Legal Services Policy Institute

June 2009

REGULATORY INDEPENDENCE

Response to the Legal Services Board's Consultation Paper

1. The nature of this response

The College of Law created the Legal Services Policy Institute at the end of 2006 as part of its charitable foundation. Given the College's heritage and growing reputation for strategic leadership in legal education in recent years, the Institute represents its contribution to the process of policy formation and to better-informed planning in legal services by everyone concerned.

This response is submitted on behalf of the Institute addressing the policy and public interest issues raised by the Consultation Paper.

2. Introduction

The Institute is in broad agreement with the proposals from the Board. Effective separation and ring-fencing of the regulatory functions of approved regulators which also have representative functions is central to the operation of the two-tier structure of regulation envisaged by the Legal Services Act. The two-tier regulatory structure in financial services[1] was short-lived, in part because of the large number of bodies involved in regulation, and in part because of the potential conflict between representative and regulatory roles. If a similar structure is to work effectively for legal services, there must be public confidence in the effectiveness of the separation of functions.

However, that confidence will not depend on rules alone. Inevitably, formal consultation is about a framework of rules and requirements. However, the real issue is that of willingness to make the new structure work. This will require more than compliance with rules. Approved regulators with dual roles will have to

[1] The Securities and Investments Board supervising Self Regulating Organisations and Recognised Professional Bodies.

demonstrate, by their behaviour, that they have fully embraced the philosophy that lies behind the Legal Services Act.

This leads the Institute to the view that the framework of rules proposed in the Consultation Paper is an appropriate starting point. Given appropriate behaviour by approved regulators, the framework could well endure. However, if there is compliance with the letter of regulations, but no active acceptance of the philosophy that lies behind them, the Board could be driven to be more prescriptive. Should that occur, it could call into question whether the separation of functions is working effectively.

In relation to the practising fee, the Institute considers that this must be considered in conjunction with any other statutory fees that an approved regulator may be able to levy, that touch on the reserved legal activities and the process of qualifying to undertake them. For example, the Law Society has the power, under its training regulations, to charge fees to students for enrolment and for attendance on the Legal Practice Course. There is a risk that if the level of the practising fee is tightly controlled, but there are not equivalent controls over other statutory fees, a disproportionate share of costs may be charged to the unregulated fees. This point is developed further in response to the questions about the practising fee.

3. Responses to the consultation questions

This paragraph sets out the Institute's responses to the specific questions posed in the Consultation Paper on regulatory independence.

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)?

As noted in paragraph 2 above, effective separation and ring-fencing are at the heart of the new regulatory system. We agree that the proposals in the Consultation Paper are an appropriate starting point. The arrangements will need to be reviewed in the light of experience of the extent to which approved regulators abide by the spirit of the proposed arrangements, as well as complying with the letter of specific rules.

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

We agree with the Board's approach, and believe that this will reinforce both the reality and the perception of the independence of the regulatory arm from a representative body.

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?

We do not consider that it should be necessary to go further. Where a majority of a regulatory board's members are non-lawyers, we believe that the board should then be free to make its own assessment and decision about who would be the best of their number to become the chair, without any further, extraneously imposed, restriction on their judgement or preference.

Further, the Institute thinks that it would be inappropriate to insist that the chair of an independent regulatory board should be a non-lawyer. Such a limitation could exclude good candidates. An appointing body might feel that a person who was currently practising could be subject to some potential conflicts of interest. However, that should be determined on the facts and merits of an individual application; it should not lead to a blanket ban on anyone who has qualified as a solicitor, barrister or other regulated legal professional.

There are people who started their careers as practising lawyers, and who have gone into other fields. In some cases, they will retain the professional title, but may not currently practise. Law teachers are among these (although some may hold practising certificates simply for the purpose of keeping up to date with current practice by undertaking locum work in a university or college vacation). Other examples are persons holding senior posts in industry, commerce or government, who retain the professional title, but are now exercising wider managerial functions. We do not believe that it would be appropriate to disqualify such persons from appointment. Appointments should be made on merit, regardless of whether a legal professional qualification is held.

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?

We agree with the Board's proposals, and believe that they will encourage a proper balance to be struck. The Institute particularly supports the notion of an independent forum to resolve resource issues, as suggested in the final bullet point

of paragraph 3.22. It would be appropriate for this body also to have the oversight and dispute resolution functions discussed in paragraph 3.37.

In an ideal world, with both the regulatory and representative arms being fully supportive of the ring-fenced approach, such a forum might not be needed. However, there are some indications[2] that such a forum might be required. We believe that it would be better for the machinery to be put in place, but with the hope that all resource allocation issues are resolved without recourse to it, than to have a position in which there was no dispute resolution machinery available.

Question 5. Is our proposed balance between formal rules and less formal (non-enforceable) guidance right?

The Institute supports the approach of principles-based rules, supported by guidance. This is consistent with a model in which behaviours are as important as formal compliance with rules.

Question 6. What are your views on our suggested permitted oversight role for representative-controlled approved regulators over their regulatory arms?

We agree with the Board's approach to the oversight, monitoring and intervention role of approved regulators. As stated in our response to Question 4, we particularly welcome the establishment of an independent forum for the management and discharge of these supervisory functions and the resolution of any disputes between the approved regulator and its regulatory arm.

The Institute favours transparency in the discharge of regulatory functions and supports the proposal that freedom of information provisions should apply. The simplest approach would be to make approved regulators subject to the Freedom of Information Act itself, by including them in Part VI of Schedule 1 to that Act. Approved regulators are discharging functions in which there is significant public interest, and are exercising powers conferred by statute. A number of comparable organisations, with responsibilities for professional standards and qualifications, are already included in Part VI of Schedule 1[3].

It may be objected that approved regulators which are also representative bodies exercise private functions, which should not be subject to the Freedom of

[2] See, for example, our response to Questions 11-16 on the practising fee below.

[3] For example the General Medical Council; the General Dental Council; the General Chiropractic Council; the General Osteopathic Council; the UK Central Council and the English and Welsh National Boards for Nursing, Midwifery and Health Visiting; the Steering Committee on Pharmacy Postgraduate Education; the Teacher Training Agency; the Panel on Standards for the Planning Inspectorate; the Construction Industry Training Board; the Authorised Conveyancing Practitioners Board; the Central Council for Education and Training in Social Work.

Information Act. We do not believe that this should be a problem: a number of entries in Part VI, Schedule 1 are limited to certain functions of the public authority concerned. Examples include the BBC, the Bank of England, and the Channel Four Television Corporation. In line with this approach, an entry for the Law Society/Solicitors Regulation Authority could read: "The Law Society, in respect only of information held for the purposes of its activities as an approved regulator under Part 4 of the Legal Services Act 2007".

Any concerns about the release of personal information handled by an approved regulator are covered by the exemption at section 40(2) (personal information) of the Freedom of Information Act. In some cases, the exemption in section 42 (legal professional privilege) may also be engaged.

Questions 7 and 8. In principle, what do you think about the concept of dual self-certification? If a dual self-certification model were adopted, how should it work in practice?

We approve of this concept as a pragmatic and cost-effective response. As with other aspects of separation and ring-fencing, much would depend on the behaviours of the parties to certification, and the Board should be ready to introduce a more hands-on approach if necessary. Given the likely number of approved regulators, we would hope that the Board's own evaluation could be regular, albeit possibly targeted on the basis of known or suspected concerns about compliance.

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"?

We were disappointed and concerned that section 51(4) contained no specific reference to the regulatory objective in section 1(1)(g), and agree with the Board's view that it is not otherwise covered. We accordingly support the Board's suggestion that its rules should explicitly include the objective as a permitted purpose. We believe that practitioners and providers must play a significant and direct role in achieving this objective, and therefore welcome rules that will allow funding to be raised for this purpose.

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

We cannot think of any other purpose that should be permitted under the rules.

Questions 11 to 16. Practising fees

We agree with the Board's proposal to seek evidence that links the level of the practising fee to the Act's regulatory objectives. Given the overriding obligations imposed on the Board and approved regulators to secure the regulatory objectives, it must be right for explicit links to be made.

We are concerned by the reference in the final bullet point of paragraph 4.21 of the Consultation Paper to "funding unpermitted activities". If activities are not permitted, it would seem difficult to justify even voluntary additional payment. We presume that the intention is to refer to "activities other than permitted activities" (which would be capable of justifying additional payment), and therefore respectfully suggest that more precise drafting would be needed in the Board's rules.

The Institute wishes to express a wider concern about the relationship between the practising fee and other statutory fees which the approved regulator is able to set. For example, the Law Society/SRA has powers under section 2(3)(c) of the Solicitors Act 1974 (as amended) to make training regulations which "may include provision for the charging of fees by the Society and the application of fees which the Society receives". The power to make training regulations was subject to the concurrence of the Secretary of State, the Lord Chief Justice and the Master of the Rolls, but the requirement for concurrence is removed by Part 1 of Schedule 16 to the Legal Services Act 2007.

One of the permitted purposes to which income from practising fees may be applied is the "education and training of relevant authorised persons and those wishing to become such persons" (section 51(4)(a) of the Legal Services Act 2007). Training regulations may prescribe "the education and training to be undergone by persons seeking admission as solicitors" and "any education or training to be undergone by persons who have been admitted as solicitors" (section 2(3)(a)(i) and (ii) of the Solicitors Act 1974, as amended). The Law Society/SRA thus has a choice about meeting its costs relating to education and training from practising fee income or from fees set under the training regulations.

It is proper that costs should fall on those who benefit, and there is nothing wrong, in principle, for the costs of administering education and training to be met from fees charged for that purpose, rather than falling on the generality of the profession. Nevertheless, there is a risk that an approved regulator may prefer to raise income from a largely unregulated fee, rather than from a practising fee that is subject to stringent scrutiny by the Board. There is, in other words, a risk that costs might be attributed to training fees without a full justification, simply because of the lower level of scrutiny. In this context, it is worth noting that, in the past, there have been allegations made by students that the Law Society has charged more in training fees than was necessary to recover its costs, and that training fees thus subsidised other activities.

In our view, the arguments set out in paragraph 4.16 of the Consultation Paper apply as much to the level of fees set under the training regulations as they do to practising fees. In particular, the statement in that paragraph that a fee that was too high "could act simply as an undue barrier to market entry, limiting both opportunities for potential applicants to the law and some serving lawyers and/or firms" is of direct relevance to training fees.

The fees charged are significant. A student must pay £80 to the SRA to register. A further £110 is then payable as a part of the fee for the Legal Practice Course, with course providers acting as agents for the SRA in collecting the fee. Fees for authorisation and validation of the LPC, which are payable by providers and are thus overheads which influence the course fee charged to students, range from £1,650 to £5,500. The Institute does not challenge the current level of these fees, but rather observes the potential for abuse, if the process for setting them is less rigorous than the process for setting practising fees.

We also believe that the separation of representative and regulatory functions within the Law Society has already had an adverse effect on the service provided in return for fees paid by students. An essential text for trainee solicitors is the *Guide to Professional Conduct*. In return for the LPC fee, every student used to be issued with a free copy of this publication. Copyright in the publication vests in the representative Law Society (even though those who write the *Guide* are now staff of the SRA). The Law Society no longer provides free copies of the *Guide* to each student; instead, these now have to be purchased by each LPC provider for issue to students. In our view, such behaviour is at best unfortunate in the context of the need for the regulatory and representative entities of an approved regulator to "co-operate constructively" (cf. Consultation Paper, paragraph 3.36).

The Institute therefore urges the Board to consider how it might approach the question of the level of statutory fees, other than the practising fee, which are set for regulatory purposes. It seems to us that training fees, and especially those paid by students, which were set at an unjustifiably high level could have an adverse effect on one or more of the regulatory objectives. Specifically, protecting and promoting the public interest (in fair access to professional training), and encouraging a diverse legal profession, could both be affected adversely by fees that acted as an undue barrier to market entry. The Institute considers that the Board should make it clear that setting training fees at an unjustifiable level could constitute an act or omission which could give rise to the issuing of a directive under section 32(1)(a) of the Legal Services Act.

Where an approved regulator proposes to raise income for the permitted purpose of education and training from a statutory fee other than the practising fee, the Institute considers that the justification for the level of the fee should be included in the evidence that an approved regulator provides in its application for approval of a proposed practising fee. It is clear that the intention of Parliament was that

practising fees charged for the permitted purposes set out in section 51(4) of the Legal Services Act should be controlled. The existence of a separate fee-raising power in relation to one of the permitted purposes should not allow an approved regulator to evade that control.

The level of fees set under training regulations should be subject to consultation, on the same basis as consultation on practising fees. Those consulted should include providers of training programmes and representatives of student interests, as well as the profession more generally.

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

As a general comment, we observe that in those rules where the Board is required to approve arrangements, there is nothing to require the Board to do so within any specific period of time.

We offer the following suggestions or comments in relation to Part A:

(a) In Rule 3(1): replace "they (the arrangements)" with "those arrangements".

(b) In Rule 3(2): replace "person(s)" with "person" (or "person or persons").

(c) In Rule 3(7): to be consistent with Rule 3(6)(a), replace "representative oversight body" in both places with "independent oversight body".

(d) In Rule 3(7), sub-rule (c) seems to us to be insufficiently precise in its meaning and import, since it is not clear what the resolution in question must relate to.

(e) In Rule 3(7), sub-rule (d) appears to be circular, in the sense that the Board can intervene when it feels it is appropriate to direct itself to do so, but does not specify any "matters". It might be reasonable for the Board to reserve to itself a general power to intervene: in such a case, this power could (and in our view should) be differently expressed.

(f) In Rule 4(1): replace "person(s) or organisation(s)" with "person or organisation".

(g) In Rule 5(2)(b): before "authority" insert "independent regulatory".

(h) In Rule 7(2): replace "entrenched by" with "set out in sections 1(1) and 28(3) of".

We offer the following suggestions in relation to Part B:

(a) In Rule 2(b): replace "practise fees" with "practising fees".

(b) In Rule 3(2)(g): replace "working to increase" with "the increase of".

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?

The Institute endorses the key tests set out in paragraph 15 of the Impact Assessment. In particular, we welcome the statement that "the process by which approved regulators set and then levy charges from their regulated community should be as transparent as possible", and believe that this transparency is an important part of holding the regulator to account. This is particularly true of training fees paid by students, who form a part of the "regulated community", but who have a limited voice in either the regulatory or representative arms of the approved regulator.

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

The Institute has no further issues that it wishes to raise.

3. Confidentiality

We do not wish our views to be confidential and have no objection to our responses being attributed.

The Legal Services Policy Institute

The Legal Services Policy Institute (LSPI) was established by the College of Law in November 2006. Its principal objectives are to:

(a) seek a more efficient and competitive marketplace for legal services, which properly balances the interests of clients, providers, and the public;

(b) contribute to the process of policy formation, and to influence the important policy issues, in the legal services sector and, in doing so, to serve the market and public interest rather than any particular party or sectional interest;

(c) alert government, regulators, professional bodies, practitioners and other providers, and the wider public, to the implications of these issues; and

(d) encourage and enable better-informed planning in legal services by law firms and other providers, government, regulators and representative bodies.

The Institute seeks to form and convey independent views; where the College might have views as a provider of education, these are expressed separately.

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