**Response by Irwin Mitchell to the Legal Services Board's Consultation paper "Regulatory Independence"**

## Introduction

1. As a major National firm providing a wide range of legal services to consumers of all kinds, Irwin Mitchell has taken an active interest in the post Legal Services Act (LSA) regulatory reforms, and as a supporter of the general thrust of the LSA reforms has responded to all consultations since the first report by Sir David Clementi. Irwin Mitchell also has a substantial regulatory practice which provides insight and understanding of how the SRA (and other regulators) deal with the clients we represent on regulatory matters.

2. We believe that regulators of the legal profession should behave in a manner that is proportionate, fair and reasonable, coupled with a clear understanding of the commercial drivers likely to influence practitioners as they face up to the most significant challenges and changes in the legal services market for generations. If regulators are to carry out their responsibilities in a flexible, professional and pragmatic manner, they should acquire a good understanding of the real issues facing the individuals, firms, and 'entities' subject to regulation. Indeed, the priority approach of legal regulators should be to convey to those whom it regulates that its principal aim is to assist them to 'get it right' in a manner that will encourage them to take advantage of the opportunities offered by the LSA rather than being restrained from development of their businesses by over-regulation that inhibits the provision of legal services to consumers.

3. We support the general thrust of the LSB's approach towards transparency and independence of regulation by maximum possible separation of regulatory powers and representative functions. We believe that the transparency and independence of regulation necessary to ensure confidence of the public and of the profession will not be furthered by a continuing struggle between the Law Society and the SRA concerning control and separation of regulatory powers and functions. Separation of powers to ensure perceived and actual independence of regulation is achieved in other jurisdictions (parts of Australia and Canada) where the regulatory and representational functions are carried out by entirely separate bodies, apparently to the satisfaction of consumers and the legal professions. Although the LSA does not go so far as to call for total separation, effectively implementing the Clementi B+ model, we support the 'ring fencing' proposals set out in the LSB consultation paper 'Regulatory Independence. Ring fencing of regulatory powers and representative functions is essential despite the problems caused by the Law Society's statutory status as "Approved Regulator", and the fact that financing of the SRA comes from PC fees that solicitors pay to the Law Society. Perhaps consideration could be given to allowing

the SRA (under LSB supervision) to levy PC fees direct from the profession.

**Responses to Questions:**

**Q1. 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)?**

1. Whilst physical separation helps towards the ring-fencing required it is also important that the regulatory arm has control over its finances so as to encourage confidence and accountability in spending the profession's money. It should have the freedom to decide on internal audit functions to ensure operational effectiveness and provide detailed financial statements/ annual reports as transparent information to the relevant profession and to the public. It should also have power to determine all rules and procedures to be adopted for the discharge of its delegated responsibilities. Please also see our introductory comments (paragraph 2) and the response to Q6.

**Q2. What do you think of our proposals relating to regulatory board appointees, set out under paragraph 3.15?**

2. We agree that appointments to the regulatory board should be made on the basis of merit and independent scrutiny after open advertisement and competition in accordance with the Commissioner for Public Appointments' Code of Practice. The Board should have a majority of non-lawyers who should be adequately informed about the work of lawyers and legal businesses and understand the issues they face. Interaction with the profession through focus groups or a separate panel of practitioners who can provide support and help to the Board along the lines of the statutory consumer panel is desirable. There is a precedent in relation to the Financial Services Authority which has a practitioner panel and a smaller businesses practitioner panel.

**Q3. Is it necessary to go further than our proposals under paragraph 3.15, for example, by making it an explicit requirement for the chair of independent regulatory boards/equivalents to be non-lawyers?**

3. Whilst there may be a leaning towards the appointment of a non-lawyer, it is not absolutely essential for perception purposes to make it an explicit requirement for the chair of the independent regulatory board to be a non-lawyer. (The reasoning is different in relation to non lawyer chairmanship of the LSB as oversight regulator). The key question is the skill, expertise and suitability of the Chair. Whilst non-lawyers may be suitable for such a role, equally there may be lawyers who are eminently suitable.

**Q4. 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?**

4. We agree that the regulatory arm should have access to the resources reasonably required for meeting its strategic and business needs subject to LSB oversight to ensure that the regulator's management of resources is robust. We agree that enforceable service level agreements need to be in place to ensure that the regulatory arm receives the resources and services it needs. The proposals in paragraph 3.22 are sensible although there may be some practical difficulties. We agree that different considerations apply to longer term issues over financial viability for example pension provision.

**Q5. Is our proposed balance between formal rules and less formal (non-enforceable) guidance right? In what ways would further or different guidance be helpful?**

5. It is difficult to respond to this question as paragraph 3.24 is very brief. However, we agree with the idea of setting out clear principles and then issuing guidance on compliance with those principles.

**Q6. 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?**

6. Our introductory comments (paragraph 2) and our response to Q1 partially address this crucial question. Any oversight arrangements will need to give confidence to consumers and the professions that there is real and meaningful regulatory independence and separation between the representative controlled approved regulator and the regulatory arm. Sensible dialogue will be necessary to allow the representative body a suitable voice on regulatory policy issues without interference in the day to day business of regulation. Effective monitoring of the work of the regulatory arm by the approved regulator, so that the representative body can be confident that the responsibilities imposed on it by statute are discharged, makes sense. Independent and occasional strategic review of the structural framework also makes sense.

**Q7. In principle what do you think about the concept of dual certification?**

7. Please see our reply to question 8 below.

**Q8. If the dual certification model were adopted, how should it work in practice or would alternative arrangements be more appropriate, either in the short or longer term?**

8. The concept of dual self certification is in principle a good one, reducing the regulatory burden on approved regulators and the LSB and keeping in check the inevitable running costs that will ultimately fall on the professions.

**Q9. 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 and a citizen's legal rights and duties"?**

9. We agree that the mandatory permitted purposes should be widened so that practising fees can be applied for the purpose of increasing public understanding of the citizen's legal rights and duties. Because public legal education (PLE) is one of the regulatory objectives in Section 1 of the LSA it should be taken seriously by the LSB whose duty should be to encourage the approved regulators in furthering their own PLE activities and those of their members. Giving assistance to consumers in appreciation of the importance of awareness of their legal rights and responsibilities is a core part of the spirit and letter of the LSA.

**Q10. Should any other (general or specific) purpose be permitted under our Section 51 rules?**

10. We cannot at present identify any additional purposes.

**Q11. What do you think about our proposal to seek evidence that links to the regulatory objectives in the Act?**

11. Evidence based regulation and oversight is always desirable. The proposal to seek evidence linking to the regulatory objectives is sensible and will show that approved regulators are keeping the crucial regulatory objectives at the forefront of their minds.

**Q12. What criteria should the Board use to assess applications submitted to it?**

12. The criteria should include details of the way in which the fee will be used, with a detailed budget and business plan which can be assessed against the regulatory objectives.

**Q13. 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?**

13. The Memoranda of Understanding should set out the way in which the Board and the approved regulators will work together and should take the best elements from the existing memoranda with other regulators such as the FSA. This will include the type of information that should/should not pass between the organisations.

**Q14. 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?**

14. Ideally there should be annual consultation on the practising fee application with the relevant profession although clearly this is easier where a representative elected council exists.

**Q15. 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?**

15. The details set out in paragraph 4.21 should be sufficient.

**Q16. Are there any issues in respect of practising certificate fees that you think we should consider as part of this consultation exercise?**

16. Please see our response to the LSB consultation on the Levy.

**Q17. Please comment on our draft proposed rules, both in terms of the broad framework and the detailed substance.**

17. We have not had time to give these detailed consideration.

**Q18. Are there any comments that you wish to make in relation to our draft impact assessment, published at annexe C alongside this consultation paper?**

18. We have not had time to give detailed consideration to the draft impact assessment.

**Q19. Are there any other issues that you would like to raise in respect of our consultation that has not been covered by previous questions?**

19. No