

Chris Kenny
Chief Executive
Legal Services Board
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26th October 2009

Dear Chris,

COMPLIANCE AND ENFORCEMENT – STATEMENT OF POLICY

We are grateful to the Legal Services Board (LSB) for giving the Bar Council an opportunity to respond to your consultation paper *Compliance and Enforcement - Statement of Policy* which we have read with interest.

We have seen the response of the Bar Standards Board to this consultation paper which we are content to adopt. In this letter we confine our observations to the following three key related issues.

Legal principles underlying the LSB's consultation: Discretion which the Legal Services Act 2007 confers on Approved Regulators (ARs)

Our first concern is that the LSB's proposals are based on an inappropriate model. The proposals treat the regulatory relationship between the LSB and ARs as equivalent to the sorts of relationships which regulators such as the Office of Fair Trading and the Financial Services Authority have with their regulated constituencies. The LSB is proposing a structure for compliance and enforcement which is similar to regimes which as such are not remotely comparable. The structure for ensuring compliance and enforcement which exists between competition or utility regulators and commercial operators is an entirely inappropriate comparator for the purpose of structuring compliance and enforcement arrangements between the LSB and ARs as envisaged and approved by Parliament in 2007.

We do not think the significance of this point should be underestimated because the LSB has been established as a "second line" regulator. The rights and duties to take decisions about regulated members lies with ARs, the "front-line" regulators, not the LSB. If the LSB disagrees with the decision of an AR, it has no legal right to intervene for that reason alone. The correct legal analysis is that the board can only intervene if an AR's decision is irrational in a public law sense. Parliament accepted that the role of the LSB was to be a supervisory regulator, leaving front-line regulators to deal with the day-to-day responsibilities of regulating their professions. It did not set up the LSB to second-guess or micro-manage ARs' decision-making. A wide margin of discretion is, and must be, accorded to ARs.

However the LSB's consultation paper assumes that the Board can not only intervene but also impose sanctions in circumstances where it takes a different view from an AR. This is wrong in law and follows from an incorrect analysis of the relationship between ARs and the second-line regulator. To paraphrase Section 49(3) of the Legal Services Act, the LSB's principal role is "the oversight of approved regulators". If, having considered a matter, an AR adopts a more cautious view than that of the LSB, that is a matter for the AR. It is not for the LSB to attempt to substitute its view for that of an AR. We would expect nevertheless that in the course of regular, fruitful debate and discussion between two sets of co-operating regulators there would be no need for intervention - but to suggest that the LSB could impose an aggravated fine is mistaken.

Reciprocal regulation and accountability

In its response to the LSB's earlier consultation on regulatory independence, the Bar Council made the point that the ability of ARs to maintain a fully transparent and accountable relationship with the LSB was, in effect, a mutual obligation.

In its response the Bar Council sought clarification from the LSB as to its duties of mutual transparency towards ARs. The Bar Council has not yet received such a response. An effective relationship between the LSB and its ARs will depend on mutual transparency. It is not yet clear how the LSB will discharge its obligations in this regard and we look forward to clarification of this matter.

Proportionality and general principles of administrative law

There is at present no adequate acknowledgement that the LSB is subject to principles of administrative law. However, this should be uncontroversial given that the express terms of Section 49(4) of the Legal Services Act make it unlawful for the Board to impose a penalty on an AR which is acting reasonably. In the exercise of its powers, the LSB would be bound to adhere to the principles of proportionality, non-discrimination, consistency and reasonableness. The LSB should set out how it proposes to adhere to these principles.

We hope the LSB will find these observations useful. We would be pleased to elaborate on them if that would be helpful.

Yours sincerely,



Nicholas Green QC
Vice Chairman of the Bar

Cc (by email) Mahtab Grant (LSB)