Legal Services Board consultation on Regulatory Independence – Law Society response

Introduction

1. The Law Society welcomes the opportunity to respond to the Legal Services Board's consultation paper entitled "Regulatory Independence". The consultation covers two distinct areas – rules to be made under section 30 of the Act to ensure that regulatory functions are not prejudiced by representative functions and that decisions relating to the exercise of regulatory functions are so far as reasonably practicable taken independently from decisions relating to the exercise of representative functions; and rules under section 51 of the Act concerning the purposes for which money raised through practising fees may be used, and the procedural arrangements and criteria for the Board's decisions about practising fees.

2. The main text of this response sets out the Law Society's views on the issues covered in the consultation paper. The annex summarises the Law Society's views to the specific questions on which the Legal Services Board seeks views.

Background

3. The Law Society has been responsible for promoting professional improvement and facilitating the acquisition of legal knowledge since its first Royal Charter, granted in 1845. This has developed over time into a role of promoting professional values more generally, and of representing the interests of solicitors. The Society has also been responsible for the regulation of solicitors, primarily under statutory powers, since 1907. Statutory powers are now mostly contained in the Solicitors Act 1974, and in the very substantial amendments which have subsequently been made to the Act, not least in the Legal Services Act 2007. The Law Society is the largest of the approved regulators. There are currently 113,000 solicitors holding practising certificates.

4. The Law Society is committed to the key principles of the Legal Services Act. In particular, the Law Society supports the separation of regulatory decision making from representative interests. The Law Society established independent boards to deal with regulation and consumer complaints in 2005, prior to the introduction to Parliament of the Legal Services Bill. Those independent boards had full delegated power within their areas of responsibility, to the extent that the Council could lawfully delegate its powers. The process of delegation was completed last year, when the relevant provisions of the Legal Services Act came into force, and the Council was able to delegate the power to make statutory rules to the Board of the Solicitors Regulation Authority.

5. The Law Society is also committed to ensuring that the costs of regulation are not needlessly increased. For this reason, the Law Society strongly supported Sir David Clementi's conclusion – which underpins the Legal Services Act – that support services can properly be provided both to the professional body and to its

regulatory arm on a shared service basis, rather than through separate support services for the two bodies.

6. In short, the Law Society is committed to helping ensure that the Legal Services Act works in the way Parliament envisaged. But the Law Society is also determined to ensure that the settlement represented by the Legal Services Act is not undermined by those who might prefer a complete separation between professional bodies and regulatory bodies, on the lines of the British Medical Association and the General Medical Council.

7. The Act makes clear that the Law Society and a number of professional bodies – not their regulatory arms – are approved regulators. There is no basis on which it can be argued that that is a mere technicality, devoid of real substance. Although it is necessary for approved regulators which also hold representative responsibilities to delegate regulatory decision making to a separate body, the approved regulator itself retains substantial public interest responsibilities which cannot be abdicated, and which cannot sensible be delegated to the regulatory board. These include making the regulatory arrangements (including the arrangements for appointing the board of the regulatory arm) and ensuring that the arrangements operate effectively.

<u>The need for rules</u>

8. The Law Society accepts that rules are needed to flesh out the requirement that the exercise of regulatory functions – that is decisions about mandatory requirements concerning solicitors' practice - are not prejudiced by representative functions. However, we believe the Legal Services Board goes too far in arguing that its objective should be that "any reality or perception of regulatory decisions being compromised or led by representation interests – whether directly or indirectly – is completely removed." There is no justification derived from the Act for adopting that approach. In some eyes, there will be a perception that regulatory decisions are compromised by representative interests whenever professionals are involved in making those decisions. Indeed, some people will have that perception whenever a decision is made with which they disagree. It is not the proper function of the Legal Services Board to attempt the impossible task of completely removing that perception. The Board's proper role is rather to ensure that there is no substance to any such allegations, and to challenge any misplaced perceptions wherever they arise.

9. The Legal Services Board argues that "a profession that is not trusted will lose credibility and respect and fail to maximise its commercial potential." That is undoubtedly true. But there is no evidence that the present regulatory arrangements lack credibility, or that they undermine the profession's ability to maximise its commercial potential. The arrangements which have already been made guarantee independent decision making on regulatory issues. The Legal Services Board should be an active advocate for these arrangements.

<u>Internal Governance – Ring Fencing</u>

10. The Legal Services Board proposes that the discharge, management and control of regulatory functions should be separated from – and independent of – the approved regulator itself.

11. Subject to two important caveats, the Law Society agrees with that proposition. In particular the Law Society agrees that regulatory arms should not merely be responsible for decisions on individual regulatory matters, but should also be responsible for:-

    - Policy decisions concerning regulatory issues.
    - Statutory rules which are of mandatory effect.
    - Determination of the overall strategy for regulation.
    - Determination of priorities for regulatory action, both in terms of case work and in relation to policy development.
    - Settling the annual business plans for the regulatory function.
    - Determination of the regulatory arm's internal processes.
    - Determination of what committee structure should support the regulatory board.
    - Determining the membership of each of the regulatory board's committees and other working parties.

12. The first caveat is that the Society does not think it is appropriate for the regulatory arm to be able unilaterally to opt out of the provision of support services on a shared service basis. We expand on that in paragraphs 29-38 below.

13. Secondly, we consider it may be desirable for the approved regulator to determine the framework within which the regulatory arm will be free to determine its own procedures, and to determine the structure and membership of its own committees. For example, it would be entirely legitimate for the approved regulator to require its regulatory arm to have appropriate methods of internal audit, and for the internal audit function to be directed by an independent Audit Committee, shared between the approved regulator and its independent regulatory arm. Furthermore, it would be legitimate for the approved regulator to lay down some requirements about the composition and method of appointment of any committees to which regulatory powers are delegated (for example, that a majority of members should also be members of the board of the regulatory arm; that a minimum proportion should be lay or should be qualified persons; or that non board members should themselves be appointed through open competition). Indeed, the approved regulator could properly – if it thought fit – require that specified decisions (such as the making of statutory rules) should be dealt with by the board itself, rather than delegated to another body. None of these requirements would improperly constrain the independent decision making of the regulatory arm. Whilst provisions on these lines could not be introduced in a BMA/GMC style structure where the regulatory body is free-standing, they are entirely appropriate in the legal sector where the approved regulator retains the ultimate responsibility for the effectiveness and propriety of its regulatory arm.

<u>Regulatory Board Appointees</u>

14. The Law Society agrees that all appointments to regulatory boards should be made on the basis of merit, after open advertisement and competition. The Law Society agrees there should be no element of election to office, nor of nomination on the basis of sectional interest or background.

15. The Law Society does not agree that it is appropriate for the Legal Services Board to require that regulatory boards should contain a majority of non lawyers, nor to require that their chairs should be non lawyers. Rules of that sort would not be a proper use of the power under section 30, since they could not reasonably be described as necessary to ensure the independence of the regulatory arm from representational influence. The Law Society accepts that it would be appropriate to make a rule prohibiting members of the ruling Council of the approved regulator from serving simultaneously on the regulatory arm (although the consultation paper does not appear to contain a proposal to that effect). It would plainly be difficult for an individual in that position to deal with a regulatory proposal to which the professional body (in its representative capacity) was strongly opposed. Similarly, we agree that all members of regulatory boards should be appointed on the basis of merit, rather than elected. If some Board members were elected from the profession, they might subconsciously regard themselves as in part representing the profession, even though their job was to regulate according to regulatory objectives in the Act. Nomination of members from particular constituencies could create an even stronger potential conflict.

16. The Law Society believes substantial lawyer membership of regulatory boards is an important strength of the system for regulating lawyers, helping to ensure that regulatory boards are in touch with the reality of practice and helping to engender professional buy-in to the regulatory arrangements. We do not accept that lawyers' membership of regulatory boards is to be regarded with suspicion. We agree that there should also be substantial lay membership on regulatory Boards, but we do not think it justifiable for the Legal Services Board to prescribe that a majority of members should be non-lawyers. Indeed, there is a strong argument for regulatory boards to contain a majority of lawyers, so that they have the knowledge of practice which is vital for effective regulation.

17. We agree that appointment panels for members of regulatory boards must be constituted in such a way as to demonstrate that representative interests cannot dictate appointments. We agree that a majority of members of appointment panels should be independent of the professional body. However, under the Act the approved regulator is responsible for making the arrangements for the appointments. The Law Society in fact appointed a person who is wholly independent of the Society to chair the appointment panel for SRA Board members who will take up these appointments in January 2010, but we nevertheless do not see any persuasive reason why the Legal Services Board should prohibit appointment panels from being chaired by an office holder of the approved regulator. Nor do we agree that a majority of appointment panel members should necessarily be non-lawyers. That proposition appears to conflate the issue of being a lawyer, with the issue of having responsibility for representing the interest of lawyers. If the Legal Services Board were to impose a requirement that a majority of members of appointment panels be non lawyers, it would no longer be possible for the appointment panel for ordinary members of the SRA Board to consist of the SRA Board Chair (who is and will be a solicitor), a Law Society office holder and a lay OCPA accredited assessor. There is no good reason why such a panel – only one of whose members would have any responsibility for representing the interests of solicitors - should be considered unacceptable.

Responsibility for making the arrangements

18. The Law Society does not agree that the regulatory arm should have lead responsibility for making the arrangements for appointments, either when the competition is for all or most of the board, or when a casual vacancy is being filled. We do not think that it is necessary to secure proper independence. We note that the Legal Services Board was itself appointed by the Lord Chancellor: we nevertheless expect it to act independently of Government, as the Act requires.

19. Approved regulators are legally responsible for appointing the board of their regulatory arms. We recognise that it is desirable for the Legal Services Board to issue guidance – covering such matters as composition of the appointment panel, terms of office, and requirement for consultation with the regulatory arm – for the way that should be done. However, we do not believe approved regulators should be required to delegate responsibility for making the arrangements to their regulatory arms.

20. Indeed, in the Law Society's view it is bad practice for responsibility on these matters to be left to the regulatory arm. To do so would substantially increase the risk of the regulatory arm becoming essentially self perpetuating, irrespective of changing needs. The approved regulator must from time to time consider whether the current responsibilities of its regulatory arm are appropriate, or whether (for example) separate bodies should be set up to deal with rule making on the one hand and monitoring and enforcement on the other. Similarly, the approved regulator needs to consider whether skills and competencies originally required of members of its regulatory board remain appropriate, or whether they need fine tuning. These are matters on which it is certainly appropriate to consult the regulatory arm. But it would be wrong for those who might have a vested interest in the status quo to have lead responsibility for determining those matters.

21. The Law Society agrees that there should be clear arrangements to provide for the objective appraisal of board members. In the Society's view, it is for the approved regulator to determine what those arrangements should be, although the Society accepts that the management of the appraisal process should generally rest within the regulatory board itself. The Law Society also agrees that any limits on the length of time for which board members may serve and the circumstances (if any) in which board members may be reappointed without participating in a fresh competition need to be clearly specified at the time of appointment.

22. The Law Society agrees that the circumstances in which individual members (or the board as a whole) could be dismissed need to be specified. The Society also agrees that it needs to be clear by whom decisions on dismissal may be made.

Management of Resources

23. The Legal Services Act obliges the Legal Services Board to make internal governance rules which require approved regulators
"to take such steps as are reasonably practicable to ensure that it provides such resources as are reasonably required for or in connection with the exercise of its regulatory functions"

The Law Society fully supports that provision. Indeed, the inclusion of this provision in the Act can be traced back to a suggestion the Law Society made in evidence to the Joint Committee which considered the draft Bill.

24. Ever since the establishment of the independent regulatory boards, the Law Society has sought to act as if this obligation was already in force. The Society recognises that the obligation goes beyond the provision of a sufficient budget. Where (as in the Society's case) the approved regulator provides support service on a shared service basis, the obligation also covers the need to provide sufficient support services, of adequate quality, to meet the reasonable needs of the regulatory arm.

25. But it is important to note that the obligation is to "take such steps as are reasonably practicable" to provide "such resources as are reasonably required". It is not an unqualified obligation. It is qualified by two objective tests: whether the steps are "reasonably practicable" (a balance of perceived benefit and cost) and whether the resources are reasonably required. Whether particular steps are reasonably practicable may need to be considered in the light of the regulatory burden on solicitors compared with other regulated persons in the legal sector and elsewhere, particularly in the light of the current economic pressures. Nor does the statute create an obligation to provide whatever resources the regulatory arm wants, or even whatever the regulatory arm considers is reasonably needed. It is an obligation to provide what is in fact reasonably needed. The approved regulator, acting in accordance with the regulatory objectives, is entitled to make its own assessment of what is reasonably needed, rather than merely rubber-stamping a request from its regulatory arm.

26. As it happens, the Law Society has not yet found it necessary to turn down a budget request from the SRA. But neither the Law Society nor any responsible approved regulator could guarantee that it will endorse all requests in future.

27. In the Law Society's view, the key requirements so far as budget setting is concerned are that:-

- The regulatory arm is entitled to put forward its view of what is required.
- There is a process under which there is full consultation with the regulatory arm about its proposals.
- The decision making body is informed of the request made by the regulatory arm, and the regulatory arm has the opportunity to argue its case before that decision making body.

28. The Legal Services Board appears to propose that regulatory arms should themselves set their budget. That is inconsistent with the provisions of the Act. Furthermore, it is not necessary to secure the Legal Services Board's objectives. The Legal Services Board has the power to set practising fees, and the power to issue directions to the approved regulator. If the approved regulator were to provide a budget for the regulatory arm which was in the Legal Services Board's view inadequate to meet its reasonable needs, the Legal Services Board would have power to set higher practising fees than those proposed by the approved regulator, and if necessary to direct the approved regulator to provide its regulatory

arm with a higher budget. Responsibility for setting budgets should thus rest with the approved regulator, not with the regulatory arm.

Shared Services

29. The Law Society strongly supports the continued provision of support services on a shared service basis. The Law Society believes that this approach is essential in order to avoid wasteful duplication, which would unnecessarily increase regulatory costs. Furthermore, it is entirely consistent with the recommendations of Sir David Clementi, and is the basis on which the relevant provisions of the Legal Services Act were drafted.

30. Sir David Clementi canvassed this issue in his final report. He said that :-

> "A key question, asked in the Consultation Paper, is how a separation under Model B+ might be achieved. There are two broad options. One possibility would be institutional separation to create separate bodies for regulation and representation, similar to the split within the medical profession between the General Medical Council and the British Medical Association. The other option would be to ring-fence the regulatory function from the representative function within a single body.
>
> The argument in favour of separate institutions is that it makes the split transparent. Against this it would add to the number of bodies which form part of the legal system and is likely to increase costs. Whilst it would be expected that ring-fencing, within a single institution, of regulatory functions away from representative functions would require separate executive and policy teams, it would be possible for a number of common services to be provided under a single senior administrative officer".

31. In the light of Sir David Clementi's conclusions, and the structure of the Act, there is no sensible basis on which the Legal Services Board could conclude that regulatory arms should have a right unilaterally to opt out of the provision of support services on a shared service basis.

32. The Law Society accepts – as noted earlier – that the obligation of approved regulators to provide the resources reasonably needed for the regulatory arm includes a requirement to provide support services of sufficient quality and quantity to enable the regulatory arm to discharge its responsibilities effectively. But the Law Society does not believe it is appropriate for the Legal Services Board to lay down prescriptive rules about how that should be achieved., Members of regulatory boards have an untrammelled right to report to the Legal Services Board wherever they consider that an action of the approved regulator undermines their independence or effectiveness. That, coupled with the Legal Services Board's power to issue directions to the approved regulator, is sufficient to ensure that the regulatory objectives are not at risk of being prejudiced as a result of support services being provided on a shared service basis.

33. The Law Society agrees that the arrangements for managing shared services should themselves involve members drawn from both the regulatory and representative functions, together with independent members. The Law Society

has established such a body – the Support Services Resolution Board – to resolve any disagreements which may arise between the Law Society and SRA on Support Services issues. It contains ten members – four each from the Law Society and SRA, together with two independent members jointly appointed by the Law Society and SRA.

34. The Law Society agrees with the Legal Services Board's proposition "that line management responsibility for staff with shared services functions crossing the boundaries between regulatory and representative arms should make clear that the interests of the regulatory arm are not subordinate to those of the representative-led organisation."

35. In the Law Society's case, support services are provided both to the Law Society, as professional body and to SRA through the various central directorates. Each is headed by a Group director, who is responsible both to the Law Society and to SRA. Management responsibility for staff within their central service function rests with the Group directors, although they naturally act in accordance with the wishes of their customers (the Law Society as professional body and the SRA) except where those wishes are inconsistent with overall Group policies. Where a disagreement arises as to what the Group policy should be on a particular issue, or where there is another disagreement between the Law Society and SRA about a shared service issue, the matter will be determined by the Support Services Resolution Board,.

36. The professional body and the regulatory arm are treated equally on these matters. So, for example, if an individual director wished to appoint a new member of staff in contravention of the established procedures for doing so, the Group Director of Human Resources would ensure that they did not do so, whether the director concerned was from the professional body or from the regulatory arm. Given the Law Society's vulnerability to claims for discrimination in the event of improper recruitment practices being adopted, provisions on these lines are essential.

37. It is essential to continue to provide support services on a shared service basis in order to avoid substantial unnecessary regulatory costs. The preliminary estimate is that the additional cost of providing separate support services for the SRA and for the Law Society as professional body respectively would be in the region of £5m a year, in addition to set up costs of not far short of £10m. That is a significant additional regulatory burden. It would be quite wrong to impose such a burden on the profession, especially as no regulatory benefit would be achieved by doing so.

38. The Society agrees with the Legal Services Board's view that, whatever conclusions the Legal Services Board comes to in relation to support services generally, there is a particular need for the arrangements for pensions to remain a matter for the approved regulator. The Law Society will naturally continue to consult the SRA about pension issues.

<u>Oversight arrangements</u>

39. As the Legal Services Board rightly notes, it is the approved regulator rather than its regulatory arm which is responsible in law for the discharge of the regulatory

functions. All the Legal Services Board's powers – including the power to fine – are directed at the approved regulator itself, not at the regulatory arm. There must accordingly be a strong presumption that the approved regulator is entitled – and perhaps required – to put in place effective monitoring and supervisory arrangements. If the approved regulator failed to do so, it would be vulnerable to the exercise of the Legal Services Board's mandatory powers. Quite apart from the risk of fines, there is a clear reputational risk to the approved regulator from that.

40. On the other hand, the Act – and the rules which the Legal Services Board will make under section 30 – are designed to ensure that approved regulator's regulatory functions is not prejudiced by its representative functions. The Act also enables members of regulatory arms to report to the Legal Services Board wherever they consider that action by an approved regulator is undermining their independence or effectiveness.

41. In the Law Society's view, these considerations lead to two conclusions:-

- The approved regulator must not, in the exercise of its monitoring and supervisory function, purport to require its regulatory arm to change any regulatory decision - including decisions about general policies to be adopted, strategic plans and so on.
- The monitoring and supervisory function must not be carried out in such a way as to require the regulatory arm to spend a disproportionate amount of time responding to the requirements of the approved regulator.

42. The Law Society doubts whether the rules need to say any more than that.

43. The Law Society has a residual concern that it will not be able to direct its regulatory arm to take a particular decision even where the actions of its regulatory arm risk putting the Law Society in breach of its legal obligations, for example in connection with equality and diversity. However, the Law Society recognises that even in those circumstances it would be inappropriate for the Society directly to intervene in a regulatory matter. In those circumstances, if the Law Society was unable to resolve the issue with its regulatory arm, the Society would itself refer the matter to the Legal Services Board, inviting the Legal Services Board to make a direction about the issue. The Law Society plans to ensure it has the power to direct its regulatory arm to comply with directions issued by the Legal Services Board, and to take power to dismiss the board of the regulatory arm forthwith in the extremely unlikely event that the board should still not comply.

44. The Law Society agrees that approved regulators should be entitled to commission independent reviews of the structural framework of the regulatory arm. The Society would naturally hope to agree with its regulatory arm about any such reviews, but we do not think the agreement of the regulatory arm can properly be a pre-condition for a review. We recognise that under the Legal Services Act, the agreement of the Legal Services Board would be required before any changes to the regulatory arrangements could be made, whether or not those changes were agreed between the approved regulator and its regulatory arm.

45. As far as dismissal of the regulatory board or individual board members is concerned, the Society agrees that the criteria on which dismissal might be justified need to be carefully spelt out in advance. Those criteria will naturally need to include failure to act in accordance with an LSB direction. The Society considers there is a strong case in principle for those decisions being a matter for the approved regulator, subject (as ever) to the Legal Services Board's power to issue a direction. However, it is inconceivable that an approved regulator would in practice wish to take such a step without consultation with the Legal Services Board. Accordingly, we do not have any objection to a requirement that the LSB's concurrence should be required before any member of a regulatory board is dismissed. Where the approved regulator and its regulatory arm were agreed as to a dismissal of an individual Board member, we consider that the LSB's role should be confined to satisfying itself that the criteria for dismissal have indeed been met. The Legal Services Board should not substitute its judgement for a joint view of the approved regulator and the regulatory arm, unless satisfied that the two bodies were behaving improperly.

Monitoring and Scrutiny

46. The Law Society agrees that approved regulators should monitor the work of their regulatory arms, and that the approved regulator should specify its needs for the necessary information to monitor effectively. We agree also that the approved regulator should not in the exercise of this function purport to require the regulatory arm to change its approach to a regulatory issue.

47. We would expect that the approved regulator's information needs would be a subset of those which the board of the regulatory arm itself required. However, we do not think the approved regulator's right to information can necessarily be restricted in that way.

48. The Law Society agrees that it should be rare for the approved regulator to require information about individual cases. The Law Society recognises that requiring information about live cases could interfere with the regulatory process, and might well be seen as attempted interference with it. We would therefore have no objection to a prohibition on requiring information about such cases.

49. The position with closed cases is slightly different. The approved regulator may consider that its regulatory arm is taking an approach which is unjustifiable in relation to a category of case. Concern about this may come not just from solicitors (whose interests might be dismissed as representative in nature) but from other affected third parties. For example, insurers may express concern where as a result of apparent dilatoriness by the regulatory arm, the losses caused to an insurer have increased. We accept that the approved regulator cannot require its regulatory arm to change its processes even in those circumstances. But the approved regulator ought to be entitled – in order to monitor whether its regulatory arm operates effectively – to have sufficient information about individual closed cases to register its concerns appropriately with the SRA or the Legal Services Board, on the basis of adequate knowledge of the matter concerned. Accordingly – whilst the Law Society has not at present sought access to such information from its own regulatory arm – the Law Society does not consider that the Legal Services

Board should prohibit approved regulators from requiring details of individual closed cases.

50. The Law Society has no objection to regulatory arms being required to comply with Freedom of Information Act principles. The Law Society has arrangements on those lines in place already. However, those arrangements are not sufficient in themselves to ensure that approved regulators have all the information they need to exercise their monitoring role effectively.

Compliance with the Rules

51. The Legal Services Board suggests that compliance will be secured through a requirement on approved regulators to have in place governance arrangements which comply with the section 30 rules; consideration and approval by the Legal Services Board of the detailed arrangements settled by each of the approved regulators; and a requirement that the approved regulators and, separately, their regulatory arms certify compliance with the rules on an annual basis, flagging up any areas of non compliance.

52. In the Law Society's view, given that the regulatory arm will notify the Legal Services Board promptly during the course of the year if it considers that action of the approved regulator prejudices its independence or effectiveness, it seems unlikely that an annual certificate from the regulatory arm is necessary or appropriate. Subject to that point, the Society supports the Legal Services Board's proposed approach.

53. If the Legal Services Board nevertheless decides to adopt dual self-certification, the Board will no doubt wish to make clear to all concerned that the process of annual self certification is not intended to be the only means through which concerns about the compliance with internal governance rules should be raised. If a regulatory arm should consider during the course of a year that governance arrangements do not comply with the section 30 rules, it should be expected – if unable to resolve the matter with the approved regulator – to draw the matter to the attention of the Legal Services Board promptly.

54. The Law Society doubts whether it will often be necessary or proportionate for the Legal Services Board to look behind the certification process. Such action would be needed only where the Legal Services Board has concerns that the regulatory arm may be unduly influenced by any representational interests of the approved regulator.

Rules concerning practising fees

55. The Legal Services Act did not seek to make fundamental changes to the way in which decisions about practising fees are made. The principal purpose of the provisions in section 51 was for the Legal Services Board to become the approving authority, in place of the previous patchwork of confirming authorities. This followed the general approach of the Act that the Legal Services Board should become the single oversight regulator.

56. The provisions in section 51(4) – covering the purposes for which practising fees may properly be applied – are themselves based largely on rules made under sections 47 and 48 of the Access to Justice Act 1999, which define the purposes for which the Bar Council and the Law Society can currently use practising fee income.

57. Those permitted purposes under section 51(4) include – as they did under the Access to Justice Act provision – a wide range of non-regulatory activities carried out by the approved regulator in its role as a professional body, as well as the regulatory activities carried out by the regulatory arms.

58. The Legal Services Board argues in relation to practising fees that "any theoretical argument that this is the profession's money and so the representative controlled approved regulator should hold the financial levers of power would therefore be invalid." This comment rather misses the point. Under the Act, the approved regulator is responsible for making recommendations to the Legal Services Board about practising fees. There is no reason why that function should be delegated to the regulatory arm in order to secure independence or effectiveness, given that the Legal Services Board has sufficient powers of direction to ensure that the approved regulator provides its regulatory arm with the necessary resources to undertake its work. Furthermore, it would plainly be inappropriate for responsibility for making the recommendation to rest with the regulatory arm when fees will include the sums required for non regulatory purposes under section 51(4) of the Act.

<u>The Permitted Purposes</u>

59. The Law Society supports the proposal that "increasing public understanding of citizen's legal rights and duties" should be brought within the statutory purposes for which practising fees can be applied. Some of the Society's existing work comes within this category, such as the series of leaflets we have produced on a range of common legal issues.

60. The Law Society suggests a further addition to the permitted purposes, namely "improving access to justice." The improvement of access to justice is itself one of the regulatory objectives of the Act. It is also a very high priority for the Law Society.

61. The Law Society already carries out a good deal of work aimed at improving access to justice. Some of this – such as work concerned with promoting the extension of legal aid to types of proceedings from which it is currently excluded, and pressing for financial eligibility for legal aid to be improved so as to make a reality of successive Governments' commitment to ensuring equal access to justice - also falls within the category of law reform, and is thus a permitted purpose within section 51 already.

62. But the Society also carries out a good deal of work aimed at establishing satisfactory contractual terms and remuneration structure for practitioners undertaking legal aid work, so that sufficient practitioners continue with legal aid work, thus reducing the risk of advice deserts becoming more commonplace. This work does not naturally fall within the definition of law reform, and hence cannot at present be funded through practising fees. Since improving access to justice is a

regulatory objective, we believe that all the Society's work aimed at improving access to justice should be included within the purposes for which practising fees may be used.

The Application Process

63. The Law Society agrees that it is not appropriate to fix a one size fits all approach to the processes by which practising fees are settled. However, the Law Society does not agree that an elaborate application process would serve any useful purpose. Unless there was a disagreement between an approved regulator and its regulatory arm – or perhaps to ensure that an approved regulator which does not have any representative functions has properly considered the views of its regulated community – there is no apparent reason why the process for settling practising fees should be made any more elaborate than it is at present

64. Practising fees will essentially consist of three elements:-

- Resources reasonably required by the regulatory arm for its regulatory purposes.
- The resources required by the approved regulator for the other permitted purposes under section 51 or the Act.
- Levies imposed by the Legal Services Board in respect of its costs and those of the Office for Legal Complaints, and (in the Society's case) those of the Solicitors Disciplinary Tribunal.

65. The Legal Services Board needs to be satisfied that practising fees are sufficient to enable the approved regulator to provide a budget for the regulatory arm which, so far as reasonably practicable, provides the resources which are reasonably required. , It also needs to be satisfied that the fees do not impose an unacceptable burden on the regulated community. But it will rarely be necessary or appropriate for the Legal Services Board to make its own detailed assessment about these issues. Unless the LSB fears that the regulatory arm may not be fully independent of the representative side of the approved regulator, the Legal Services Board can safely assume that a budget is sufficient if the regulatory arm is satisfied. Furthermore, where that budget has been endorsed by the ruling body of the approved regulator, it is difficult to see any benefit in the LSB separately considering for itself whether the budget is excessive.

66. The non-regulatory work for which practising fee income can be used is also important in the public interest. This applies to law reform, promotion of human rights, development of practice rights internationally and the improvement of practice standards. The sums levied by the Law Society from the profession to be spent on that work represent a very real commitment by the profession to serving the public interest. It is important that that work is not crowded out by excessive demands for spending on regulation.

67. The Legal Services Board's role in relation to the sums required for non regulatory purposes is limited. The Legal Services Board is not entitled (and says it does not wish) to involve itself in non regulatory matters. Given that the ruling body of the approved regulator is itself drawn from the profession, there is no need for the Legal Services Board itself to consider whether the amounts required are

reasonable, save in the very unlikely event that the Board considers that the sums required are so large as to have a significant impact on the number of regulated persons in practice, and hence on access to justice.

68. The only remaining question will be whether the practising fees for which approval is sought will indeed be sufficient to fund the sums required for the various budgets, and for any contingencies. It is difficult to see that the Legal Services Board will generally need to involve itself in that aspect either.

69. The Legal Services Board proposes introducing a requirement on approved regulators to set out for each authorised person a statement covering:-

- The sum expected to be raised by practising fees in total.
- The amount required by the authorised person concerned.
- The proportion devoted to the various mandatory purposes.
- Any additional voluntary payment

70. The Law Society supports a requirement for transparency. It already publishes details of the break down of its practising fee. However, the Society does not consider it sensible to require the identification of shared service costs separately. It would be more informative for authorised persons to be shown the costs of regulatory and non regulatory work, including in each case the share of shared services properly attributable to them.

<u>The Draft Rules</u>

71. It is clear that the draft Rules are at a very preliminary stage (they do not even seem to reflect accurately the Legal Services Board's own position as set out in the narrative). We do not therefore think that any purpose would be served by a detailed critique at this stage. We will, of course, comment on the draft Rules when a version revised in the light of consultation is published. However, we would point out that draft Rule 3 (5) (that the regulatory arm is the sole arbiter of whether something is within its regulatory functions) is not sustainable in law, as it purports to exclude the jurisdiction of the courts.