

Internal Governance and Practising Fee rules

The Law Society response to the Legal Services Board consultation

1. The Law Society welcomes the opportunity to comment on the Legal Services Board's proposals for rules to be made under sections 30 and 51 of the Legal Services Act, following the Legal Services Board consultation on these issues earlier in the year. The Law Society supports the way in which the Legal Services Board has conducted this consultation. The stakeholder event held at the end of July – and the discussion paper that was prepared as background to that event – were particularly helpful, as was the Legal Services Board's publication of a summary of responses alongside the Board's response to the consultation.
2. This response broadly follows the order of the LSB's consultation paper. The Annex to this response contains our comments on the draft rules themselves.

The Legal Services Board's general approach

3. The Law Society supports the general approach which the Legal Services Board proposes to adopt. Laying down first mandatory principles; secondly, rules where necessary to ensure compliance with those principles; and thirdly illustrative guidance to support the rules appears to us to strike the right balance. It enables LSB to establish clarity as to the outcomes to be achieved, whilst avoiding an unduly prescriptive approach to the way in which individual regulators might do so. This approach seems to us entirely consistent with the principles of good regulation.

Application to approved regulators

4. The Law Society supports the approach taken to the application of the rules, including using the concept of "applicable approved regulators" to cover regulators which also have responsibility for representative functions.

Definitions

5. The Law Society supports the LSB's definition of "the principle of regulatory independence", "prejudice" and "undue influence". However, we consider the LSB definition of "lay person", in the context of members of Regulatory Boards, is too narrow. We do not think that people who happen to have a legal qualification, but have not practiced for many years should continue to be regarded as lawyers. The purpose of requiring a substantial number of lay members on Boards is to bring to the decision making process an external perspective. Individuals who have not practiced as lawyers for, say, ten years and have instead obtained substantial experience in other fields should surely on that basis be regarded as "lay persons".
6. The Law Society welcomes the Legal Services Board's confirmation that it is legitimate for regulatory boards to be chaired by a lawyer. The Law Society accepts that such appointments should also be open to lay persons, with the best

candidate for the post being appointed. In practice, we think close knowledge of the legal sector is likely to be important for prospective Chairs of regulatory Boards.

Composition of Regulatory Boards

7. The Law Society does not support the Legal Services Board's conclusion that a majority of members of regulatory boards should be lay persons. Whilst the Society agrees that there should be a very substantial lay involvement on Regulatory Boards – and the SRA currently has seven lay members on a board of sixteen – the Society does not consider it appropriate to require a lay majority. There is a risk that this approach may undermine confidence in some international jurisdictions about regulation of lawyers in England and Wales. Requiring a lay majority does not appear to the Society to represent best regulatory practice in other professional sectors. Furthermore, this approach may also lead to regulatory boards being larger than would otherwise be necessary, in order to secure sufficient knowledge of the sector to be regulated amongst the lawyer members, whilst still maintaining a lay majority. An alternative approach might be for the Legal Services Board to require (for example) at least seven lay and at least seven lawyer members on a 16-person board, with the precise composition being determined by the appointments panel on the basis of appointing the best candidates.
8. The Law Society supports the Legal Services Board's modified approach to the arrangement concerning the process for appointing Regulatory Boards. The Law Society remains committed to full consultation with our regulatory arm about the arrangements to be made for appointments, but we do not think it appropriate for the regulatory arm to lead on the arrangements, especially bearing in mind there is at least a risk that personal interests in reappointment might influence their views.

Provision of shared services

9. The Law Society supports the Legal Services Board's decision to afford greater flexibility than originally proposed in the arrangements to be made concerning shared services. It would have been inappropriate to give regulatory boards a unilateral right to opt out of shared services, particularly bearing in mind the very significant potential for any such decisions to cause substantial additional costs to approved regulators. The Law Society agrees that there should be an evenly balanced mechanism to resolve any differences which might arise about the way in which support services are provided. The Law Society intends to operate through its recently established Support Services Resolution Board – which contains equal numbers of members drawn from the Law Society and SRA, together with two external independent members – to resolve such issues. We fully accept that if our regulatory arm should consider that a decision of the SSRB undermines its effectiveness, it should be free to ask the Legal Services Board to intervene.
10. The Law Society's approach to the setting of the budget is that, where agreement cannot be reached between the Law Society and the SRA, the Council will be informed both of the recommendation of the Management Board (which is the

body within the Law Society responsible for advising the Council on the budget) and of the stated requirements of the SRA. The protocol between us provides that if the SRA remains dissatisfied following the Council decision, the Law Society – in seeking Legal Services Board approval to the practising fees – would include in full the SRA's representations on the subject. (The SRA could of course make these points direct to LSB in any event). We believe these arrangements comply with what the LSB intend, but we would be happy to discuss that further. We make this point because on one reading the phrase in the LSB's consultation paper to the effect that mechanisms within approved regulators "must approve a regulatory budget proposed by the regulatory arm" could be taken to mean that the approved regulator has no option but to approve the regulatory arm's request. We do not believe that can be intended, and it would certainly not seem to us to be in accordance with the Act. The arrangements which the Law Society has in place ensure that the views of SRA are fully taken into account in the budget setting process and that LSB is informed of any disagreements. Given LSB's powers to direct, that seem to us sufficient to ensure that there is no possible public or consumer detriment from the present arrangements.

Practising Fee rules: permitted purposes

11. We agree with the Legal Services Board's extension of the definition of "applicable persons".
12. The Legal Services Board does not appear to have adopted the Law Society's suggestion that work we carry out in order to improve access to justice should be specifically included as one of the permitted purposes. The Law Society continues to believe it is desirable to make this change, although much of the work the Society undertakes in this area is in any event permitted as amounting to participation in law reform and the legislative process, or as promotion of human rights and fundamental freedom. However, not all of the Law Society's work on access to justice can readily be brought under these headings. For example, negotiating the terms of contracts and work in relation to Best Value Tendering - although crucial to ensure the continued availability of legal and providers - does not naturally fall under either head. The improvement of access to justice is one of the statutory regulatory objectives, and it would be peculiar for the Legal Services Board not to recognise that in settling the permitted purposes. We would be grateful if the Legal Services Board could re-examine that point.
13. The Law Society believe the work it does as primary professional consultee of the SRA, responding to consultation from SRA and putting forward suggestions of our own, comes within the permitted purposes of section 51 either as work relating to the regulation of authorised persons, or as participation in law reform. However, if there is any doubt about that, we believe the Legal Services Board should add an additional limb to section 51 to ensure the position is clear.

Implementing proposals

14. The Law Society accepts the proposed requirement to certify compliance with the internal governance rules by 30 April 2010. We hope to carry out our work on that in conjunction with the SRA, although we recognise that the LSB has

decided that separate certificates should be provided by the approved regulator and the regulatory arm. We look forward to working with LSB throughout that process.

Practising Fee rules

15. We support the approach LSB propose to take to Practising Fee rules, and in particular we support the LSB's intention to work with each approved regulator to ensure that appropriate arrangements are put in place in good time for next year's applications.

The draft rules

16. The Annex to this response contains the Law Society's comments on the draft rules themselves, as set out in Annex A of the LSB's paper.

Law Society comment on draft rules

1. The Law Society's comments on the draft rules themselves are as follows. Unless otherwise stated, we are content with the draft rules.

ICR: A2

2. As indicated in the body of our response, we think the Legal Services Board could apply a broader definition of "lay person" than the one used for membership of the LSB itself.

IGR: E9

3. The word "notify" would seem to be more appropriate than "certify" in paragraph 9 (b).

Schedule: Principle 1: Governance - Rule A

4. It needs to be clear that the "body" which performs regulatory functions can be a branch or arm of the approved regulator, rather than a separate legal entity.

Principle1 – Rule C

5. As indicated in our main response, we do not agree that LSB should prescribe a lay majority on regulatory boards, particularly given the very restrictive definition of lay persons LSB propose to adopt.

Principle 1: Guidance

6. Whilst we agree that approved regulators should whenever possible consult with regulatory bodies when developing guidance on regulatory matters, we do not think we can guarantee that any guidance we issue would not "contradict" guidance issued by our regulatory arm. Although we hope such a situation would not frequently arise, it may be that we consider guidance issued by the regulatory arm incorrectly interprets the existing regulatory provisions. We must be free to issue our "guidance" to that effect, whilst recognising that anything issued by the Law Society itself would be mere opinion, and that the regulatory arm may take a different view. Such a situation could easily have arisen earlier this year in respect of SRA's guidance concerning arrangements to prepare for ABSs, which the Law Society considered unduly restrictive in its original form.

Principle 2 - Rule B/C

7. The phrase "the principle of this part of this table" is unclear.

Principle 2: Appointments – Guidance to Rule B

8. We do not agree that there should always be a lay majority on appointment panels. Indeed, where the Chair of the regulatory body is a lawyer (and is involved in appointments) requiring a lay majority would cause an appointment panel to be larger than would be appropriate. We also doubt whether it is always

appropriate for a regulatory Board member to be on the appointment panel for Chair, particularly if the then current Chair is a candidate for re-appointment.

Principle 2: Guidance Rule B

9. We do not agree that remuneration for the Regulatory Board should be determined by the regulatory board. Indeed, we think that is a distinctly odd proposition. In the Law Society's case, remuneration for the Board members is determined by our Remuneration Committee, which includes representation from SRA (although the SRA representative would be expected not to participate in discussion about SRA Board remuneration). We believe our approach is consistent with the principles in the Combined Code. LSB may wish to give further thought to this aspect of the guidance.

Principle 2: Guidance to Rule E

10. The LSB say persons appointed to a regulatory board should not have been responsible for any representative functions immediately prior to appointment. We think that states the position too baldly. We do not think there is a problem with one or two members of a regulatory Board having served on a representative Council immediately prior to appointment, although we accept it would be undesirable for a substantial number to have done so. Furthermore, given that "representative function" is defined as having the same meaning as under section 27 (2) of the Act, we assume it is intended only to cover the representative functions of approved regulators. We think that should be made clear, because it would be undesirable for there to be restrictions on the appointment to regulatory boards of people who have carried representative work for other professional associations (such as a local Law Society, or the Black Solicitors Network).

Principle 3: Guidance to Rule A

11. We think it is reasonable for the approved regulator to determine levels and terms of conditions for all the staff it employs, whether they are performing regulatory functions or not. The Law Society is a single employer. Staff are members of Society-wide pension schemes and other benefit schemes such as private medical cover, gym membership etc where significant economies of scale are achieved through corporate membership. A unilateral right for the regulatory arm to set different conditions for regulatory staff would be unacceptable, and is inconsistent with the Board's general approach to these issues.
12. We recognise of course that the Law Society is obliged to give the regulatory arm the resources it reasonably requires; and we accept that where there is a strong business case for SRA to establish different arrangements, that should be permitted unless it would have unacceptable consequences for the approved regulator. We accept that disagreements about these matters should be settled by the equally balanced Support Services Resolution Board rather than being determined by the Law Society alone. We accept that the Legal Services Board will have power to intervene if a decision of the SSRB impairs the effectiveness of our regulatory arm. But we do not accept that there should be any overall

presumption that the regulatory arm is entitled to introduce different terms and conditions for staff.

Principle 3: Strategy and Resources – Rule B

13. The proposed rule that a regulatory body should have the power to do anything calculated to facilitate or incidental or conducive to the carrying out of their functions seems too wide. A provision on these lines could lead to extravagant activity only loosely connected with the regulatory arm's core purpose. Given the unrestricted right of regulatory arms to report to LSB whenever they consider any actions of the approved regulator adversely impact on their independence or effectiveness, we doubt whether any provision on these lines is needed.

Principle 3: Guidance to Rule D

14. Similarly, in respect of the guidance on Rule D, the Law Society's arrangements provide for the Support Services Resolution Board to decide whether it is appropriate for our regulatory arm to obtain services otherwise than through the Law Society's Central Services, if an issue should arise on that matter. If SRA remain dissatisfied following the SSRB's decision, they will of course have the right to raise the issue with the Legal Services Board.

Principle 5: Oversight – Rule B

15. The Law Society regulations currently permit the Law Society to direct the SRA on matters within the SRA's Terms of Reference only where it is necessary to do so in order to require the SRA to comply with the direction of another regulator (principally the LSB). We assume that the LSB has no objection to that provision, particularly bearing in mind that it is the Law Society which bears the financial risk from non compliance with requirements of that sort.

Practising Fee rules

16. We have the following comments on the draft Practising Fee rules.
 - As indicated in the substance of our response, we believe the Board should add to the permitted purposes "work carried out with a view to improving access to justice", and if necessary "work in relation to the regulation of authorised persons". It may also be desirable to include a specific reference to the levy to meet the costs of the Solicitors Disciplinary Tribunal.
 - We would be grateful to know why the Legal Services Board requires information about non practicing fee income to be applied to permitted purposes. We can understand that the Board might wish to know about other income which it was intended to apply to regulatory purposes (because the Board would be concerned if regulatory budgets were being prepared on a very optimistic basis about likely income) but we are not clear as to why the Board needs information about other income applied to non regulatory permitted purposes.
 - In the definition of applicable persons, it is important that the Law Society's powers are not confined to "members", since not all those

Annex

regulated by the Law Society through the SRA (indeed not even all the solicitors we regulate) are members of the Law Society.