COMPLIANCE AND ENFORCEMENT – STATEMENT OF POLICY

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A RESPONSE BY THE INSTITUTE OF LEGAL EXECUTIVES AND ILEX PROFESSIONAL STANDARDS LIMITED

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CONSULTATION BY THE LEGAL SERVICES BOARD ON THE COMPLIANCE AND ENFORCEMENT STRATEGY (INCLUDING MAXIMUM FINANCIAL PENALTY), AND DRAFT STATUTORY INSTRUMENT AND RULES

DATE: 26 OCTOBER 2009

Introduction

This Response represents the joint views of the Institute of Legal Executives (ILEX) an Approved Regulator under the Legal Services Act 2007 (the Act) and its regulatory arm ILEX Professional Standards Limited (IPS). Views were shared and with no significant difference of opinion between the two organisations,this Response is a sent jointly. Answers are set out below to the questions in the consultation, where ILEX and IPS are able to offer a view.

Question 1 – What are your views on the LSB's proposed Compliance and Enforcement Strategy? If you think we should have other or additional aims, please say what you think they should be and why you think we should have them.

We approve the LSB's approach to focus enforcement action on Approved Regulators. We also approve the approach to focus primarily on the outcomes for consumers and those who are regulated by the Approved Regulator. We approve the LSB approach to taking into account the better regulation principles and the protection and promotion of the public interest.

The LSB considers that compliance will ensure that those who provide regulated activities are confident that their Regulators are, amongst other things, up to date in their professional thinking and management practice. We are not convinced that it is for the LSB to use their compliance and enforcement strategy to interfere with the management practice of the Approved Regulators and to define what "up to date" professional thinking and management practice might be.

We would like to see an emphasis within the LSB's strategy on informal resolution, with enforcement at any stage being seen very much as a last resort.

We also reiterate our concern, expressed previously in relation to the LSB's business plan, that the LSB seems set on using the compliance and enforcement strategy to establish something in the way of a 'gold standard' for the operation of the regulation of legal services. The LSB appears to have conceded the point in relation to its business plan, but we remain concerned that the compliance and enforcement strategy seeks to make the Approved Regulators "seen as world leaders" in the full range of their activities. Consumers can be confident that their advisers are 'proportionately regulated' without the aim of any particular Approved Regulator to be a world leader; this sets the level at which the LSB can intervene under its compliance and enforcement strategy at too low or too easy a level.

Question 2 – What are your views on the matters that the LSB proposes to take into account in deciding whether (and if so what) action is appropriate? In particular, what are your views on how the LSB should judge whether an Approved Regulator's acts or omissions have been unreasonable?

The LSB's policy statement must make it absolutely clear that the LSB will not seek to exercise any of its powers, including informal resolution, unless it is satisfied that the Approved Regulator's approach or action is unreasonable in significantly prejudicing one or more of the regulatory objectives. The policy statement should make it clear that the LSB will fully share with the Approved Regulator not only any concern that the LSB may have, but also the evidence for that concern.

One definition of 'unreasonable' might be the test used in judicial review cases i.e. the Wednesbury principle, which, in short says that an administrative body will only be found to have acted unreasonably if its decision was so far removed from the norm that no reasonable person would have contemplated that particular decision. We believe that this would be a useful benchmark test, as it will indeed be the test used in any judicial review proceedings brought by an Approved Regulator against the LSB itself.

It will be important, however, that in any definition of 'unreasonable', the result does not inhibit innovation, flexibility and beneficial competition including diverse standards between Approved Regulators.

Question 3 – What are your views on the informal resolution process and the timescales? If you have alternative suggestions please say what they are and why you consider they are more appropriate.

The focus of LSB action should be on informal resolution as the Act indicates. We appreciate that in emergency situations the informal resolution will not be appropriate; however it must be given significant emphasis.

Wherever the LSB becomes aware of an issue with an Approved Regulator we would expect the LSB not only to notify the Approved Regulator promptly of the issue, but will expect full disclosure of the evidence giving rise to that concern.

We have concerns about the timescales set out in paragraph 3.12. In a small organisation, where only one member of staff may be employed to handle a particular regulatory issue, 4 days is a very short time within which to produce the detailed response expected, if that individual is on sick leave or annual leave. Acknowledgement of notification within 7 working days and resolution or a detailed proposal within a further 20 working days is a more realistic timescale. Such restricted timescales as are proposed by the LSB really makes the informal resolution appear quite formal. The informality of the process is merely the LSB being open to the Approved Regulator's proposals for resolution. What may be missing is the LSB engaging in constructive dialogue with the Approved Regulator to achieve a resolution. The LSB should be promoting guidance, collaboration and flexibility.

Question 4 – What should the LSB publish about informal resolution of an issue? Will publication help to spread learning in the regulated community or do you consider that it may hamper informal resolution of an issue? Are there alternatives that you consider would be more appropriate?

We support the LSB's commitment to transparency in all that it does. We accept that information of value to other Approved Regulators may emerge from the informal resolution of an issue between the LSB and an Approved Regulator.

However, as the LSB will publish all relevant documentation in all other types of enforcement action, the restriction on publication might itself prove an incentive to review matters at an early stage and informally if the informal resolution remains primarily a private matter. We would suggest that the reporting of an informal resolution could be 'anonymised' and simply put forward as best practice in appropriate cases.

Question 5 – What are your views on how performance targets could work?

We believe that performance targets can be a positive step and helpful to an Approved Regulator. We would expect it to be rare for the LSB to take a combined approach as set out in paragraph 3.21; if performance targets are set, particularly if they are agreed which we would expect the aim to be between the LSB and the Approved Regulator, there should not need to be 'a much quicker route to compliance and the achievement of the desired outcomes'. Performance targets being used in anything other than a positive and supportive way by the LSB to address an issue and to raise standards would, in our view, have an ultimately negative affect.

Question 6 – What are your views on how directions should be used?

We are somewhat confused and concerned by paragraph 3.26 and would welcome further discussion on this issue. Whilst we understand that directions are likely to be used when the LSB wants to ensure that specific actions are carried out by an Approved Regulator, we would assume that they are only to be used if the Approved Regulator has not met previously designated performance targets.

Question 7 – What are your views on using directions to require an Approved Regulator to spend money on a specific issue?

We assume that the LSB will rarely, if indeed it has the power, decide for itself what Approved Regulators should be spending their money on. We assume that such a direction would be used where, for example, it is clear that the Approved Regulator is unreasonably refusing an item in the regulatory arms' proposed budget.

Question 8 – What are your views on how censure should be used?

We take the view that censure poses a danger to the consumer's perception of and confidence in the legal system as a whole. Issues of proportionality need to be considered before using this measure, not merely issues of the unreasonable nature of an individual or series of actions by the Approved Regulator directly or indirectly through its regulatory arm. We expect this to be used very rarely indeed.

Question 9 – What do you think the LSB's aim should be in imposing financial penalties?

We think that the LSB's aim in using financial penalties is flawed, and requires considerably more thought.

Although the LSB claims that those who pay for the Approved Regulator through their practising fees should be able to influence the Approved Regulator's behaviour, those who pay for the Approved Regulator will be exercising that 'influence' ex-post facto.

Furthermore, if it is a regulatory cost to be levied on those who are regulated by the Approved Regulator, and those individuals have the ability to switch to another Approved Regulator, the levying of a financial penalty may, in effect, put the Approved Regulator out of business. It surely cannot be appropriate to use financial penalties to put an Approved Regulator out of business; there are other enforcement measures under the Act that the LSB can use to intervene in or close down an Approved Regulator.

We also question whether that particular line of thinking is correct in any event. For example, if those who are regulated by the Law Society/SRA wish to change Approved Regulators, there is in fact no where else for them to go. To move Regulators would mean that the individuals would cease to be solicitors. A conveyancing solicitor may be able to change Approved Regulators to the Council for Licensed Conveyancer and become a Licensed Conveyancer; he/she would not be able to maintain their status as a solicitor unless she/he paid the practising certificate fee to the Law Society/LSB.

The imposition of a financial penalty of any significance on the Approved Regulator arising out of the behaviour of its regulatory arm should allow the Approved Regulator to seek the permission of the LSB to remove those leading the regulatory arm and appointing a fresh Board.

Question 10 – What are your views on what the maximum amount of finance penalty should be?

Question 11 – Is the formula proposed the right one or is there another more appropriate measure?

Question 12 – Can you identify any circumstances when the proposed formula may be inappropriate to use?

Question 13 – What are your views on whether the maximum should be linked to the total value of the services being regulated?

Question 14 – What are your views on the amount suggested in the formula? What other amounts do you think might be appropriate, bearing in mind, the need for a financial penalty to act as a credible deterrent? Please explain your answer.

Question 15 – What are your views on the process that the LSB proposes to use to arrive at an appropriate amount for financial penalty?

Question 16 – What are your views on the examples of the factors that the LSB may take into account when deciding what level of penalty is appropriate? What other facts do you consider the LSB should take into account?

We find the LSB's focus on the financial penalty quite disproportionate to the importance of its other compliance and enforcement powers. The approach in the consultation paper would lead one to think that the LSB considered the financial penalty to be its likely favoured and most frequently used compliance and enforcement tool. This cannot be the case.

The approach that compares the LSB's regulation of Approved Regulators, with for example, (using the example used in the consultation paper) the utility regulator's regulating commercial utilities companies, is flawed. ILEX as an Approved Regulator, and IPS as the direct Regulator, are not comparable to, for example, British Gas.

The only attraction to the LSB proposal setting a maximum penalty is that it is very simple. However, the fact is that £250 is currently more than the entire practising fee for a Legal Executive, but only 25% of a practising certificate fee for a solicitor.

Nor is the linking of the value to the contribution to GDP from legal services satisfactory. Before taking this kind of approach, we expect the LSB to set out very clearly what role our regulated members currently play in providing that £23.25billion; the average income of a Legal Executive compared to the average income of other lawyers; and how such an approach is fair equitable across Approved Regulators and those they regulate.

Once again we must point out that the LSB's approach, particularly as set out at paragraph 3.43, is indicative that the LSB intends to use, or at least does not rule out the possibility of using, the financial penalty to completely cripple an Approved Regulator and put it out of business. This is not an appropriate use of a financial penalty.

It therefore seems to us that the LSB should focus only on a level of fine that will amount to a real deterrent to the Approved Regulator in persisting further with particular unacceptable behaviour.

Guidance on how the LSB will exercise 'reasonable discretion' when setting the level of a financial penalty would be useful to the Approved Regulators. Simply stating that in exercising its judgement, the LSB would 'take into account the resources of the Approved Regulator', does not sit comfortably with earlier paragraphs of the consultation.

Question 17 – What are your views on the LSB's aims for using intervention directions? Are there other circumstances when you consider that the exercise of this power might be appropriate?

The LSB rightly regards the use of this power as an extreme measure. We agree that the aim of using intervention directions should be to stop the Approved Regulator from being able to regulate, and to obtain any documents that are necessary for the person who would be given the Approved Regulator's former functions to carry them out effectively.

Question 18 – What are your views on the LSB's aims for cancelling the designation of an Approved Regulator? Are there other circumstances when you consider that the exercise of this power might be appropriate?

We concur that a decision to recommend the cancellation of an Approved Regulator's designation is extremely serious, and should only be used in exceptional circumstances.

Question 19 – Do you think the draft Statutory Instrument is appropriate?

We have no further comment on the draft Statutory Instrument, subject to the points above.

Question 20 – What are your views on each of the initial impact assessments?

Small Firm's Impact Test

The statement that the LSB will take a proportionate approach to regulating smaller Approved Regulators to ensure the cost of compliance is not too burdensome, is not well reflected within the consultation paper. We refer particularly to our comments on financial penalties. We also wonder how the approach of the LSB to the evidence it requires from small Approved Regulators can/will differ from that required of other Approved Regulators?

Does Enforcement comply with Hampton Principles?

We do not agree that the proposals comply with the Hampton principles as we believe the fundamental to approach to financial penalties is flawed, and unlikely to be proportionate to the nature of the offence and the harm caused.

Questions 21 – 26 – Do you agree with the Board's approach for making nominations for the purposes of Section 41(2)(a) and Section 42(3)?

The proposed rules allow the Board to nominate any person that it considers to be competent to take over the exercise of the regulatory function of the Approved Regulator, and to enter and search the premises of an Approved Regulator.

We believe that the LSB needs to provide a more detailed policy on how competency will be judged. There are many people who would be unsuitable in relation to issues such as legal professional privilege when searching premises and who may lack an understanding of how an Approved Regulator may function.

In respect of Section 42(3) we would suggest there be a stipulated competency level, of which the Judge or Justice issuing the warrant for entry and search must be satisfied that the nominated person reaches prior to issue the warrant. There may be parallels in other areas of enforcement which may prove helpful in identifying relevant competence criteria.