Consumer Focus
Campaigning for a fair deal

Regulatory independence

Contents

Summary

The main points in our response are as follows:

- Regulatory independence is vital to maintaining consumer confidence in the integrity of the new regulatory regime
- In all practical respects the regulatory arm should control and manage the discharge of the approved regulator's regulatory functions without prejudice to or undue interference from those in post for representative purposes
- We wholeheartedly support the requirement that regulatory boards should be constituted with an in-built majority of non-lawyers
- Regular strategic reviews of the regulatory framework should be initiated and conducted by the LSB, involving the full range of stakeholders. The monitoring and supervisory role of the professional bodies should be very limited in scope.
- The initial approval process for approved regulators' internal governance arrangements is sensible but needs a clear timetable to focus minds and enable stakeholders to monitor progress. The LSB should use its powers if necessary to enforce compliance.
- Public legal education should be added to the list of permitted purposes

Introduction

Regulatory independence - the separation of regulation and representation functions within approved regulators - is one of the most important principles in the Legal Services Act. As the consultation document highlights, the Clementi Review identified a perception that lawyers were regulating in their own interests rather than in the public interest. This perception was fed by the prevailing regulatory architecture where lawyers took all the decisions about their own behind closed doors.

For unavoidable reasons, the legislation designated the professional bodies as the approved regulators, producing the outcome that the representation and regulation functions are carried out by the same entity. This is a rather messy state of affairs that consumers will be instinctively suspicious of. It is therefore of critical importance that the Legal Services Board (LSB) designs and implements a regime that will cast aside any doubts that lawyers continue to make the decisions. The separation of regulation and representation functions must be clearly and unambiguously demonstrated if people are to have confidence that the legal professions are truly regulated in the public interest.

We particularly support the emphasis on setting rules for the future. There should be a clear presumption that approved regulators' existing arrangements must change if they are not up to standard. The changes already made by some professional bodies to introduce a greater degree of independence into their regulatory arrangements are welcome, but these fall short in some respects. The submission to this consultation exercise by the Solicitors Regulation Authority (SRA) suggests this is particularly true of the representative arm of the Law Society[1].

The LSB should be alert to the risk that representative bodies may pass changes to their rules or make other decisions that would be inconsistent with the proposals contained in this consultation document. For example, we are concerned that the Law Society may seek to bring governance of the Legal Complaints Service back within the control of the representative arm when the terms of board members expire later this year. Such a move would be a huge step backwards and would be disruptive at a time when the consumer interest lies in a smooth transition to the Office of Legal Complaints.

The legal profession rightly cherishes its independence. However, it is equally important that regulation is conducted independently of those being regulated. That was the clear will of Parliament and this approach is consistent with modern notions of best practice in regulation. The LSB must ensure it designs a framework that delivers on this important principle and does not flinch from enforcing that framework from the start.

[1] Solicitors Regulation Authority, *SRA response to Legal Services Board consultation on proposed rules under section 30 of the Legal Services Act*, 1 June 2009.

Section 30: internal governance

Ring-fencing

We share the LSB's understanding of what the Act intended to achieve in relation to regulatory independence and support the notion of ring-fencing used in the consultation document. We agree that in all practical respects the regulatory arm should control and manage the discharge of the approved regulator's regulatory functions without prejudice to or undue interference from those in post for representative purposes. The regulatory arms must have the freedom to determine what their priorities are, how much resource they should devote in pursuit of these priorities and the methods they will use to achieve them. In doing so, the regulatory arms must primarily be answerable to the oversight regulator - the LSB - not to the representative-controlled approved regulator. If the representative professional bodies were instead to maintain this oversight function, consumers would suspect that little had changed from the previous system.

Regulatory board appointees

We wholeheartedly support the proposals around regulatory board appointees, in particular the requirement that boards should be constituted with an in-built majority of non-lawyers. While the role of all board members is to work towards the statutory and other objectives of the organisation, rather than to represent specific causes, having a majority of non-lawyers would help to foster and support a regulatory mindset that puts the interests of consumers at the heart of the approved regulators. Parliament recognised these points by requiring the LSB board to be constituted with a majority of non-lawyers. We see no reason why the same principle should not also apply to approved regulators.

We do not believe it necessary to require chairs of the approved regulators to be non-lawyers. It will be important to draw on the widest possible pool of talent to recruit the best qualified chairs. However, it may be prudent for the first chair to be a lay person in order to bolster consumer confidence in the independence of the system.

We support the proposals that all appointments to regulatory boards should be made on merit. We also agree that chairmanship of appointments panels should be independent and there should always be a majority of non-lawyers on the panel. The appointments process should be within the control of the regulatory boards so there can be no perception that the representative arm might be able to influence the outcome.

Management of resources

Approved regulators will need sufficient resources in order to do their job effectively. The representative arms of the legal bodies have a natural incentive to keep costs down, so it would be wrong for them to exert control or a veto power on decisions over allocation of resources. There is a public interest to keep costs at the minimum level necessary to deliver the regulatory objectives, since consumers will ultimately pick up the bill for regulation through higher prices. In light of this, it is appropriate for the LSB - as guardian of the public interest in the regulation of legal services - to have the final say on budgetary matters. Nevertheless, we agree that it is desirable for the regulatory and representative arms to resolve these issues without recourse to the LSB as arbiter.

Shared services

We support the concept of shared services as these arrangements help to keep regulatory costs down. This is unavoidable for smaller approved regulators in practical terms. However, shared services can and do create problems, as experience at the Law Society has demonstrated. We note with concern the SRA's view that it 'shares the Society's services largely on the Society's terms'[2].

We consider that the criteria put forward in the consultation document represent sensible mechanisms to prevent problems arising. The exact design of shared services management arrangements should be for approved regulators to design based on the unique circumstances they face. However, while any decision-making authority should have a mixed membership, the regulatory arm must have controlling power.

Balance between formal rules and guidance

The approved regulators vary in size and other characteristics, and as such it would be difficult for the LSB to impose a single set of rules. Therefore we support the proposed approach to set clear principles backed by guidance, although there may be some areas where there is a need for specific rules. The LSB should also be ready to adapt its approach learning from experience, which may mean moving guidance into rules if the initial principles-based approach does not produce the desired outcomes.

Monitoring and supervisory arrangements

The professional bodies have an important role to represent the views of their members on regulatory matters in the same way that consumer organisations represent the views of consumers. But representation should not blur into regulation and so any residual oversight role for the approved regulators must be very limited in scope.

Regular strategic reviews of the regulatory framework should be conducted as a matter of good practice. However, while the professional bodies have a legitimate role to express concerns about the existing framework, we would normally expect formal reviews to be initiated and conducted by the LSB at a time of its choosing. Not least, this would ensure the review is open to all stakeholders and would prevent a situation where a review is initiated by professional bodies for nuisance value.

There has to be a mechanism to dismiss board members or the entire regulatory board in extremis. We accept that the professional bodies are well placed to alert the LSB to serious problems with the regulatory board as they will have the closest sight of its work. We agree regulatory board members should only ever be dismissed with the LSB's concurrence, including in circumstances when the regulatory arm consented.

The proposed shared services committee would seem a logical place to locate any monitoring and supervisory arrangements. The very narrow scope for intervention by the professional bodies would not justify a separate committee.

We support proposals to require regulatory arms to comply with something comparable to freedom of information laws. The regulatory arms have day-to-day responsibility for discharging the statutory regulatory objectives in the public interest, so it follows that the public should be able to access information which would allow them to judge if they are satisfactorily performing this role. The LSB should additionally consider introducing

[2] Solicitors Regulation Authority, *SRA response to Legal Services Board consultation on proposed rules under section 30 of the Legal Services Act*, 1 June 2009.

transparency requirements on regulatory arms, for example by insisting on publication of board papers and minutes.

Compliance with the rules

We agree with the initial approval process, but this needs a clear timetable to focus minds and so that progress can be assessed. The LSB should make clear that it will use its powers if necessary to enforce compliance.

The concept of dual self-certification is attractive as a risk-based and proportionate means of ensuring continuing compliance. We envisage there may be circumstances when both arms of the approved regulators think they have complied with the rules, but the LSB might disagree. Therefore we agree there must be a process for the LSB to evaluate the self-certification. This process should include a facility for other interested parties including the Consumer Panel to raise concerns.

Practising Fees

The permitted purposes

We support the view that the statutory list of 'permitted purposes' is generally broad enough to allow approved regulators to apply funds raised through mandatory practise fees to further and comply with the objectives and responsibilities set out in the Act.

We agree that 'increasing public understanding of citizen's legal rights and duties' should be added to the list of permitted purposes. This is an important activity which is likely to need significant investment by the LSB and approved regulators over a sustained period. As such it is important those charged with this responsibility have a clear mandate to raise the money to fund this activity.

Maximising Transparency

We entirely agree with the statement that money paid to approved regulators by practitioners will, at least insofar as lawyers in private practice are concerned, ultimately come from the paying public. It is important that the public can see what their money is being spent on in their interests, so they can form a view about whether funds are being directed in the right areas and value for money is being achieved.

The proposals in the consultation document appear sensible. So far as practicable, we would encourage regulators to report expenditure against the main areas of regulatory activity, eg rule-making, supervision, public legal education.