INVESTORS IN PEOPLE

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Dear Craig

CONSULTATION RESPONSE: "REGULATORY INDEPENDENCE"

I am pleased to provide a response in my capacity as both Legal Services Ombudsman for England and Wales and Legal Services Complaints Commissioner, to the Legal Services Board's consultation on Regulatory Independence.

My views in relation to the specific questions in the consultation paper are as follows:

***Question 1* – 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)?**

I have long advocated the separation of the representative and regulatory functions of approved regulators, recommending this approach to the Clementi Review and commenting on it throughout the passage of the Legal Services Bill. Effective separation would require the regulatory arm determining its own rules, procedures and strategy without any interference perceived or otherwise from the representative arm.

I have seen with interest the separation within the Law Society and can see the benefits of such a split. However, the present governance arrangements are such that conflicts are apparent between the Law Society and the Solicitors Regulation Authority, which have been aired publicly and appear to be happening more frequently. Defining the split in such a way as proposed by the consultation paper, so as to leave the necessary oversight of the regulatory arms strategy primarily with the LSB, will help to eliminate potential overlap of roles between the representative and regulatory arms of an approved regulator.

I would, therefore, support the proposals of the LSB.

***Question 2* – What do you think of our proposals relating to regulatory board appointees, set out under paragraph 3.15?**

I would agree fully that the appointment of the board must be on merit, through an open recruitment process that is demonstrably transparent in how it is conducted and in the decisions it makes. I agree that no member of the board must be elected on to it to represent a 'sectional' interest, as this would create imbalance in the structure of the board and lend itself to the long-held criticism that it is the profession regulating itself. I support fully the need for the way the board is appointed, and decisions on the performance or removal of board members, to be wholly removed from the representative arm.

Whilst I have empathy with the view of the board being constituted with an in-built majority of non-lawyers, I wonder whether this is an essential requirement if the board is appointed openly. I would be looking for a board to have a broad range of skills, knowledge and experience, and believe that lawyers from other backgrounds (e.g. barristers on the board of the approved regulator for solicitors) could add considerable value to the regulatory boards of the various strands of the profession. A concern to have a non-lawyer majority may mean valuable skills are lost to accommodate a reasonable sized board that is not unnecessarily large to be workable.

Whilst there should be a demonstrable separation between the representative and regulatory functions at board level, there do need to be appropriate mechanisms in place to ensure that a balanced perspective is available and that each arm is able to take account of the views of the other in its decision making.

***Question 3* – Is it necessary to go further than our proposals under paragraph 3.15, for example by making it an explicit requirement for the chairs of independent regulatory boards/equivalents to be non-lawyers?**

I do not feel at this stage it would be necessary to take this further step. I consider that if appropriate assurances are in place as to how the board will be recruited, particularly that the chair is recruited on merit regardless of professional qualifications, this may not be necessary. However, it would be appropriate for the LSB to keep this under review once the boards have been constituted and their actions are scrutinised, for any perceived bias.

***Question 4* – 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?**

A shared service model is not new and is something that many organisations are utilising effectively. I would hope to see current best practice in this area adopted. I would support fully the need for rules around enforceable service level agreements and the need for the board of the regulatory arm being involved in the construction of the shared service arrangements. I would also welcome an independent and objective forum for the resolution of disputes over budgets.

However, given the diversity of professional bodies affected, I would not wish to see something that was overly prescriptive or based on a premise that they will be unable to get this right without rules.

This is clearly an area that could present opportunities for dispute and the LSB should be available, if necessary, to quickly ensure that any disagreements in the construction or implementation of a shared service model are overcome, before they escalate and become difficult to reconcile.

***Question 5* – Is our proposed balance between formal rules and less formal (non-enforceable) guidance right? In what ways would further or different guidance be helpful?**

I think the previous answer covers this, but it is worth emphasising that this is an area where issues of minutia could prevent agreement, or delay agreement for a considerable time, which would be to the detriment of the consumer and the profession. It will be for the LSB to take a higher position on this and ensure its guidance on principles is adhered to, and it should be ready to step in with support and a common sense perspective if necessary.

***Question 6* – 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?**

I fully support the position that the regulatory arm must be able to act with independence and with limited and only essential involvement by the representative arm. As such the proposals set out in this section of the consultation appear sensible.

However, there have been considerable comments aired in public which appear to cast doubt over the present Law Society arrangements for its split of regulatory and representative functions. While the way this split is presently constituted and, therefore, does not incorporate fully many of the factors set out in the LSB consultation, in its response to the Legal Regulation Review – Call for Evidence, the Law Society expresses reservations about the effectiveness of some aspects of the work of the Solicitors Regulatory Authority. I hope that the LSB will assure itself that the regulatory arm of any approved regulator is ‘fit for purpose’ before its final arrangements for the split is approved.

***Question 7* – In principle, what do you think about the concept of dual self-certification?**

I would see dual-certification as a progressive programme based on risk, with the goal of full dual-certification being something the LSB should work towards. Initially it would be appropriate for the LSB to make certain the arrangements that may still be bedding-in in the approved regulators, are working effectively, and it may be necessary for the ‘Board to Board’ meetings to take place before the first year’s certification. This will allow opportunity to explore in more depth how the arrangements are working in practice.

It is anticipated that some of the problems with the internal governance will have been aired and resolved in-year. This may aid the LSB in identifying where the greatest risk of non-compliance exists, but other mechanisms, such as updates from both parties may be necessary to support this if the LSB is to have confidence in the dual-certification process. The LSB may also wish to consider some element of external feedback into the process, so that independent parties can comment on the outcomes and impact of separation.

***Question 8* – If a dual self-certification model were adopted, how should it work in practice? Or would alternative arrangements be more appropriate, either in the short or longer term?**

Please refer to my answer to question 7 (above). I would see this as a progressive programme with more controls necessary in the early years.

***Question 9* – 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 of the citizen's legal rights and duties?**

I agree with the purposes proposed, and support fully the need to extend this to include the addition of the use for increasing public understanding of the citizen's legal rights and duties.

***Question 10* – Should any other (general or specific) purpose be permitted under our section 51 rules?**

I see no other purposes that have not been expressly covered.

***Question 11* – What do you think about our proposal to seek evidence that links to the regulatory objectives in the Act?**

***Question 12* – What criteria should the Board use to assess applications submitted to it?**

I support fully the need to link the purposes for the practising certificate fee back to the Act. In assessing the level of the fee, the LSB would have to - at least initially - base this on historical data levels. However, it may want to compare whether the stated purposes for its historical use, match or are comparable to the purposes it now sees as important. It is acknowledged that this comparison may not be possible to conduct effectively depending on the way the purpose of the practising fee has been defined in the past.

***Question 13* – 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?**

***Question 14* – 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?**

In relation to questions 13 and 14, I feel certain that the approved regulators and professional bodies are better placed to offer a detailed observation. In general terms and for transparency it may be useful to consult and if the terms on how the fee can be used are explicit, then consultation would appear to be on the level of fee. Consulting with individual members on this basis, may not be the most effective use the regulator's time, as its benefit would potentially be limited.

My view at this stage is that approved regulators should not be required to consult.

***Question 15* – 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?**

I believe that it is appropriate for those paying a practising certificate fee to know where that money will be used. The level of detail required by the LSB appears to provide a sensible balance between proportionality and the necessary bureaucracy to meet that aim.

***Question 16* – Are there any issues in respect of practising certificate fees that you think we should consider as part of this consultation exercise?**

I would not have further comment to make on this specific issue.

***Question 17* – Please comment on our draft proposed rules, both in terms of the broad framework and the detailed substance.**

My only comment would be in regard to the role of 'whistleblower'. This allows persons involved in the regulatory function to 'whistle blow' without fear of action being taken against them by their employer. This is something I would strongly support, as it ensures greater openness in the regulatory actions being taken.

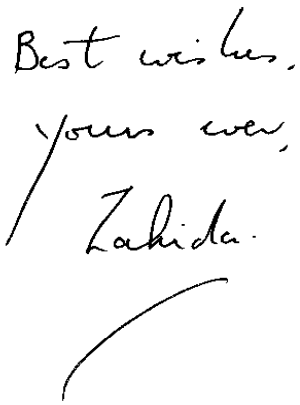
***Question 18* – Are there any comments that you wish to make in relation to our draft impact assessment, published at *Annex C* alongside this consultation paper?**

My comment on the draft impact assessment relates to the cost of implementing the whole programme for the approved regulators. This is about pulling apart what presently exists in approved regulators, where improvements are necessary and re-building or building new structures and processes. This necessity for a dual approach and not just starting from afresh or tinkering around the edges will come at a cost. I believe that the profession would like to be certain the full costs of this have been established and are not unnecessarily burdensome.

***Question 19* – Are there any other issues that you would like to raise in respect of our consultation that has not been covered by previous questions?**

> My final comment is that the LSB itself will set the tone in terms of transparency, particularly in relation to openness over how it spends money allocated to it, for what purpose and its expenditure ceiling. By maintaining for itself the highest standards of transparency, the LSB is more likely as a result to encourage the approved regulators to be fully accountable.

I hope you find my comments helpful and I look forward to the LSB's conclusions following the consultation period.



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