The OFT's response to the Legal Services Board's Consultation on Regulatory Independence *Consultation on proposed rules to be made under sections 30 and 51 of the Legal Services Act 2007 (c.29)*

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 process and procedures; and the power to direct strategic direction)?

We welcome the Legal Services Board's ('LSB') thinking. We also believe that Approved Regulators should have regulatory responsibility only where they can demonstrate that this will not conflict with their representational responsibilities. Consumers and the public at large are unlikely to trust any regulatory framework, unless and until, they are satisfied that it is separate and independent from representative self-interest.

Any internal separation undertaken in place of completely new structures should set out clear and robust arrangements to minimise the risk or reality of prejudice or other undue interference from those acting for representative purposes. Just as justice must not just be done but seen to be done, regulatory independence must be manifest and perceived as independent by consumers and the public.

We consider that if this cannot be achieved by "ring fencing " or Chinese walls, then there may be cases where the LSB may need to consider whether securing the independence of the regulatory arm acting with demonstrable independence from representational interests would be best achieved by a completely separate regulatory body. This is the model used in dentistry and in medicine with the British Medical Association and the British Dental Association representing members and the General Medical Council and General Dental Council regulating those professions.

However we appreciate that the formation of a new body may not be proportionate or feasible for some of the smaller Approved Regulators.

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

The OFT agrees with the LSB's proposals.

We consider that the appointment process should be seen by both the public and the profession of producing demonstrably qualified and genuinely independent members from a variety of backgrounds best suited to considering the consumer and public interest.

We believe that a lay majority is required, at least in any vote which relates to non representational issues, and so we welcome your proposal that a regulatory board must have a lay majority.

In our view lay members are more likely to be objective in their decision making, rather than those who have practiced in the particular profession, and are qualified in suitable and diverse areas. Lay membership will also enhance the public perception that the Approved Regulators are acting in the public and consumer interest.

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?

The OFT believes that this may be preferable if the LSB considers that it will enhance the public perception as to the independence of the regulatory board.

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 out such arrangements as suggested in paragraph 3.22?

The OFT agrees with the LSB's proposals and we would hope to see effective dispute resolution in the suggested forum.

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?

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?

The OFT is not in a position to make suggestions, but we would propose that these rules - whether formal or informal - and the envisaged permitted oversight role are reviewed from time to time by the LSB to ensure their effectiveness and ultimately that they operate in the consumer and public interest.

Question 7 – In principle, what do you think about the concept of dual self-certification?
Question 8 – If a dual self-certification model were adopted, how would it work in practice? Or would alternative arrangements be more appropriate, wither in the short or longer term?

The OFT appreciates that an annual requirement for each approved regulator and (separately but as part of a complementary process) its regulatory arm to certify continued compliance with our internal governance rules is attractive since it reduces the burden on the LSB by ensuring that a large slice of the work necessary to evidence compliance was done in house, rather than by the LSB.

We suggest that this model is reviewed from time to time by the LSB to ensure its effectiveness and ultimately that it operates in the consumer and public interest.

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"?

The OFT agrees with the LSB's proposal.

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

The OFT agrees with the LSB's proposals.

In particular we would wish to see a requirement on Approved Regulators to evidence that the overall budget funded through the collection of the fee receipts is appropriate. High fees could act as a barrier to market entry, limiting both opportunities for potential applicants to the law and some lawyers and/or firms and could impact negatively on access to justice for consumers. Conversely low fees would provide an inadequate budget for the purposes of robust and effective regulation which we do not believe is in the public or consumers' interest.

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?

We would favour such a requirement provided that it would be proportionate for Approved Regulators to do so. It may be more necessary for non elected boards to consult especially if a board does not include lay members (see answer 2 above.)

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?

The OFT very much favours the LSB's proposal regarding transparency and we envisage that details of fees as sought is paragraph 4.21 will provide sufficient detail for the public and consumers to understand how the fees have been spent.

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?

We welcome sight of your draft impact assessment. In particular we take note of your assessment of regulatory impact on smaller approved regulators and the risk that if costs of regulation are too high then members of these organisations may leave. We therefore share LSB's concerns that regulation must be proportionate.
We also welcome that LSB has developed rules on the basis that consumers' interests are at the heart of these.