Legal Complaints Service response to Legal Services Board consultation on regulatory independence

The Legal Complaints Service (LCS) is the independent complaints-handling body funded by the Law Society to provide redress to consumers in cases of inadequate professional service provided by solicitors where the parties have been unable to resolve the matter directly. In our response to your consultation, we speak as an organisation that works within the auspices of a representative body whilst putting the consumer and public interest at the heart of its business.

We work in partnership with both the Law Society (representation) and the Solicitors Regulation Authority (SRA) (the regulator for solicitors, also funded by the Law Society). Both the LCS and the SRA continue to have independent Boards to which complaint handling and regulatory powers are delegated. We hope that this continuing self-governance is indicative of the Law Society's genuine commitment to the independence of the regulatory regime.

We can also speak about working with other regulators, including those that are involved in the regulation of solicitors (such as the Office of the Immigration Services Commissioner) and those that regulate other lawyers (such as the Council for Licensed Conveyancers).

In responding to your consultation we have made our comments under the headings contained in the consultation document. We have not responded to every issue that you are consulting on but have commented on those areas where we have experience or evidence to inform our views.

Internal governance

In our view, separation of the regulatory functions of the Law Society (regulation and resolution of complaints) from the representative function has been beneficial for consumers and the profession, although not without some difficulties.

The LCS has powers delegated to it to deal with complaints of inadequate professional service, develop policy, strategy and its own research. Although we set our own business plan we are constrained by limits set on the organisation by the Law Society – we are not in total control of our destiny.

From our experience of handling complaints, it appears to us that solicitors need guidance on matters of both conduct and service We know from talking to our colleagues at both the SRA and the Law Society that, in a competitive and highly regulated market, many members of the profession want and value guidance on business and professional matters. Our experience, from our contact with the profession at conferences and events, is that many solicitors are unaware of how the Law Society has separated its different functions and so consequently the boundaries between the different arms are perceived to be blurred.

The same confusion may also be evident within the organisations themselves. A scenario such as members of a representative body being able to sit in on Board meetings of the regulatory body could arise if there is not a real understanding of what true separation means.

Separation of functions: ring-fencing

We welcome your proposals to require approved regulators to ring-fence control of their regulatory functions. This control must include management and operational decision making and policy control, as well as decision making in individual cases or matters. Your

paper refers to “representative-controlled regulators”- we would strongly make the point that ring fencing will only work if it removes representative control. We consider that consumers need to feel reassured that regulation is both independent and seen to be independent of the legal profession. The proposals that you have made will go a long way towards building strong public confidence in the regulatory framework.

We would like to comment on a strand that runs through your consultation document- public perception of self regulation. Within your consultation several references are made in relation to the perception of lawyers running the regulatory system for themselves and that *‘consumers and the public at large are unlikely to trust any regulatory framework unless and until they are satisfied that it is demonstrably separate from (and independent of) representative self interest’.*

The importance of how consumers *perceive* the regulatory regime should not be underestimated. We consider that ring-fencing the regulatory function of approved regulators may be sufficient to *ensure* the independence of that function. However, our experience suggests that this in isolation will not *reassure* consumers. When we speak to consumers, in relation to complaints, there is often confusion and concern that the approved regulator and the representative body are both called the Law Society. Many solicitors also share that confusion, leading to questions being asked in the legal press and elsewhere of why the Solicitors Regulation Authority and the Legal Complaints Service are not representing solicitors’ interests in their work. It is, of course, not the function of a regulator or complaints handler to represent the people it regulates.

After the Clementi report of 2004, and in advance of the Legal Services Act, the Law Society took the initiative in 2007 and delegated its power to handle consumer complaints to the newly formed Legal Complaints Service. Prior to the establishment of LCS, complaints had been handled by the Consumer Complaints Service (CCS). The CCS was a part of the Law Society and as such all of its marketing materials were clearly branded with the Law Society’s logo. It is not surprising therefore that with the establishment of the LCS there remained a legacy of public distrust and confusion. The LCS understands that the public may perceive a possible conflict of interest where there are regulatory and representative overlaps. We believe that the branding and marketing of the separate bodies will play a significant role in not only distinguishing the two functions but will also demonstrate the separation of the two functions. When the LCS was established it was important that the new organisation was perceived as quickly as possible to be independent of the representative are. This process included:

- the wholesale re-branding of what had been known as the Consumer Complaints Service
- a new name for the organisation which clearly set out the nature of the organisation – the CCS often had members of the public ringing with queries about white goods!
- the re-branding and revision of all LCS’ external and internal literature with the emphasis on the consumer
- the creation of an independent web-site
- developing a media presence and building relationships with stakeholders such as various consumer organisations

Whilst the combination of re-branding, and all that that encompasses, together with the recently granted delegated authority have gone some way in addressing the links between regulatory, representative and redress arms there still remains confusion both for lawyers, some of whom believe that since LCS is part of the Law Society it should therefore be representing them in complaint issues, and consumers who remain sceptical about the impartiality of an organisation that would still appear to be self-regulating.

As a result of these experiences we would recommend that the proposal to ring-fence the regulatory arm is accompanied by a similar requirement to ring-fence the representative arm and that both should clearly and visibly have separate identities. We consider that this approach would complement and enhance the ring-fencing of the regulatory function and would further heighten public confidence in the system. The representative function would also benefit from having greater freedom to pursue the interests of the legal profession without that role being fettered by its obligations as the approved regulator.

In organisations such as the Law Society, this approach would require the creation of a new governing body which mirrors neither the representative nor the regulatory arms. It would have equal representation from both. This would mark a move away from the representative Law Society Council having an oversight function. The corporate level body would oversee matters of common interest to both arms (such as shared services) and could provide the monitoring role envisaged in the consultation document. In order to ensure that consumers can clearly see an independent regulatory regime it is vital that approved regulators do not share their name with the representative bodies.

Ring-fencing both the representative and regulatory arms would provide the profession with the strong, unfettered voice to serve their interests, whilst at the same time clearly demonstrating that the public are protected by an effective and independent regulatory regime.

Regulatory board appointees

We believe that the overriding objective in appointing the chair of a Board should be their ability to perform the role. This should be the primary factor in making an appointment rather than whether the person is a lawyer or non-lawyer. However, we do recognise the risk of the perception of bias that a lawyer may bring if appointed to the role.

In practice we have seen little evidence that consumers of legal services have much knowledge or interest in the backgrounds of our Board members. For that reason we do not offer a view or any evidence on whether the chair of an independent board should be a non-lawyer.

Where we can share our experiences is in the importance of appointing people to the Board that have a clear understanding of and a commitment to equality and diversity issues. A Board with a strong grounding in equality and diversity will be much more effective in meeting the regulatory objectives contained in the Legal Services Act. An understanding of such issues can be seen as a key element in meeting objectives such as improving access to justice and encouraging a diverse legal profession.

The Board of the Legal Complaints Service has a diverse membership but, more importantly, has extensive and broad experience of promoting equality and diversity. It is important to note that Board members were not appointed to represent particular parts of the community or to serve particular interest. Instead, appointments were made based upon their experience in organisations such as the Council of the Minority Rights Group, the Hearing Aid Council and the Joseph Rowntree Charitable Trust.

We believe that a key element in appointing the right people to the Board is their awareness of equality and diversity issues. A Board that is committed to this area, with the experience to meet the challenges that can be posed, will be better placed to meet its regulatory objectives.

Shared services

The LCS, together with the SRA, shares central services with the Law Society- these being Facilities, IT/Telecoms and Legal Counsel. More recently, the Finance and Human Resource & Development functions were centralised again. Although LCS contributes towards these services and staff, ultimately the reporting line for this is with the Law Society. We would agree with the SRA idea that shared services could be encompassed within a corporate element between regulatory and representative bodies and as you point out, there are obviously cost benefits through economies of scale to be gained which ultimately will benefit the profession funding those organisations. However, before commencement of sharing services it must be agreed how the services and budget will be allocated, ie is the balance between the services received relative to the amount paid?

One problem that is often encountered with shared services is the lack of control over the use of shared services budget or the ability to spend within the budget as authority is required from outside the organisation. Essential spends/posts are centralised and then cut. For example, where previously The Law Society central services had a dedicated Records Manager resource, the position was removed by the Law Society in the 2009 budget. This stopped our ability to effectively manage our data, such as the archiving process. In the run up to closure it is imperative that our house is in order.

A further problem that could arise with shared central services is the budget allocation. The concept of shared services does not imply common policies across all three organisations therefore there are likely to different and potentially competing requirements which are unlikely to deliver best value.

As central services is a reserved function of the Law Society the spending decisions are made by them, on many occasions without reference to our business objectives, on our behalf. This has sometimes led to excessive and often unnecessary expenditure, for example on cosmetic buildings maintenance which is inappropriate for an organisation going towards closure.

Sharing HRD services across three very different types of organisations can create problems when trying to deal with three different types of skill sets and providing the necessary HRD support without a thorough understanding of the needs of the individual organisation. In order to function effectively and deliver value for money the HRD function needs to be integral to the business and to develop policies that reflect business needs. Whilst some administrative functions can be shared, some embedding of staff in the business is vital.

Practising fees

Permitted purposes

We welcome your proposal to widen the permitted purposes to include increasing public understanding of a citizen's legal rights and duties. We consider that it is important for all organisations operating within the legal world to have the freedom to share their knowledge and experience in order to help inform consumers about their legal rights and duties. It is also important that the LSB looks to interpret the permitted purposes as widely as possible.

We have previously encountered difficulties with narrow interpretations of what practising fees can be used for. One situation that has led to consumer detriment is in relation to the SRA's Compensation Fund. Previously, where a solicitor was unable comply with an LCS award of compensation, the matter would be referred to the Compensation Fund for payment. Following legal advice, the Compensation Fund decided that such payments fell

outside the purpose that the practicing fee could be used for. As a result consumers are left with either taking legal action against the solicitor, who may be insolvent, or trying to recover the award from the solicitor's insurers, which can be a long and tortuous process.

In addition to our comments above, we also believe that it would be helpful to further expand one of the permitted purposes. Section 51(4)(e) of the Legal Services Act names one of the permitted purposes as "*the promotion of the protection by law of human rights and fundamental freedoms". W*e strongly support this statement. However, more recent developments such as the Equality Bill and the work of the Equality and Human Rights Commission have shown that there is less focus on the fairly narrow list of protected human rights and greater emphasis on the need to celebrate and protect equality and diversity. The legal profession have an important role to play in this regard and should be free to engage in activities that would support protection of equality and diversity. We therefore recommend that a further permitted purpose should be *"the promotion of the protection by law of equality and diversity"*.

Draft Rules

We welcome the contents of the draft rules to be issued under section 30 and 51 of the Legal Services Act. The only specific question we would wish to raise is in relation to Rule 3 of the Internal Governance Rules. In this rule reference is made to *'non-legally qualified members'*. We believe that for the sake of consistency is would be advisable to use the definition of *'lay person'* contained within section 2(3) of Schedule 15 of Legal Services Act.

Impact assessment

Consumers need to be reassured that one profession poses no more of a risk to them than another. In this respect we are concerned that in your impact assessment you state *"it may mean that particular approved regulators can make a case for implementation that might not stand scrutiny were they to have significantly more resources."* We agree that regulation needs to be risk based and proportionate. However, as discussed above, public perceptions of regulation will be central to the success of the system.

There is a risk that consumers could view the above statement as accepting that financial considerations outweigh the public interest. Consumers need reassurance that they will receive the same levels of protection irrespective of which lawyer they chose to instruct. We found this to be particularly important in the handling of complaints against legal disciplinary practices. Working alongside the Council for Licensed Conveyancers (CLC), we identified the risk that consumers may perceive one redress scheme to be better than the other. This was because LCS and CLC operated two different compensatory limits. By ensuring that our limits were the same consumers could feel reassured that they had the same access to redress irrespective of whether the firm was regulated by the SRA or the CLC. It is perhaps relevant to note that consistency was achieved by raising the limit of the CLC, rather than reducing that of the LCS.

A further risk is that a perception could be created that some types of lawyers are better than others because of the regulatory protections available. There is already a widely held view by consumers, and some lawyers, that barristers and solicitors are more able than, say, legal executives or licensed conveyancers. We sometimes receive complaints along the lines of "*my matter was handled by a licensed conveyancer and not a solicitor. I didn't want it to be dealt with by someone so junior*". If there is a perception that the regulators with smaller resources provide less protection, then there will be even greater reluctance by consumers to consider the whole range of lawyers available when deciding who to instruct.

We believe that the positive intention behind the statement in the impact assessment would be better served by providing further clarity. In particular, the LSB needs to state

unambiguously that levels of regulation cannot be allowed to fall below an acceptable level simply because of the resources of the regulation. A more positive approach would be to make clear that regulators with greater resources will be expected to be more proactive in their approach by using their resources to actively reduce and prevent regulatory breaches, for example by pre-emptive visits.

Transparency

To ensure public and consumer confidence in an effective regulator there must of course be full accessible transparency – obviously this is an issue which has gained much greater significance given the course of events over the last few weeks in Westminster. In addition to transparency to the consumer, equally there must be transparency between the regulatory and representative arms. This transparency must be two-way.