the regulatory arm should lead on the preparation of the panel – and the surrounding process – and in particular that the current chair should always serve on the panel, unless the competition is for the post of chair; and

- there must be clear arrangements in place (managed wholly or mainly by the regulatory board itself and certainly in a way that is demonstrably independent from representative arm control) to provide for the objective appraisal of all board members; for the circumstances (if any) in which board members would be eligible to be considered for reappointment; and for any permitted circumstances in which dismissal of an individual member or members would be considered and, where appropriate, effected[16].

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

[16] Our proposals on the dismissal of regulatory board members are set out from paragraph 3.33 *post*.

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?

Management of resources

3.16. The Legal Services Act is explicit in requiring us to make rules which provide for the regulatory function of approved regulators to be reasonably resourced[17]. Although the term 'resources' clearly refers to much more than cash flow, inevitably money will be a crucial factor.

3.17. With regard to finances specifically, we think that arrangements need to be put in place to insulate a regulatory arm from improper pressure from a representative-controlled ruling body. For example, we suggest that there should be a requirement to have in place budget-settlement processes that do not subordinate the needs of the regulatory arm to the representative-controlled organisation. So the budget setting process should be demonstrably independent of representative control or veto.

3.18. To link with our proposals above, we propose that a regulatory arm should have access to the resources reasonably required for meeting its strategy and its business needs (as determined by it), following consultation with the representative-led approved regulator.

3.19. Legal Services Board oversight – and the ultimate power to resolve disputes - would be important here. A regulatory arm might seek to spend much more than would be reasonable, having insufficient regard to the need to keep costs proportionate. Equally, a representative-controlled approved regulator might unreasonably seek to keep costs associated with regulation down. Our rules to be issued under section 51 will play a significant part in resolving any disputes which arise between bodies in these circumstances. But we believe that strong internal governance can avoid the need for such intervention.

Shared services

3.20. One advantage of designating existing representative-led bodies as approved regulators (and then requiring separation of function) is that some or all of the necessary operational infrastructure is already in place. Regulatory and representative arms can therefore operate shared services models, taking advantage of the resulting economies of scale.

3.21. However, management and control of the resources linked with the exercise of an approved regulator's regulatory functions will be a key marker of actual and perceived independence for the regulatory arm. Striking a proper balance will be vital. On the one hand, impeding the ability of a regulatory arm to pursue its stated

[17] Legal Services Act 2007 (c.29), section 30(3)(a).

business objectives would dangerously prejudice regulatory independence and effectiveness. On the other, the cost, time and effort invested by a regulatory arm to build a new administrative and support infrastructure could be disproportionate if suitable provision could be achieved through the approved regulator's existing infrastructure.

3.22. Where a shared services model is adopted, arrangements will need to be in place to protect the integrity of the regulatory arm's independence and effectiveness. We believe that the solution is for there to be enforceable service level agreements in place to protect the ability of the regulatory arm to receive the services and resources it needs. We suggest that certain criteria should be observed, including as a minimum:

- as a starting point, effective – and demonstrably independent – shared services management arrangements should be in place. Those arrangements should involve people connected with both the regulatory and representative functions of an approved regulator and people who are otherwise independent (and seen to be independent) of those functions. We propose that there should be significant participation from regulatory board members and the staff that they control in the design and running of such mechanisms;

- line management responsibility for all members of staff performing roles under the direction and control of the regulatory board (or equivalent) should channel through the senior employee overseeing regulatory functions and rest ultimately with the regulatory board/equivalent itself;

- in any exceptional case(s) where this were not possible, we propose that robust arrangements should be put in place to ensure, for example, no conflict of interest or undue influence is present;

- line management responsibility for staff with shared services functions crossing the boundaries between regulatory and representative arms should make clear that the interests of the regulatory arm are not subordinate to those of the representative-led organisation;

- the regulatory arm should consult the approved regulator about – and take due account of the views expressed in that consultation before implementing – changes to common terms and conditions where it believes this would enhance its operational effectiveness and/or its independence; and

- there should be an independent and objective forum to resolve disputes over budgets[18], all specifically designated shared services (e.g. IT, HR, payroll) and the content and operation of the service level agreements.

[18] Decisions about the budget arrangements for purely regulatory matters should, we think, fall to the regulatory arm. Decisions on budgetary matters involving shared service provision will be more complicated. Here, the independent "forum" we refer to may be an appropriate body to make decisions.

3.23. We suggest that different considerations may apply to longer term issues over the financial viability of an approved regulator. Pension provision may be one issue falling within this category, although we recognise the centrality of pension entitlements to an employee's terms and conditions as a general rule. While the regulatory arm should have a voice, we propose that control of such matters could probably not be entirely delegated to it.

> ***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?

3.24. When making our rules under section 30, we would want to set clear principles, but then issue guidance on how we would best envisage compliance with those principles. The guidance would be based on the substance of this chapter.

> ***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?

Monitoring and supervisory arrangements

3.25. The statutorily designated approved regulator (rather than its regulatory arm) is responsible in law for the discharge of its regulatory functions under the terms of the Act and the Board's rules. Under section 28[19], it is required as approved regulator to observe the regulatory objectives and the principles of better regulation set out in the Act, whenever discharging regulatory functions. And under sections 31 to 48[20], the approved regulator – not any regulatory arm – is the body at whom action is to be directed by the Legal Services Board where we identify a problem.

3.26. The question here becomes one of how to regulate the supervision by the approved regulator of the regulatory arm's discharge of its regulatory functions. Because of the diversity of approved regulators across the sector, a one-size-fits-all prescriptive approach is unlikely to work effectively. So we do not intend to make rules that are overly detailed in their application; or that would necessitate undue costs for approved regulators. But we will require the spirit of the Act to be observed so as to put beyond doubt – including to the consumers of legal services – that regulation is being carried out in accordance with the regulatory objectives. Put another way, we suggest that it should be absolutely clear that regulation is not to be controlled by people who also carry out representative functions and so who could

[19] Section 28 (Approved regulator's duty to promote the regulatory objectives etc) is set out in full in Annex B, see page 44.
[20] Sections 31 to 48 of the Act deal with the LSB's powers in relation to setting/directing performance targets; giving directions; issuing censures; imposing financial penalties; intervening in the discharge of functions; and cancelling designation as approved regulator.

(wittingly or unwittingly) act in a way that is wholly or mainly in the profession's interest.

3.27. To a significant extent, each approved regulators' duties under the Act can be managed through the establishment, where necessary, of a ring-fenced regulatory arm. Delegation of functions cannot divest a representative-led approved regulator of its responsibilities under the Act. However, to most material respects, the responsibilities would be discharged by a suitable part of the approved regulator's apparatus, at arm's length from representative control.

3.28. What remains for the approved regulator itself (i.e. as opposed to its regulatory arm through delegation), is accordingly limited. In carrying out its residual role, we therefore propose to require approved regulators to respect the principle of separation and the regulatory objectives. In particular, the exercise of the supervisory role should not compromise the independence or the effectiveness of the regulatory arm. This is the principle which we suggest should be included in our proposed section 30 rules.

3.29. Of course, none of this should prevent regular and frank two-way communication between the regulatory arm and the representative body, where the representative body has a perfectly legitimate interest in the regulation of its members. The representative arm should always have a voice: but it should not exercise control, or interfere in the day-to-day business of regulation. So how loud should that voice be?

3.30. For all applicable approved regulators, we envisage two possible supervisory roles for the statutory body to exercise over its regulatory arm. But we suggest that, in order to protect independence, such powers should be exercised only with the agreement of the regulatory arm (which should not be unreasonably withheld) or, in instances where that is not forthcoming or inappropriate, only with the consent of the LSB. It is possible to envisage that the Board may wish to intervene, even in cases of agreement between the approved regulator and regulatory arm.

Intervention

3.31. First, we consider that an approved regulator should, in relation to those delegated functions and acting together with its regulatory arm, be able to commission independent and occasional strategic reviews of its structural framework. These reviews should assess the extent to which mechanisms in place remain fit for purpose.

3.32. In terms of implementation, if a periodic review concluded that constitutional and/or structural change were required, it seems clear to us that the Legal Services Board would have to approve the proposed new arrangements. The process set out in Part 3 of Schedule 4 of the Legal Services Act requires Board approval[21]. Therefore consumers and the general public should have no reason to doubt the

[21] Legal Services Act 2007, Schedule 4 Part 3 governs applications from approved regulators for the authorisation of proposed changes to their regulatory arrangements.

integrity of the framework: the system overseen by us – and ultimately by the law – will ensure that decisions taken will be based on the regulatory objectives.

3.33. If any such future review process, or a more *ad hoc* investigation, suggested the need for *in extremis* replacement of a regulatory board member or of the entire regulatory board, for example where it is found that the regulatory board had wholly or manifestly failed, we can see an argument that the approved regulator should have the power to dismiss one or more board members. But, if such a power were to be held, we would propose that it should only ever be allowed to be exercised with the LSB's concurrence. This would be so even if the regulatory arm consented – although clearly any such consent (without reason to doubt its legitimacy) would influence the LSB significantly. This process should stand to prove that the independence of a regulatory arm could not be compromised by a representative-led organisation on anything less than a fully justified public interest basis.

Monitoring

3.34. Second, and more routinely, an approved regulator might wish to monitor the work of its regulatory arm. Indeed, we suggest that it should do so in accordance with its role as statutory approved regulator. Such monitoring may help the representative body represent its members as effectively as possible. It may help to facilitate constructive discussion on sensitive and/or significant regulatory issues which could assist the work of the regulatory arm. Importantly, it can be used by the representative body to assure itself that the responsibilities imposed on it by statute are being discharged.

3.35. In line with the thrust of our proposed policy here, we suggest that it will be important for the approved regulator to specify its needs and ensure that they are proportionate. Those arrangements should ensure that any monitoring stops short of allowing a representative-controlled approved regulator to *require* any action or omission from its regulatory arm. Furthermore, no processes designed for monitoring should result in burdensome compliance mechanisms falling to the regulatory arm. We think it unlikely that there would ever be circumstances in which the approved regulator needed to specify information that was more than a subset of the data specified by the regulatory arm for its own management and governance purposes. Similarly, we do not envisage circumstances where an approved regulator would need access to details of individual regulatory cases, particularly (but not only) where those cases are still live.

3.36. However, we think that within those parameters – and so long as operational effectiveness and regulatory independence are not compromised – a regulatory arm should co-operate constructively with its representative overarching body in this regard. The precise scope of such co-operation would best be left to the respective parties to agree.

3.37. We also suggest that the management and discharge of any supervisory functions might, in practice, sit best with a body that is itself demonstrably independent of representational control. The body established to oversee the

provision of (and resolve disputes about) shared services[22] could be charged with undertaking any routine and agreed monitoring activities, for example. The representative-controlled body could then be kept informed, but at the same time it would be insulated from criticism concerning the extent to which is holds – or is seen to hold – levers of power or control over the discharge of regulatory functions.

3.38. Where it falls to be determined whether or not a particular action or omission would constitute a compromise of the regulatory arm's ability to act effectively and/or with appropriate independence, we think that question – in the first instance – should be answered by the independent regulatory arm itself. In the case of any dispute, an internal dispute resolution mechanism free of representative control could be charged with making a decision. Ultimately, the LSB may need to be involved – but so long as representative control is visibly and demonstrably absent, that would seem sufficient for the purposes of the Act and our proposed rules.

3.39. We are open to views on how best to make this model work in practice; and/or whether any other models would be more or less workable. In particular, we would like to consider the pros and cons of regulatory arms complying with something comparable to the Freedom of Information Act[23] requirements so as to ensure maximum transparency of the discharge of their delegated regulatory functions. This transparency could be a mechanism by which accountability is fostered, not merely to the approved regulator, but to the regulated community; to the LSB as oversight regulator; and to consumers and the public. Of course, FoI-style exemptions[24] would have to apply in appropriate cases, but a proposal along these broad lines could negate the need for any overbearing powers of operational oversight.

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?

Compliance with the rules

3.40. We do not envisage difficulties in working with any of the approved regulators to ensure that their respective arrangements comply with the broad scheme of the Act and the more focused principles we will introduce under it, whatever the outcome of this consultation. However, we are required not only to make rules, but to ensure that those rules are complied with. The question is how to ensure such compliance in an effective and proportionate way.

[22] As suggested in the final bullet of paragraph 3.22, above.

[23] http://www.statutelaw.gov.uk/legResults.aspx?LegType=All%20Primary&PageNumber=7&BrowseLetter=F&NavFrom=1&activeTextDocId=1876329.

[24] Part II of the Freedom of Information (FoI) Act (sections 21 to 44 inclusive) provide for specific exemptions to the general right of access to information.

3.41. We envisage a process under which the Board approves arrangements made in compliance with our section 30 rules for each approved regulator; and then have in place a mechanism which would test those arrangements for effectiveness on a periodic basis. In summary, we propose that:

- our rules should require the approved regulators to have in place governance arrangements that would ensure compliance with our internal governance rules issued under section 30;

- we should approve the respective arrangements settled by each of the approved regulators once we are satisfied that the proposed arrangements comply with our internal governance rules;

- there be an annual requirement for each approved regulator and (separately but as part of a complementary process) its regulatory arm to certify continued compliance with our internal governance rules; and

- there be a requirement on the approved regulator and its regulatory arm, where they are unable to certify compliance, to identify actual or perceived areas of non-compliance and that they be required to give reasons for that non-compliance, to set up plans or proposals for rectification and to submit to further self-certification and LSB review when complete compliance had been achieved.

3.42. This 'dual self-certification' is potentially attractive. First, the process of agreeing the certification should focus minds constructively on ensuring appropriate compliance. Constructive relationships – although demonstrably not "cosy" – are a must for effective regulation at proportionate cost. Second, a process managed by the approved regulator and its regulatory arm would ensure that a large slice of the work necessary to evidence compliance was done "in house", rather than by the LSB. However, it is our clear intention that the process of dual self-certification should reduce the regulatory burden on approved regulators and the LSB alike.

3.43. Of course, the Board could not divest itself of responsibility for ensuring compliance simply on the basis of two signatures on a certificate. There would always be some onus on us to evaluate the self certification process; and there may be a need – whether on a random or more targeted basis – for 'Board to Board' style meetings where the issues can be explored in more detail. These are issues we would like to discuss with approved regulators and others during the consultation process to develop a scheme that would be both robust and proportionate.

3.44. In our draft Business Plan, we set out proposals in respect of developing excellence in legal services regulation[25]. Our initial view is that the work required to approve the arrangements proposed by approved regulators would become part of the general review of arrangements we proposed in that business plan. However, if consultees think that a stand-alone process would be more suitable, we would be interested in hearing views.

[25] Legal Services Board Draft Business Plan 2009/10. See section 5d, pages 18 and 19. http://www.legalservicesboard.org.uk/what_we_do/consultations/index.htm

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?

4. Practising Fees and the links with section 30

4.1. Section 51 of the Legal Services Act provides for the control of practising fees paid by authorised persons (i.e. regulated lawyers) to their approved regulators as a condition of authorisation. Under the provision, we have to make rules that specify the purposes for which approved regulators may be permitted to apply amounts raised by practising fees. Because we also have the responsibility of approving the level of any practising fees charged by approved regulators, we must in addition make rules about how applications for approval are to be made, considered and decided upon.

4.2. There are clear and obvious synergies between the provisions of section 51 and those of section 30. The Legal Services Board is prohibited[26] from (and has no interest in) interfering in the representational work of approved regulators, so long as that work does not itself interfere with the regulatory functions of approved regulators[27]. And practicing fees that are charged as a *mandatory* condition of authorisation must have some justifiable public interest purpose. It follows from both of these observations that the permitted purposes themselves must either be regulatory (i.e. intended to fund the work of the ring-fenced regulatory arm) or otherwise operate in the public interest. As the majority of this is likely to be regulatory, it is this source of financing that will pay wholly or mainly for the provision of the independent regulatory function that will operate under the section 30 rules.

4.3. As argued in the previous chapter, the Act requires independent regulation *and* the appropriate resourcing of that function. Hence it requires funds to be provided by the profession to pay for regulation and makes provision for appropriate funds to be raised through a compulsory levy of practising fees: payment is not voluntary. Any theoretical argument that this is the profession's money and so the representative-controlled approved regulator should hold the financial levers of power would therefore be invalid.

4.4. We therefore see it as imperative that rules under section 51 are in place alongside rules to be made under section 30. The object of both sets of rules – which we plan to publish side by side – will be to entrench the concept of regulatory independence. This chapter sets out our views on how we propose to develop rules, although again we stress that we have not settled our thinking and are keen to test ideas through consultation.

4.5. We start with an analysis of what rules we should make for permitted purposes; go on to discuss the process we envisage to agree practising fee levels with approved regulators; and then discuss the extent to which we can ensure maximum transparency in the setting of annual practising fees.

[26] Legal Services Act 2007, section 29(1).
[27] See section 29(2).

The Permitted Purposes

4.6. Section 51(3) requires the Board to make rules specifying the "permitted purposes" – i.e. the purposes for which an approved regulator is permitted to apply amounts raised by practising fees where payment of those fees is a condition which must be satisfied for those persons to be authorised by the approved regulator to carry on one or more reserved legal activities. In accordance with section 51(4), the Board must include within its permitted purposes six specific purposes. Those purposes are:

(a) the regulation, accreditation, education and training of relevant authorised persons and those wishing to become such persons, including—

(i) the maintaining and raising of their professional standards, and

(ii) the giving of practical support, and advice about practice management, in relation to practices carried on by such persons;

(b) the payment of a levy imposed on the approved regulator under section 173;

(c) the participation by the approved regulator in law reform and the legislative process;

(d) the provision by relevant authorised persons, and those wishing to become relevant authorised persons, of reserved legal services, immigration advice or immigration services to the public free of charge;

(e) the promotion of the protection by law of human rights and fundamental freedoms;

(f) the promotion of relations between the approved regulator and relevant national or international bodies, governments or the legal professions of other jurisdictions.

4.7. This list was, in effect, drawn from the statutory provisions that regulated the use of funds from practising fees before the Legal Services Act. In terms of the practising fees rules that we are required to make, the first question is whether there are any additional purposes that should be included.

4.8. We think that it is essential that each approved regulator is able to apply funds raised through mandatory practise fees to further and comply with the objectives and responsibilities set out in the Act, in particular the requirements of the regulatory objectives set out in section 1 of the Act. The statutory list of purposes that the Board must include among its permitted purposes (i.e. as set out in section 51(4)) seems to be wide-ranging enough to cover most functions likely to fall within the scope of the regulatory objectives.

4.9. However, the objective listed at section 1(1)(g), "increasing public understanding of citizen's legal rights and duties", appears to fall outside the explicit scope of any of the statutory purposes. Therefore we intend to make rules to make clear that practise fee funds can be applied for this purpose. Furthermore, while we cannot at this stage identify any additional purposes for which there is a regulatory or public interest need, we would be interested in the views of consultees on whether or not there should be provision made for additional such purposes and, if so, what.

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"?

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

The Application Process

4.10. Section 51(5) of the Act provides that no practising fee is payable under an approved regulator's regulatory arrangements unless the Board has approved the level of that fee. Accordingly, subsection (6) of that section requires the Board to make rules about:

(a) the form and manner in which applications for approval must be made (including the material which must be provided with such an application);
(b) any necessary consultation that the Board determines is necessary prior to the submission of such an application; and
(c) the procedures and criteria that will be applied by the Board when considering an approved regulator's application.

4.11. It is clear, perhaps more here than anywhere else, that a one-size-fits-all approach will not work for rules under section 51(6). The range of approved regulators, the extent to which those approved regulators expect to be regulating entities as well as individuals, and the budget cycle of the various organisations will, in all likelihood, make it impossible to prescribe universally applicable rules.

4.12. Our aim is therefore to set clear criteria against which any application is to be assessed and then to impose a general duty on each approved regulator to agree with the Board suitable arrangements on the content and timing necessary for their applications, and on any appropriate consultation requirements that should be built in to the cycle. There will also be a requirement on us and on the respective approved regulators to agree and publish an agreed memorandum of understanding – or any other appropriate protocol(s) – so that authorised persons, consumers and the public at large can see what arrangements are in place.

The need for evidence

4.13. Where our approval is sought, we suggest that approved regulators should link any proposed practising fee back to the requirements of the Legal Services Act, in particular, the regulatory objectives.

4.14. Questions that approved regulators should address in their application would therefore include the extent to which the proposed fee can be shown: to be in the public interest and the interests of consumers; to help maintain or improve access to justice; to support and encourage an independent, strong, diverse and effective legal profession; and to help authorised persons and the approved regulators themselves promote and maintain adherence to the professional principles.

4.15. We suggest that it would be necessary for us to see an analysis of the extent to which any proposed *change* in the fee level from previous years would impact in any or all of these areas. That should not be taken to imply that the overall figure will not itself be subject to scrutiny. However, after some years of operation, our primary (although not exclusive) focus will be on the proposed variation from previous years and in particular the immediately preceding year. The analysis submitted to us should, we suggest, also include an explanation of how the proposed variation would apply to and impact on the regulated community, including to sections of that community.

4.16. Furthermore, we would propose a requirement on approved regulators to show evidence that the overall budget funded through the collection of the fee receipts would be neither too high nor too low. In the case of the former, the resulting levy could act simply as an undue barrier to market entry, limiting both opportunities for potential applicants to the law and some serving lawyers and/or firms. At worst, it could impact negatively on access to justice for consumers. In the case of the latter, an inadequate budget for the purposes of robust and effective regulation could never be in the public interest – or indeed that of the profession and industry.

4.17. In developing these suggestions, we will want to work up criteria that are easily applicable irrespective of the size of the approved regulator making the application. We will wish to discuss suitable criteria in detail with stakeholders throughout the consultation exercise.

Timing

4.18. We recognise that it is important to minimise the impact on budget cycles of approved regulators; and for the approval process envisaged by the Act to be proportionate. Accordingly, we consider it better to work one-on-one with approved regulators and their regulatory arms to ensure that suitable timetables are in place, and that the requirements of the Board are manageable.

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

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

Question 13 – If they are adopted, what should Memoranda of Understanding between the Board and approved regulators contain? For approved regulators in particular, are there any particular implications for your organisations?

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?

Maximising Transparency

4.19. The money paid to approved regulators by the practitioners they authorise/regulate, at least insofar as lawyers in private practice are concerned, will ultimately come from the paying public. The level of the fee will therefore impact on one or both of consumer pricing and profit margins. Accordingly, the organisations which spend that money should be held to account for the way in which they spend it.

4.20. Setting out, with clarity and transparency, what is being charged and for what purpose, is a central part of that accountability. Proportionality is also key: if the granularity of detail explaining how and why funds are applied is excessive, it will be too expensive to administer and is unlikely to be digested by any but the most determined of practitioners. But a sensible balance must be achieved.

4.21. As part of the rules we make under section 51(6), we propose to oblige approved regulators to set out for each authorised person required to pay a practising fee as a condition of authorisation:

- the sum expected to be raised by practising fees paid by all regulated persons;
- the amount of money that the authorised person is required to pay (including a breakdown of any discounts or additional sums payable for specific reasons, with an appropriate explanation);
- the proportion of that sum that is to be applied for the discharge of regulatory functions (i.e. money that will go to the regulatory arm where the approved regulator also has representative functions);
- the proportion of that sum that is to be applied for permitted purposes that are discharged by the representative controlled approved regulator;

- the proportion of that sum that will be applied for any shared-service corporate functions that cannot be categorised as either falling directly under the regulatory arms costs or the costs of the representative-controlled approved regulator; and
- any additional voluntary payment requested for the purpose of funding unpermitted activities.

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?

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

5. Draft Rules

5.1. When we make our rules under sections 30 and 51, we intend to publish them side by side for formal consultation under section 205 of the Act. At this stage, we invite your views on the substance and drafting of these draft rules, and on the appropriate balance of detail in the rules themselves and in any appropriate accompanying guidance.

Draft Rules to be issued by the Legal Services Board under sections 30 and 51 of the Legal Services Act 2007 (c.29)

Part A: The Internal Governance Rules

Rule 1. Application and definitions

(1) Subject to sub-paragraph (5) of this rule, these rules, the internal governance rules, apply only to each "applicable approved regulator".

(2) An "applicable approved regulator" is an approved regulator that has responsibilities for the discharge of representative functions as well as for the discharge of regulatory functions.

(3) The terms 'regulatory functions' and 'representative functions', when used in these rules, are to be construed in accordance with, and have the meaning given by, section 27 of the Legal Services Act 2007 (c.29).

(4) The Legal Services Board ("the Board") shall determine and certify whether an approved regulator is an applicable approved regulator for the purposes of these rules.

(5) Any approved regulator certified by the Board otherwise than as an applicable approved regulator must in any event have in place arrangements that ensure that no ancillary function amounting to a representative function can be allowed to prejudice its regulatory functions.

Rule 2. Purposes of the rules

(1) These rules set out requirements to be met by applicable approved regulators for the purpose of ensuring that:

(a) no exercise of an applicable approved regulator's regulatory functions is prejudiced by its representative functions; and

(b) decisions relating to the exercise of an applicable approved regulator's regulatory functions are, so far as reasonably practicable, taken independently from decisions relating to the exercise of its representative functions.

(2) [*It is a matter for consultation whether any additional provision is required, for example, to define the criteria needing to be applied in any determination on whether an act or omission with respect to independence is "reasonably practicable". We welcome your views on the need for such provision and, if there is a need, on what that criteria might look like*.]

Rule 3. Independent Governance Arrangements

(1) Each applicable approved regulator must have in place independent governance arrangements, which the Board must approve before they (the arrangements) can have effect.

(2) The purpose of the independent governance arrangements required under sub-paragraph (1) of this rule shall be to ensure that the exercise of powers or functions by any person(s) involved in the exercise of an applicable approved regulator's regulatory functions is not prejudiced by the applicable approved regulator's representative functions; and is, so far as reasonably practicable, independent from the exercise of those functions.

(3) Independent governance arrangements must:

(a) vest authority for the strategic development, resourcing, operation, management and control of its regulatory functions in an independent regulatory authority; and

(b) ensure that the independent regulatory authority has the power to do anything calculated to facilitate, or incidental or conducive to, the carrying out of any of its functions.

(4) An independent regulatory authority is a decision-taking organ of the applicable approved regulator which has a majority of non-legally qualified members and no representative function.

(5) Subject to Rule 1 (3) of these rules, internal governance arrangements made in accordance with this rule must provide that, in the event of any uncertainty, the question of whether a matter is within the regulatory functions of the independent regulatory authority shall be determined by the independent regulatory authority.

(6) If an independent regulatory authority is accountable to any other decision-taking organ of the applicable approved regulator, it must be accountable only:

(a) to an independent oversight body which itself has a majority of non-legally qualified members and no representative functions; or
(b) to a body which has representative functions but only in accordance with sub-paragraph (7) of this rule.

(7) Where an independent regulatory authority is accountable to a representative oversight body, the representative oversight body may intervene in the discharge of its functions only with the express approval of the Board. Matters where the Board might consider such intervention to be appropriate might include (but not be limited to):

(a) dealing with serious misconduct on the part of one or more of the persons involved in the discharge of the independent regulatory authority's functions;
(b) dealing with the findings of an independent report into the discharge of those functions;
(c) where there is a resolution of its non-legally qualified members; or
(d) where there is a direction of the Board.

Rule 4. Communications

(1) As part of their internal governance arrangements, each applicable approved regulator must ensure that the persons involved in the exercise of its regulatory functions are, in that capacity, able to make representations to, be consulted by, and enter into communications with any person(s) or organisation(s) including but not limited to the Board, the Consumer Panel, the Office for Legal Complaints and other approved regulators.

(2) Nothing in these rules prevents a relevant approved regulator conducting legitimate communication with its independent regulatory authority, so long as that communication does not prejudice, interfere with, or impinge upon the independence or effectiveness of the independent regulatory authority.

Rule 5. Provision of resources

(1) As part of their internal governance arrangements, each applicable approved regulator must define a duty on itself to take such steps as are reasonably practicable to ensure that it provides such resources as are reasonably required for or in connection with the exercise of its regulatory functions.

(2) The resources to be provided under this rule include:

(a) financial resources whose expenditure is to be determined by the independent regulatory authority; and

(b) any accommodation, staff or information technology services which the authority has determined it does not wish to purchase itself out of its own financial resources.

Rule 6. Whistle-blowing

(1) Each applicable approved regulator must make such provision as is necessary to enable persons involved in the exercise of its regulatory functions to be able to notify the Board when they consider that their independence or effectiveness is being prejudiced.

(2) Such provisions shall include:

(a) the establishment, in their terms of service, of a right to make such notification, exercisable without consent or notification, wherever a person considers that independence or effectiveness is being prejudiced; and
(b) a guarantee, from the applicable approved regulator, that no action will be taken against any person making such a notification.

Rule 7. Duty to co-operate

(1) An independent regulatory authority must recognise and comply with a duty to co-operate with the applicable approved regulator from which delegated authority to it.

(2) In complying with its duty under sub-paragraph 1 of this rule, an independent regulatory authority should ensure that it consults and constructively engages with the applicable approved regulator in furtherance of the regulatory objectives and the principles of better regulation entrenched by the Legal Services Act.

Rule 8. Guidance

(1) Applicable approved regulators must, in seeking to comply with these rules, have regard to any guidance issued by the Board under this rule.

(2) For the avoidance of doubt, and further to sub-paragraph (1) of this rule, any guidance issued under this rule does not, in or of itself, constitute a part of these rules.

Rule 9. Approval arrangements

(1) In accordance with sub-paragraph (1) of rule 3 of these rules, applicable approved regulators must submit draft internal governance arrangements to the Board for the Board to consider and, if satisfied, approve.

(2) The Board must approve independent governance arrangements submitted to it by an applicable approved regulator once it is satisfied that the proposed arrangements meet the requirements of these rules.

(3) [Any necessary provision about circumstances in which intervention would be possible following Board approval – *details to be the subject of consultation*].

(4) [Requirement for annual self certification on compliance with these rules from each relevant approved regulator; and for simultaneous certification from the respective independent regulatory authority – *details to be the subject of consultation*]

(5) [Transitional arrangements to specify how, and by when, applicable approved regulators must seek to comply with these rules following the making and coming into force of the rules – *details to be the subject of consultation*]

Part B: The Practising Fee Rules

Rule 1. Application and definition

(1) These rules, the practising fee rules, apply to each approved regulator.

(2) In these rules, reference to "practising fees" is to fees paid to approved regulators where payment of those fees is a condition which must be satisfied by persons who seek to be authorised by the approved regulator to carry on one or more reserved legal activities.

(3) In these rules, reference to "permitted purposes" is to the purposes for which an approved regulator is permitted to apply amounts raised by practising fee.

Rule 2. Purposes of the rules

These rules specify:

(a) the permitted purposes; and

(b) the requirements to be met by the Board and by the approved regulator in regard to the submission, consideration and approval of applications to set the level or levels of practise fees.

Rule 3.

(1) Monies raised through mandatory practising fees must not be applied for any purpose other than one or more of the permitted purposes.

(2) The permitted purposes are:

(a) the regulation, accreditation, education and training of relevant authorised persons and those wishing to become such persons, including—

(i) the maintaining and raising of their professional standards, and

(ii) the giving of practical support, and advice about practice management, in relation to practices carried on by such persons;

(b) the payment of a levy imposed on the approved regulator under section 173;

(c) the participation by the approved regulator in law reform and the legislative process;

(d) the provision by relevant authorised persons, and those wishing to become relevant authorised persons, of reserved legal services, immigration advice or immigration services to the public free of charge;

(e) the promotion of the protection by law of human rights and fundamental freedoms;

(f) the promotion of relations between the approved regulator and relevant national or international bodies, governments or the legal professions of other jurisdictions.

(g) working to increase public understanding of the citizen's legal rights and duties.

Rule 4.

[*This rule will specify the requirements/mechanics of the application process. Our high-level proposals in this respect are set out in the consultation document (see paragraphs 4.10 to 4.21). It is a matter for consultation what level of detail the rules should include and, accordingly, we invite views*.]

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

6. Next Steps

6.1. As we set out in our proposed consultation timeline, this consultation will run between 25 March and 26 June. We are inviting written representations from any and all interested parties; and will seek to meet one-on-one and in group sessions with key stakeholders including all of the approved regulators (regulatory and representative arms), the Ministry of Justice and representative consumer groups. We aim to publish the results of our consultation before the end of July.

6.2. Alongside this work, it is our intention to publish the evidence that we collect through the consultation exercise. We will aim to publish each written consultation response submitted to us alongside our summary of those responses in the summer. We also plan to include a summary record of events held with stakeholders in the course of the exercise. This transparency should ensure that the evidence base on which we intend to proceed is clear for all to see.

6.3. Following the consultation process, we will need formally to make our rules under the provisions of sections 30 and 51 respectively. In doing so, we will be required to meet the statutory deadline of 31 December 2009[28]. We will also need to issue any guidance to accompany those rules, where this consultation process shows that such guidance would be helpful. It will be important to work with all of the approved regulators to ensure that the timetabling of this work is managed as smoothly as possible.

6.4. In the longer term, we will need to ensure that the rules made are implemented appropriately. The approved regulators will be required to define their respective governance processes according to the rules. The envisaged 'authorisation' process will be a significant part of the performance and governance reviews suggested in our draft Business Plan for 2009/10[29]. And the arrangements for the proposed dual self-certification process will then need to be developed further with all concerned parties. We will engage approved regulators and other stakeholders on issues of substance and of practicality in this regard throughout and beyond the consultation period.

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?

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?

[28] The Legal Services Act 2007 (Commencement No. 4, Transitory and Transitional Provisions and Appointed Day) Order 2009, SI 2009 No. 503 – see paragraph 6.
[29] See Section 5d (pages 18/19) of LSB's draft Business Plan.

Annex A

The Legal Services Act 2007 (c.29)

Section 1 – the regulatory objectives

1 The regulatory objectives

(1) In this Act a reference to "the regulatory objectives" is a reference to the objectives of—

(a) protecting and promoting the public interest;

(b) supporting the constitutional principle of the rule of law;

(c) improving access to justice;

(d) protecting and promoting the interests of consumers;

(e) promoting competition in the provision of services within subsection (2);

(f) encouraging an independent, strong, diverse and effective legal profession;

(g) increasing public understanding of the citizen's legal rights and duties;

(h) promoting and maintaining adherence to the professional principles.

(2) The services within this subsection are services such as are provided by authorised persons (including services which do not involve the carrying on of activities which are reserved legal activities).

(3) The "professional principles" are—

(a) that authorised persons should act with independence and integrity,

(b) that authorised persons should maintain proper standards of work,

(c) that authorised persons should act in the best interests of their clients,

(d) that persons who exercise before any court a right of audience, or conduct litigation in relation to proceedings in any court, by virtue of being authorised persons should comply with their duty to the court to act with independence in the interests of justice, and

(e) that the affairs of clients should be kept confidential.

(4) In this section "authorised persons" means authorised persons in relation to activities which are reserved legal activities.

Section 21 – regulatory arrangements

21 Regulatory arrangements

(1) In this Act references to the "regulatory arrangements" of a body are to—

(a) its arrangements for authorising persons to carry on reserved legal activities,

(b) its arrangements (if any) for authorising persons to provide immigration advice or immigration services,

(c) its practice rules,

(d) its conduct rules,

(e) its disciplinary arrangements in relation to regulated persons (including its discipline rules),

(f) its qualification regulations,

(g) its indemnification arrangements,

(h) its compensation arrangements,

(i) any of its other rules or regulations (however they may be described), and any other arrangements, which apply to or in relation to regulated persons, other than those made for the purposes of any function the body has to represent or promote the interests of persons regulated by it, and

(j) its licensing rules (if any), so far as not within paragraphs (a) to (i),

(whether or not those arrangements, rules or regulations are contained in, or made under, an enactment).

(2) In this Act—

"compensation arrangements", in relation to a body, means arrangements to provide for grants or other payments for the purposes of relieving or mitigating losses or hardship suffered by persons in consequence of—

(a) negligence or fraud or other dishonesty on the part of any persons whom the body has authorised to carry on activities which constitute a reserved legal activity, or of employees of theirs, in connection with their activities as such authorised persons, and

(b) failure, on the part of regulated persons, to account for money received by them in connection with their activities as such regulated persons;

"conduct rules", in relation to a body, means any rules or regulations (however they may be described) as to the conduct required of regulated persons;

"discipline rules", in relation to a body, means any rules or regulations (however they may be described) as to the disciplining of regulated persons;

"indemnification arrangements", in relation to a body, means arrangements for the purpose of ensuring the indemnification of those who are or were regulated persons against losses

arising from claims in relation to any description of civil liability incurred by them, or by employees or former employees of theirs, in connection with their activities as such regulated persons;

"practice rules", in relation to a body, means any rules or regulations (however they may be described) which govern the practice of regulated persons;

"qualification regulations", in relation to a body, means—

(a) any rules or regulations relating to—

(i) the education and training which persons must receive, or

(ii) any other requirements which must be met by or in respect of them,

(in order for them to be authorised by the body to carry on an activity which is a reserved legal activity,

(b) any rules or regulations relating to—

(i) the education and training which persons must receive, or

(ii) any other requirements which must be met by or in respect of them,

(in order for them to be authorised by the body to provide immigration advice or immigration services, and

(c) any other rules or regulations relating to the education and training which regulated persons must receive or any other requirements which must be met by or in respect of them, (however they may be described).

(3) In this section "regulated persons", in relation to a body, means any class of persons which consists of or includes—

(a) persons who are authorised by the body to carry on an activity which is a reserved legal activity;

(b) persons who are not so authorised, but are employees of a person who is so authorised.

(4) In relation to an authorised person other than an individual, references in subsection (2) and (3) to employees of the person include managers of the person.

Section 27 – regulatory functions

27 Regulatory and representative functions of approved regulators

(1) In this Act references to the "regulatory functions" of an approved regulator are to any functions the approved regulator has—

(a) under or in relation to its regulatory arrangements, or

(b) in connection with the making or alteration of those arrangements.

(2) In this Act references to the “representative functions” of an approved regulator are to any functions the approved regulator has in connection with the representation, or promotion, of the interests of persons regulated by it.

Section 28 – general duties of approved regulators

28 Approved regulator's duty to promote the regulatory objectives etc

(1) In discharging its regulatory functions (whether in connection with a reserved legal activity or otherwise) an approved regulator must comply with the requirements of this section.

(2) The approved regulator must, so far as is reasonably practicable, act in a way—

(a) which is compatible with the regulatory objectives, and

(b) which the approved regulator considers most appropriate for the purpose of meeting those objectives.

(3) The approved regulator must have regard to—

(a) the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed, and

(b) any other principle appearing to it to represent the best regulatory practice.

Section 29 – separating regulation from representation

29 Prohibition on the Board interfering with representative functions

(1) Nothing in this Act authorises the Board to exercise its functions in relation to any representative function of an approved regulator.

(2) But subsection (1) does not prevent the Board exercising its functions for the purpose of ensuring—

(a) that the exercise of an approved regulator's regulatory functions is not prejudiced by its representative functions, or

(b) that decisions relating to the exercise of an approved regulator's regulatory functions are, so far as reasonably practicable, taken independently from decisions relating to the exercise of its representative functions.

Section 30 – the internal governance rules

30 Rules relating to the exercise of regulatory functions

(1) The Board must make rules (“internal governance rules”) setting out requirements to be met by approved regulators for the purpose of ensuring—

(a) that the exercise of an approved regulator's regulatory functions is not prejudiced by its representative functions, and

(b) that decisions relating to the exercise of an approved regulator's regulatory functions are so far as reasonably practicable taken independently from decisions relating to the exercise of its representative functions.

(2) The internal governance rules must require each approved regulator to have in place arrangements which ensure—

(a) that the persons involved in the exercise of its regulatory functions are, in that capacity, able to make representations to, be consulted by and enter into communications with the Board, the Consumer Panel, the OLC and other approved regulators, and

(b) that the exercise by those persons of those powers is not prejudiced by the approved regulator's representative functions and is, so far as reasonably practicable, independent from the exercise of those functions.

(3) The internal governance rules must also require each approved regulator—

(a) to take such steps as are reasonably practicable to ensure that it provides such resources as are reasonably required for or in connection with the exercise of its regulatory functions;

(b) to make such provision as is necessary to enable persons involved in the exercise of its regulatory functions to be able to notify the Board where they consider that their independence or effectiveness is being prejudiced.

(4) The first set of rules under this section must be made before the day appointed by the Lord Chancellor by order for the purposes of this section.

Section 51 – control of practising fees

51 Control of practising fees charged by approved regulators

(1) In this section “practising fee”, in relation to an approved regulator, means a fee payable by a person under the approved regulator's regulatory arrangements in circumstances where the payment of the fee is a condition which must be satisfied for that person to be authorised

by the approved regulator to carry on one or more activities which are reserved legal activities.

(2) An approved regulator may only apply amounts raised by practising fees for one or more of the permitted purposes.

(3) The Board must make rules specifying the permitted purposes.

(4) Those rules must, in particular, provide that the following are permitted purposes—

(a) the regulation, accreditation, education and training of relevant authorised persons and those wishing to become such persons, including—

(i) the maintaining and raising of their professional standards, and

(ii) the giving of practical support, and advice about practice management, in relation to practices carried on by such persons;

(b) the payment of a levy imposed on the approved regulator under section 173;

(c) the participation by the approved regulator in law reform and the legislative process;

(d) the provision by relevant authorised persons, and those wishing to become relevant authorised persons, of reserved legal services, immigration advice or immigration services to the public free of charge;

(e) the promotion of the protection by law of human rights and fundamental freedoms;

(f) the promotion of relations between the approved regulator and relevant national or international bodies, governments or the legal professions of other jurisdictions.

(5) A practising fee is payable under the regulatory arrangements of an approved regulator only if the Board has approved the level of the fee.

(6) The Board must make rules containing provision—

(a) about the form and manner in which applications for approval for the purposes of subsection (5) must be made and the material which must accompany such applications;

(b) requiring applicants to have consulted such persons as may be prescribed by the rules in such manner as may be so prescribed before such an application is made;

(c) about the procedures and criteria that will be applied by the Board when determining whether to approve the level of a fee for the purposes of subsection (5).

(7) Rules under subsection (6)(c) must, in particular, contain—

(a) provision requiring the Board, before it determines an application for approval of the level of a fee, to consult such persons as it considers appropriate about the impact of the proposed fee on persons providing non-commercial legal services;

(b) provision about the time limit for the determining of an application.

(8) In this section “relevant authorised persons”, in relation to an approved regulator, means persons who are authorised by the approved regulator to carry on activities which are reserved legal activities.

Section 205

205

Consultation requirements for rules

(1) This section applies in relation to—

(a) rules made by the Board under this Act, and

(b) rules made by the OLC under Part 6,

other than excluded rules.

(2) If the Board or the OLC (“the rule-making body”) proposes to make any rules, it must publish a draft of the proposed rules.

(3) The draft must be accompanied by a notice which states that representations about the proposals may be made to the rule-making body within the period specified in the notice.

(4) Before making the rules, the rule-making body must have regard to any representations duly made.

(5) If the rules differ from the draft published under subsection (2) in a way which is, in the opinion of the rule-making body, material, it must publish details of the differences.

(6) The rule-making body must publish any rules it makes, and rules may not take effect before the time they are published.

(7) Subsection (6) does not apply to rules made by the Board under section 37(4), 95(3) or 173.

(8) The rule-making body may make a reasonable charge for providing a person with a copy of—

(a) a draft published under subsection (2), or

(b) rules published under subsection (6).

(9) In this section “excluded rules” means—

(a) rules of procedure made by the Board for the purposes of paragraph 21 of Schedule 1,

(b) rules made by the Board in its capacity as an approved regulator or a licensing authority, and

(c) rules of procedure made by the OLC for the purposes of paragraph 20 of Schedule 15; and references to making rules include references to modifying the rules and, in relation to any modifications of rules, references to the proposed rules are to be read as references to the proposed modifications.

(10) This section is subject to section 156(3)(which disapplies this section to OLC rules made in response to a Board direction under section 156(1)(b)).

Annex B

1. The issue of regulatory independence was a crucial part of Clementi, and of the subsequent work by Government and Parliament. Although the focus of all involved should now be on looking forwards, not backwards, the historical backdrop to the work is relevant. Accordingly, this Annex sets out the contextual background, to inform and enhance understanding of what precedes it in the paper.

The history of the reforms

2. In March 2001, the Office of Fair Trading published its report, *Competition in the Professions*[30]. Among its findings, the OFT's report identified a number of rules of the legal professions that were potentially unduly restrictive, and that may have had negative implications for consumers. It was suggested that these rules could affect the quality and price of legal services. Accordingly, the OFT recommended that rules governing the legal professions should be fully subject to competition law and that unjustified restrictions on competition should be removed.

3. The legal profession reacted to the report by making some changes on its own initiative. For example, the Bar introduced a new Direct Access Scheme that enabled – in certain circumstances – a barrister in independent practise to be instructed by a non-lawyer. However, it was felt that a more root and branch review of the regulatory framework was necessary, to ensure that there was sufficient confidence in the structures in place; and in particular to ensure that the interests of consumers were not being overlooked. The Government response was to launch a consultation process, which concluded by finding that *"the current framework is out-dated, inflexible, over-complex and insufficiently accountable or transparent"*.

4. Recognising the need for a wide-ranging evaluation of current structures, and for recommendations on suitable reforms, the then Lord Chancellor commissioned Sir David Clementi – the Chairman of Prudential PLC and a former Deputy Governor of the Bank of England – to lead an independent review of the regulatory framework for legal services in England and Wales. Sir David's report[31], published in December 2004, concluded:

    - the system had insufficient regard for the interests of the consumers;
    - the governance structures of the main professional bodies were inappropriate for their regulatory tasks;
    - the oversight regulatory arrangements for professional bodies were over-complex and inconsistent; and
    - there were no clear underlying objectives and principles.

[30] http://www.oft.gov.uk/shared_oft/reports/professional_bodies/oft328.pdf
[31] See footnote 6, above.

Separating regulation from representation

5. The vast majority of the legal services sector is covered by organisations with both regulatory and representative responsibilities. Although Sir David Clementi considered establishing a Legal Services *Authority*, which would replace the existing regulatory bodies and regulate all lawyers directly, he concluded that retaining dual-purpose bodies like the Law Society and the Bar Council in the regulatory system would be advantageous, not least in the practical sense of retaining expertise, helping to maintain the confidence of the profession and achieving economies of scale.

6. In essence, Clementi's so-called 'Model B+' provided "for the setting up of an oversight regulator, the Legal Services Board (LSB), vested with regulatory powers which it would delegate to recognised front-line bodies, where it was satisfied as to their competence and that appropriate arrangements, in connection with governance issues and the split between regulatory and representative functions, had been made"[32].

7. Sir David recommended "that it should be a statutory requirement for a front-line regulatory body to separate out its regulatory and representative functions, but that in regard to detailed governance arrangements the body would need to satisfy criteria laid down by the LSB… Where the LSB was not satisfied that the governance arrangements for a front-line regulator were sufficient, it should be empowered to call for further measures, including the right finally to insist upon institutional separation. If the LSB is to remain an oversight regulator, and have only a small staff itself, it needs to have confidence that the underlying regulatory boards are satisfactorily constituted"[33].

8. Responding to the Review, the Government endorsed Clementi's 'separation' recommendation. Its 2005 White Paper said: "Existing FLRs [Front Line Regulators, now approved regulators] will need to demonstrate to the LSB that they have appropriate governance arrangements in place. For most this will mean demonstrating a clear separation between their regulatory and representative functions. This will provide the assurance that consumers need that FLRs are not driven by the interests of their members. However, we recognise that this may present practical difficulties for smaller FLRs. It will be for the LSB to consider suitable arrangements that maintain the integrity of this principle but also provide for the challenges faced by smaller FLRs"[34].

[32] See footnote 6, above. Clementi report, Foreword (page 8) paragraph 16.
[33] See footnote 6, above. Clementi report, Chapter B (page 39) paragraph 39.
[34] See footnote 12, above. White Paper, (page 30) paragraph 5.2.

Pre-Legislative Scrutiny

9. The Government published a draft Bill[35] in May 2006, which was based on the proposals set out in its White Paper. Clause 25(1)(d) of that draft Bill would have given the Board a power to direct remedial action where an approved regulator had failed to ensure that the exercise of its regulatory functions was not prejudiced by any functions it had in connection with representation, or promotion, of the interests of persons regulated by it.

10. The Joint Select Committee chaired by Lord Hunt of Wirral MBE, which scrutinised the draft Bill, spent some time considering this provision. During the course of its evidence hearings, Sir David Clementi told the Committee that he did not believe the principle of separation was "clearly enough enshrined"[36] in the draft Bill as it then stood. The Committee's report highlighted that Sir David "noted that clause 25(1)(d) gives the regulator the power to issue directions in respect of any situation where an approved regulator's regulatory functions are "prejudiced by" its representative functions and concluded "this is a long way short of my recommendation which was for the ring fencing of the regulatory board of the [approved regulators]""[37].

11. Lord Hunt's Committee expressly supported Sir David Clementi's position. At paragraph 118 (recommendation 7) of its report, the Committee said:

> "*[w]e recommend that the draft Bill should be amended to require approved regulators to separate fully their regulatory and representative functions. This separation should require all regulatory decisions to be taken by an independent regulatory arm; that arrangements must be made to ensure the regulatory arm has the resources it reasonably requires; and that the regulatory arm should be entitled to seek the intervention of the LSB should it feel that any action or inaction on the part of the relevant professional body is damaging to its independence or effectiveness*".

12. These two sentences are important in understanding the context of what followed. The overriding message from the Joint Committee, contained in the first of those sentences, was one of full separation ("require approved regulators to separate fully..."). Citing with approval the text of Clementi's evidence immediately beforehand, the Committee implicitly if not explicitly – and in any event clearly – backed Sir David's call for the "ring fencing" of regulatory arms. The specific issues raised by the Committee in the second sentence are also instructive. The implication is that if, for instance, regulatory decision-making and/or resourcing were, in any practical sense, left under the control of an approved regulator with representative functions, there was unlikely to be any public confidence that the regulatory arm was sufficiently independent of the profession to regulate in the public interest.

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[35] http://www.official-documents.gov.uk/document/cm68/6839/6839.pdf.
[36] Extract from Memorandum to the Committee from Sir David (ref Ev 72), reproduced in Volume II of the Joint Select Committee's report, page 102.
[37] See paragraph 113 of Joint Committee's report.

13. In its response[38] to the Joint Committee, the Government accepted the case for change, recognising the centrality of separation to the credibility of Clementi's Model B+. A new provision was therefore drafted for the full Bill introduced to the House of Lords in November 2006: what was initially clause 29 went on to become section 30 of the Act that received Royal Assent in October 2007.

The Parliamentary Passage

14. Regulatory independence – and the principle of separating regulatory and representative functions – was also a central theme of the Parliamentary debates[39] during passage of the full Bill. While the issues were debated exhaustively in both Houses, a short summary of relevant debates might help to demonstrate the will of Parliament in this regard. Much of those debates focused on the newly drafted provision in clause 29 (subsequently 30) of the Bill

15. From the very first speech on the full Bill, made by the then Lord Chancellor during the House of Lords' second reading debate on 6 December 2006, it was clear that the Legal Services Act (as it was to become) would mean significant change in the legal services sector. The focus, right from the off, was described as putting "consumers' interests at the heart of the regulatory arrangements"[40]. Later on in his speech, the Lord Chancellor said:

> "*Part 4 of the Bill sets out the arrangements under which the LSB will regulate "approved regulators" such as the Law Society and the Bar Council. This defines the regulatory and representative functions of approved regulators and importantly, at Clauses 28 and 29 [now sections 29 and 30], provides for a proper separation in the exercise of these functions. While the LSB is prohibited from interfering in their representative functions it requires approved regulators to have internal governance arrangements that prevent regulatory decisions being unduly influenced by representative interests. The proper resourcing of regulatory boards is also required*"[41].

16. The detail of the issue was picked up in committee. In the House of Lords, the opposition's Shadow Lord Chancellor, Lord Kingsland, tabled two amendments which were debated on 22 January 2007, both of which were intended to probe the integrity of the Government's drafting. Lord Kingsland said: "we support the Clementi recommendations that require professional bodies to separate their regulatory responsibilities from any representational role *and* [our emphasis] ensure that decisions on regulatory and representative functions are taken independently"[42]. Later he said that the distinction between regulation and representation would "be

[38] http://www.official-documents.gov.uk/document/cm69/6909/6909.pdf.
[39] See e.g. second day of Lords Committee (22/1/07, from column 974); and sixth sitting of Commons Committee (19/06/07, from column 226).
[40] Rt Hon The Lord Falconer of Thoroton QC, Lord Chancellor and Secretary of State for Constitutional Affairs. Legal Services Bill [HL] second reading, House of Lords, Hansard 6/12/06 column 1162. This sentiment was often repeated throughout the passage of the Bill, by Ministers and others alike.
[41] House of Lords Hansard 06/12/06, column 1164 to 1165 *per* The Lord Chancellor.
[42] House of Lords Hansard 22/01/07, column 974, *per* Lord Kingsland.

crucial to the effective work of the Legal Services Board"[43]. In response, the Minister (Baroness Ashton of Upholland) reiterated:

> "*the Bill should require regulators to separate fully their regulatory and representative functions... The Joint Committee said that it would help to ensure that the Legal Services Board acts proportionately if approved regulators separate fully and transparently their regulatory and representative functions. That would mean that there would be a high level of public confidence and less reason for the LSB to intervene. I completely agree with that. In line with the model that we have adopted, we think it is appropriate for the approved regulators, following the board's internal governance rules, to organise themselves in such way as they see fit in order to achieve that. If the board is not satisfied that the regulatory functions of an approved regulator have been separated from its representative functions, it is able to direct the approved regulator to take sufficient action to achieve that*"[44].

17. That point was built on by the Minister in the House of Commons. Bridget Prentice MP, speaking during the committee stage debate on (what was then) clause 29, said:

> "*...it is important that the board is able to take appropriate action where it considers that the approved regulator is allowing representational interests to prejudice the exercise of regulatory functions. It is important to ensure that the board is able to act where, for example, the actions of the representative side discredit the regulatory arm, resulting in damage to consumer confidence. Clause 29(2) is necessarily and deliberately wide in definition to ensure that the board is not prevented from taking such appropriate action.*"[45]

Developing our proposals

18. In setting out proposals for consultation, we suggest that the intention of the 2007 Act – and of Parliament when passing it – is clear. The existing front line bodies that have been involved with the regulation of legal services to date should continue to be recognised in statute as approved regulators only so long as (and on the condition that) the function of regulation is carried on with sufficient separation from any representational and/or promotional function that they also undertake. Without sufficient separation, we believe that the evidence collected before, during and after the Clementi review suggests that the public, and in particular the consumers of legal services, would view regulation as being compromised, or in some way prejudiced, by representational or professional interest.

19. When considering the degree of 'separation' envisaged between regulation and representation, our view is that Parliament did not intend to mandate institutional separation. However, there was an expectation that clear and robust separation of function could and should be achieved, both in terms of appearance and reality, where any approved regulator also had representative responsibilities.

[43] House of Lords Hansard 22/01/07, column 976, *per* Lord Kingsland.
[44] House of Lords Hansard 22/01/07, column 976, *per* Baroness Ashton.
[45] House of Commons Public Bill Committee, 19/06/07, column 226, *per* Bridget Prentice MP.

20. The proposals in our consultation paper therefore seek to give effect to that intention. If this model envisaged by Parliament fails, as we made clear in our 2009/10 draft Business Plan[46], the very real likelihood is wholesale statutory regulation, with progressive loss of public confidence in the concept of a profession. In our view, this would be damaging for the profession, for the consumer and for the public. We must therefore strive to make it work.

[46] http://www.legalservicesboard.org.uk/what_we_do/consultations/index.htm. See Chapter 2 (Context), page 5, paragraph 10.

Annex C

Impact Assessment

1. In our draft business plan for 2009/10[47], we made a commitment to set out the anticipated impact on consumers and the profession of alternative regulatory options in our consultation papers; and to seek views from others about whether we have made the right assessment.

2. Our consultation on regulatory independence is the first policy consultation exercise we have undertaken. This is therefore our first opportunity to carry out an impact assessment alongside the published consultation paper.

3. In inviting comments, we urge consultees to focus on the issues of substance that we raise; and on wider issues of process that can help to shape future impact assessment work that we undertake.

Purpose and intended effect

4. The Legal Services Board is under a statutory duty to make rules under sections 30 and 51 of the Legal Services Act 2007 (c.29) that will, respectively, ensure appropriate separation of approved regulators' regulatory functions from any representative functions also carried out; and provide for the control of practising fees charged by approved regulators. In discharging our duty to make those rules, we are required to act in a way that is compatible with – and that is considered most appropriate for meeting – the regulatory objectives set out in section 1 of the Act. We are also under a duty to have regard to best regulatory practice.

5. Under the terms of the statute, the purpose of the rules we must make under section 30 is to ensure that the exercise of approved regulators' regulatory functions is not prejudiced by any representative functions also undertaken; and, so far as reasonably practicable, to ensure that decisions relating to the exercise of an approved regulator's regulatory functions are taken independently from decisions relating to the exercise of any representative functions.

6. The purposes for which we must make rules under section 51 are twofold. First, we need to specify for what permitted purposes approved regulators may apply amounts raised by practising fees paid by their practitioner members. Second, because we have the responsibility of approving the level of any practising fees charged by approved regulators, we must also make rules about how applications for its approval are to be made, considered and decided upon.

7. The obligation to comply with the rules will extend exclusively to the eight approved regulators recognised by the Legal Services Act; and to any other bodies that might

[47] http://www.legalservicesboard.org.uk/what_we_do/consultations/index.htmb. See Chapter 5 (Policy Focus), page 10, paragraph 40).

be designated in the future, from the point that they are so designated. The extent to which the current eight bodies, listed in the table under Part 1 of Schedule 4 to the Legal Services Act, would each be bound to comply with some or all of the rules eventually made would be determined by the extent to which those bodies do or do not exercise both regulatory and representative functions[48].

8. Neither the Council for Licenced Conveyancers nor the Master of the Faculties is responsible for exercising representative functions as defined by the Act. We therefore assume that the rules made under section 30 would have little if any impact on those bodies. However, we envisage the section 30 rules being applicable to each of the other six approved regulators[49]. In any event, the clear requirement of the Act that representative work should be distinct from regulatory work (and managed accordingly) should be observed by all approved regulators, irrespective of the applicability of section 30 rules.

9. The section 51 rules we make will apply to each of the eight approved regulators. Each of those bodies levies their respective regulated communities, charging a fee, the payment of which is mandatory as a condition of being authorised to practise.

10. Clearly though, while the duty to comply with the rules we make will extend only to the approved regulators we oversee and so the *direct* regulatory impact of our proposals will be relatively simple to foresee, the impact of the approved regulators' compliance with our rules will be felt much more widely. That impact will itself be determined by the policy proposals that we bring forward for the statutory rules.

Policy objectives

11. Traditionally, consultation exercises involve discussion and consideration of certain policy options, including the standard 'do nothing'. Each option would be designed to achieve particular objectives; or perhaps to achieve the same objectives in different ways. However we are dealing with issues that have been the subject of wide spread public debate – at least at the principle level – for a number of years. There have been consultations, independent reviews, White Papers, pre legislative scrutiny and full Parliamentary debates. Now that the Legal Services Act is on the statute book, the 'do nothing' option is impossible: we are required by the law to make new rules and to entrench the vision of regulatory independence.

12. It is therefore our intention to present for consultation a defined set of proposals. We will explain our policy objectives, our rationale and methodology and then suggest draft rules on which we will seek stakeholder and public comment.

13. Accordingly, in developing our draft rules – and to shape the intention underlying those rules – we have identified criteria that we propose to meet. These are:

[48] The definition of "regulatory functions" and "representative functions" are set out in section 27 of the Legal Services Act.

[49] To put this in perspective, of the circa 135,600 lawyers regulated by the eight approved regulators, under 2,000 of them fall to be regulated by either the CLC of the Master of the Faculties. That equates to just 1.4% of the entire regulated community.

(a) the rules we develop should, so far as possible, ensure compliance and furtherance of the regulatory objectives;

(b) the evidence established by Government and Parliament that there was a lack of confidence in professional self-regulation[50] should be addressed with the central aim that the new regulatory framework should hold and maintain public, consumer and professional confidence from the point that the LSB opens its doors for business; and

(c) the role of the Legal Services Board as a proportionate oversight regulator should underpin the drive to meet our other policy objectives.

14. These proposed criteria need to be developed into proposals on which we can consult. In terms of the rules to be developed under section 30, it seems to us that three particular issues are important:

- the rules we make should seek to maximise public and consumer confidence in the integrity and effectiveness of the regulatory framework. The reality and perception of regulation being managed independently from the profession will be important;
- the regulated community should be able to recognise and accept that the framework under which they will be required to operate is both fair and appropriate. In particular, individual members of the legal profession should have confidence in the expertise and integrity of those that are regulating them; and
- the rules that we develop should fix clear principles and then require each approved regulator to apply those principles in light of the circumstances of their own branch of the profession.

15. In terms of the section 51 rules, we suggest that there is also a need to meet three key tests:
    - where charges are levied on members of the profession as a mandatory part of the authorisation process, any funds raised should only be applied for purposes that are demonstrably regulatory in nature or that serve some other public interest function. Membership fees for purely representative purposes should not be a *mandatory* part of any authorisation process. Importantly, the purposes for which funds raised through the practising certificate levy permitted under the rules should extend to any and all purpose(s) connected with meeting or furthering the regulatory objectives;
    - the process by which approved regulators set and then levy charges from their regulated community should be as transparent as possible. If practitioners are paying for their own regulation, maximum transparency can allow them – and the wider public – to hold those spending the money to

[50] This perception was referred to in the regulatory independence consultation paper to which this Assessment is annexed. See paragraph 2.5 (page 14). Also see Annex B of to the consultation paper for additional background.

account. That accountability will be a core component of building a framework that ensures trust and confidence; and

- we envisage a need for the rules we make to be flexible enough to meet the diverse needs (including the need to fit with budgeting cycles) of different approved regulators across the system. Without this flexibility, we imagine that the system will find it extremely difficult to function effectively, or at all.

Impact analysis

16. In shaping our proposals, we have made an initial assessment of the impact we think is likely in certain areas. Most directly, the regulatory impact of our proposed rules will be felt by approved regulators. It is likely that the largest two approved regulators (the Law Society and the Bar Council) will experience a level of impact that is (at least to some extent) very different from that likely to be felt by the other six approved regulators. This is not simply because of size and relative wealth of the bodies themselves, but significantly because both organisations have already done a lot of work to develop internal mechanisms in anticipation of the statutory rules that we now have to make.

17. We also assess the likely impact on the wider regulated community of authorised persons. While we do not regulate lawyers, we do regulate their regulators. We will therefore almost of necessity make our presence felt at practitioner-level. An assessment is also made of equality impacts on practitioners and on consumers, including large corporations, small businesses or individuals on the High Street. We reiterate that our impact assessment is provisional and we invite comments on substance and on our broader framework.

18. **Regulatory impact on larger approved regulators** – The Law Society and Bar Council have, over recent years, worked to separate the regulatory and representative functions for which they are respectively responsible. No assessment has been made of the extent to which this work would be likely to satisfy the body of proposed rules we are presently consulting on. There has been no judgement made about the extent to which the rules we end up making will require action from either the Law Society or the Bar Council. However, it seems clear (subject to the outcome of consultation) that action will be necessary, if only to comply with the approval and dual self-certification regime we have proposed.

19. That said, in respect of our proposed section 30 rules, we expect that the most significant practical issue for approved regulators, including both of the larger bodies, will be the impact of our rules on the broad business model that they operate. If rules permit (or encourage) the continuance of a model whereby common support services like accommodation and facilities, finance, HR and IT can be provided across the organisation, covering regulatory and representative functions, then economies of scale can be enjoyed. If rules were to require a greater degree of institutional separation, those economies of scale could be lost. It is therefore important, so long as the integrity of regulatory independence and operational effectiveness is

maintained, not to make rules that are unduly burdensome. We have shaped our proposals accordingly.

20. In respect of our proposed rules under section 51, there is a risk that new processes and requirements imposed by the Legal Services Board will cost extra and/or be harder to manage. This risk extends to an operational risk for the Board itself, as the levy funding its work and that of the OLC will not be effective unless approved regulators can levy the members of their profession at the appropriate time. The law requires us to make rules and approve applications under those rules – and so necessarily give rise to some degree of risk. By shaping our policy to fit the particular circumstances of each approved regulator, we think we are mitigating this risk.

21. On the other hand, the benefits of this work should not be forgotten amongst discussion of risk. If market confidence is boosted and consumers are more trusting of the regulatory framework, the providers of legal services should find increased opportunities – and this should impact positively for the Law Society/SRA in particular[51]. We have conducted no work to quantify potential benefits here.

22. Importantly, if the Legal Services Board has confidence in the regulatory arrangements of approved regulators – principally because consumers and the public voice confidence in the arrangements, the extent to which we will need to intervene in day-to-day regulation across the sector will be reduced significantly. Robust rules should actually cut the cost of oversight regulation in the longer term. This is a core assumption of the Clementi review and all that followed. The Legal Services Board wholeheartedly endorses it. We hope that the profession will respond accordingly, accepting the need for the principles we propose, helping reduce the need for oversight regulation in the future.

23. **Regulatory impact on smaller approved regulators** – Many of the issues applicable to the Law Society and Bar Council are also likely to apply to smaller regulators. But cost is likely to be, proportionately, a far more tangible risk. First, at least some of the smaller regulators are constituted at present by an overwhelming majority of elected representatives acting, in effect, pro bono for the good of the organisation. Although sometimes expenses are covered, the resulting bill is insignificant. Any requirement under section 30 rules to ensure sufficient proportion of independent persons involved with discharging regulatory functions will entail additional cost where previously there was none. Unlike larger bodies, smaller approved regulators are more likely to see costs escalate, in percentage terms, dramatically.

24. Second, unlike the Law Society and Bar Council, the vast majority of authorised-person members of smaller organisations are not strictly required to practise under the auspices of those organisations. So whereas a barrister cannot act as a barrister otherwise than under the regulatory framework of the Bar Council, a patent attorney,

[51] As regulator of circa 80% of authorised persons across the market, and as a likely leader in innovation around ABS, many of the practitioners making the most of opportunities are likely to be regulated through the Law Society/SRA.

trademark attorney or costs lawyer could give legal advice in their respective fields without formally coming under any regulatory regime. The only requirement for regulation comes when the practitioner provides reserved legal services – and on a significant number of occasions, no such services need be given.

25. The risk, therefore, is plain. If the costs passed on by smaller approved regulators (as a direct result of our statutory rules) seem to the respective regulated communities to be disproportionate, many of their members may leave and practice outside the regulatory net. That means the approved regulators will lose membership fee/practising certificate income. It also means that consumers may ultimately find themselves without recourse to regulatory remedies in certain cases.

26. The debate about the extent to which legal services, as such, need to be regulated is wider than the scope of this particular exercise. It is an issue on the Legal Services Board's agenda, which will need to be considered in due course. However, in respect of the immediate exercise, the intention of the rules we seek to make is clear: policy principles must be capable of proportionate application. That does not mean we can compromise on principles. But it may mean that particular approved regulators can make a case for implementation that might not stand scrutiny were they to have significantly more resources. We would be interested in views on the extent to which this proposition is valid.

27. **Regulatory impact on authorised persons** – Although the primary impact will be on the approved regulators to which individual lawyers belong, lawyers themselves will feel some impact from our work on regulatory independence and more broadly. We do not foresee practising fees having to rise unduly. There is likely to be some impact, however, at least insofar as the short and medium term is concerned. Our rules under section 51 will seek to protect the most vulnerable in the market place – the criteria against which we plan to assess practising fees will include impact on regulatory objectives, part of which will involve looking at the strength and diversity of the profession. However if fees do rise, particularly where authorisation from an approved regulator is not an essential (i.e. mandated under statute) part of their practise[52], some practitioners may feel that the cost of regulation is no longer worth paying. They could simply walk away from regulation, continuing to practise outside the framework overseen by the Legal Services Board.

28. We would not expect our rules, under either section 30 or 51, to have a disproportionate affect on any authorised person. This consultation exercise will look at the extent to which individual lawyers, and individual firms, chambers or even sectors will feel any impact.

29. The benefits of robust rules, particularly under section 30, need to be considered alongside potential adverse impacts. If the rules work well, there will be less need for oversight intervention from the Legal Services Board. This will reinforce the culture of

[52] i.e. because the practitioner does not undertake any reserved legal activities as part of his/her practise.

profession-led but nonetheless rigorous and effective regulation. In turn, it should help to buttress the essential characteristics of a strong and independent profession.

30. **Consumer impact** – Consumers come in all shapes and sizes, some with money and previous experience; others with extreme vulnerabilities that cry out for additional and robust protections to be in place. However, in the broadest possible sense, we have developed rules on the basis that consumer interest should be at the heart of our rationale. We aim to establish much higher levels of consumer and public confidence in the profession than we believe has been evident to date.

31. However, if the effect of our regulatory proposals is to drive a certain proportion of hitherto regulated lawyers away from regulation (i.e. they leave their approved regulator because of cost burdens and set up in practise exclusively in non-reserved areas, as paragraph 27 above envisages), the potential impact is unclear.

32. On one level, the change could be viewed as positive for consumers. If cost would be disproportionate and profit margins could not accommodate the impact, those costs would be passed on to paying consumers. If those consumers are accessing services that statute does not – presumably for good reason – require to have 'reserved activity' status, might consumers benefit from such a change, at least in price terms?

33. However, the flipside of the coin is all too predictable. If lawyers move away from regulatory supervision, consumers otherwise entitled to redress where things go wrong would probably have no guaranteed access to such redress. Nor would any mechanism necessarily be present to ensure appropriate standards are maintained in client care or in the substance of the legal advice provided.

34. Our consultation exercise tests the extent to which 'consumer' interests have been reflected in our proposals. We need to engage with the widest possible range of consumers, including representative groups. We welcome evidence from any and all other groups and individuals too.

35. **Equality impact** – We expect the impact on the profession and certainly on the majority to be relatively low. The impact on equality and diversity issues across the profession (and consumers) would appear also to be low. Positively, we believe that our proposals will enhance the management of regulatory functions, including those related to the regulatory objective of encouraging a strong, effective, diverse and independent legal profession. However, many of the authorised persons on whom impact might be most significant could be members of the smaller approved regulators and/or some of the lowest earning members of the profession. We should therefore seek to establish whether the proposals have a demonstrable effect on equality and diversity issues.

Next steps

36. We want to use the consultation exercise now underway to seek views from the widest possible set of stakeholders. In particular, we are keen to find evidence of

indicative actual costs of compliance, and other impacts, to enable a robust analysis of the envisaged impacts foreseen at this stage of the policy development process. We look forward to receiving that evidence.

37. Once we have analysed the evidence received, we aim to publish a final version of this impact assessment alongside the rules we make nearer the end of the year.

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