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Craig Robb
Legal Services Board
7th Floor Victoria House
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29 June 2009

Dear Sir,

Regulatory Independence.

I refer to the consultation paper in respect of the above matter and now enclose a response considered and approved by Solicitors in Local Government.

I regret the lateness of the submission however the meeting of our National Executive Committee was only held on Friday 26 June 2009.

If you require any clarification or further information in respect of this submission then please let me know.

Yours faithfully

George Curran
on behalf of Solicitors in Local Government

Agenda Item.

REGULATORY INDEPENDENCE

CONSULTATION RESPONSE TO THE LEGAL SERVICES BOARD

National Executive Meeting: 26 June 2009

Report prepared by George Curran

1. Purpose of Report

To consider a response to the consultation process initiated by the Legal Services Board in respect of the regulation of the profession and the process for setting the Practising Certificate fee.

2. Recommendations

The NEC are asked to agree the responses in the report (or provide alternatives or amendments) for submission to the LSB.

3. Report detail.

The LSB have initiated a consultation process on the issue of regulatory independence. They have made it clear that the job of the LSB is about putting the interests of citizens and consumers at the heart of the system. The separation of regulation from representation was a key plank in the creation of the Board by the Legal Services Act 2007.

There had been a preconception that self regulation operated in the interests of the regulated bodies not the wider public.

They make it clear that their role and their work is about ending , once and for all, any perception that lawyers run the regulatory system for themselves. This concept must be taken into account at all times when considering any response to this consultation process. To do otherwise would be foolhardy.

The consultation paper seeks views on a set of statutory rules to be made under the 2007 Act. Again it is made clear that in setting out these proposals they are building on the Act; not seeking to re-open it. That debate has ended.

They make proposals about internal governance of approved regulators and the control of the practising fees charged by the approved regulators and paid by regulated practitioners. There is seen to be a clear linkage between these two issues as the second must be resolved in such a

manner so as to provide adequate funding for the regulator to enable it to properly discharge its functions.

The consultation document runs to some 66 pages. It is therefore intended to try to encapsulate the relevant matters and respond to the issues raised in as brief a manner as may be possible without any loss of understanding of the whole. However anyone with a particular interest in this matter would do well to read and consider the whole consultation document.

The intention is to pose the question then set out a suggested response for discussion and consideration.

INTERNAL GOVENRANCE

Q1. How might an independent regulatory arm best be `ring-fenced` from a representative-controlled approved regulator which requires a delegation of the power to regulate processes and procedures; and the power to determine strategic direction?

A1. The Law Society has already established arrangements with the SRA to seek to achieve these outcomes and thereby demonstrate its intention to make the new regulatory structure work in the way intended by Parliament. The arrangements introduced indicate that the Law Society accepts that regulatory decisions must be taken by a body quite separate from the Council of the Law Society. Experience of the day to day relationship will establish if the current model is appropriate and properly workable to achieve the objectives of the LSB.

Q2.What do you think of our proposals relating to regulatory board appointees?

These are that appointments to boards should be on merit, independent scrutiny, equal opportunities, probity, openness, transparency and proportionality after open advertisement and competition. Further, that there should be no limitation on the selection of any Chair on the basis of professional qualification and there should be a presumption of an in-built non-lawyer majority.

Panels charged with the selection of members of regulatory boards must be demonstrably independent of the representative arm. Chairmanship of the panel should be independent with a majority of non-lawyers. Other than at the point of initial establishment, the regulatory board should lead on the preparation of the panel. There must also be clear arrangements managed by the regulatory board for appraisal of board members and for consideration for re-appointment and removal.

A2. The Law Society has adopted the above approach to appointments to the SRA Board. Taking into account the wish to ensure there is no perception of Lawyers regulating lawyers the further point must also be agreed. However as the Law Society has been appointed as the approved regulator it is reasonable to assume that it (and the profession) should continue to play a role in the regulation of the profession. While there is a role for independent persons it is the profession that has a better, if not full, understanding of the work and activities of those persons who are regulated. Strong professional involvement, bringing with it direct knowledge and understanding, is important to ensuring proper regulation of the profession and its continued independence from Government; which is of itself, for the benefit of society and its citizens in preserving the rule of law. If appointment is to be in accordance with the stated criteria there is

no real basis for insisting on a built in majority of non-lawyers. To impose such a requirement suggests that the appointing panel is not capable of making appropriate appointments.

Again it is difficult to disagree with the general proposals relating to the panels; but this does not, of itself, require that lawyers cannot be engaged in this process. Where else is the appointing panel going to secure relevant expertise to make a full and proper assessment of candidates for appointment? To have an appointing panel with no knowledge or experience of legal practice will not enjoy the confidence of the legal community; and likewise, it is doubted that it would gain and maintain the confidence of the general community which it is set up to protect and preserve.

To propose the regulatory board should take the lead in establishing the panel by which appointments are to be made to the board builds into the process a clear risk of self interest which this process is seeking to avoid; "jobs for the boys". It undermines the perception of independence.

Q3. Is it necessary to go further with these proposals for example by making it an explicit requirement for Chairs of independent regulatory boards to be non-lawyers?

A3. Taking into account the independent nature of the appointing panel it would appear to be unnecessary to suggest that the Chairman of the Regulatory Board could not be a Lawyer (in a minority field) if that individual was considered to be the best available candidate.

Q4 Do you agree with our proposals for the management of resources (including shared services)? What issues might stand outside such arrangements?

These proposals reflect the fact that the regulatory function must be reasonably resourced; but insulated from improper pressure from the representative ruling body in order to meet its strategic and business needs. To achieve this situation shared service models can be advantageous to achieve economies of scale.

A4. These proposals are appropriate. However while the regulator must be insulated from pressure, equally the `parent` body and those individuals who are regulated need protection so that the financial requirements of the regulatory body do not become too extensive and financially draining on the profession. It is important that services are provided economically. This recognises and reflects the expressed views of Sir David Clementi.

There are current shared service arrangements between the Law Society and the SRA. Again it's a matter of time and experience to see how workable they are. In that regard arrangements have been made to create a mechanism by which any day to day problems can be resolved. Similarly experience with the current arrangements will identify if any aspect of resources requires specific and separate attention. In that regard any decision about the use of such services on a shared basis by the SRA should be a matter of joint determination rather than being for decision by the SRA alone due to the likely impact on the whole of the regulated profession.

Q5. Is our balance between formal rules and guidance right?

By this arrangement the LSB propose to set out principles supported by guidance of how they would best envisage compliance being achieved.

A5. Where the LSB have a responsibility for a number of regulatory bodies and their relationship, in some cases, with a `parent` representative body it is probably the best approach to leave it to the bodies to determine, in the light of guidance, how to satisfy the requirements of specific rules. This will allow for flexibility and ingenuity in developing arrangements as opposed to strict compliance with stated fixed rules.

Q6. What are your views on our suggested permitted oversight role for representative-controlled approved regulators over their regulatory arm? Are modifications required to make it work?

The point is made that it is the statutorily approved regulator (rather than the regulatory arm) that is responsible in law for the discharge of the regulatory function. In our case that is the Law Society not the SRA. It remains however for the LSB to regulate the Approved Regulator (TLS) in its supervision of the regulator (SRA). Due to the diversity of approved regulators a "one size fits all" perspective is unlikely to work effectively. They will however require that the spirit of the Act is observed: that regulation is carried out in accordance with the regulatory objectives including separation.

It is proposed that the statutory regulator (TLS) should have two supervisory roles over the regulatory body. These powers should only be exercised in agreement with the regulator (consent not being unreasonably withheld); or the consent of the LSB. There will be reserve power for the LSB to intervene.

The first of these supervisory roles is to commission independent and (occasional) strategic reviews to test if the mechanisms in place remain fit for purpose. Secondly, to routinely monitor the work of the regulator. It is suggested that the supervisory function should be carried out by a body independent of representational control. Such a body may also arbitrate in disputes concerning shared services. There may also be a need for an internal dispute mechanism free of representative control with the potential for ultimate referral to the LSB.

A6. These are all matters that are in hand in the arrangements between TLS and SRA. Time and experience will determine if they were initially appropriate or require change over time in the light of experience. It does appear better to seek to set out general principles for relationship compliance rather than strict rules of behaviour.

Q7. In principle what do you think about the concept of self-certification?

The function of the LSB is to make the rules and ensure compliance. They envisage that they will approve arrangements that comply with the rules; then have an arrangement to test their effectiveness. This latter aspect being achieved by annual certification from the regulator and its regulatory arm (dual certification) of continued compliance with the internal governance rules. If such a certificate is not given there will be a requirement to specify areas of non-compliance together with reasons for the non-compliance endorsed with proposals for rectification. The LSB will have reserve powers to ensure compliance.

A7. This appears to be a satisfactory process. Again, like other aspects of these proposals it will be tested by time and experience. It is a worthy initial approach to the issue of overall supervision.

Q8. If a dual certification model were adopted, how should it work in practice? Or would alternative arrangements be more appropriate?

A8. In practice it may be capable of operation by a process of mutual exchange of reports from each body to the other with a limited, stated, period of time within which the receiving body might be able to comment on the statement they have received. If this arrangement is to have real merit it should not simply be a statement/certificate of compliance but should seek to explore how the working arrangements and satisfaction of the regulatory objectives might be better achieved.

PRACTISING FEES

Section 51 of the Act provides for control of practising fees paid by authorised persons, (practising solicitors in our case) and that rules about how applications for approval are to be made, considered and decided upon. There are clear synergies between the internal governance rules and the practising fees.

The LSB is prohibited from interfering in the representative work of the approved regulator. Any practising certificate fee that is charged as a mandatory condition of authorisation to practice must be justifiable in terms of operating in the public interest. Consequently the proposals under both areas of consultation will be published together to entrench the concept of regulatory independence and maximise transparency in setting the annual practising certificate fee.

The mandatory list of purposes in the 2007 Act for which the PC fee can be used was drawn from the statutory provisions that regulated the use of PC fees before the Act. The LSB propose to include a further purpose of "increasing public understanding of citizen's legal rights and duties" for which PC fees may be used. At this point in time they cannot identify any other additional purposes that could be included.

Q9 Do we agree to the inclusion of the above additional purpose?

A9. This appears to be quite reasonable and to some extent may permit monies raised to be utilised by the representative arm for the general benefit of the profession and the public.

Q10 Should any other purposes be permitted under the Rules?

A10. I am not aware of any either in the general legal arena or from the Law Society itself.

Q11 What do you think about our proposals to seek evidence that links to the regulatory objectives of the Act.

Q12 What criteria should the LSB use to assess fee applications submitted.

The LSB propose that there must be clear criteria against which the PC fee application can be assessed and that the applicant should be required to link the amount and purpose of the fee to

the requirements of the Act and the regulatory objectives. Further that any change in the amount of a fee, year on year, be justified.

They also propose to set clear criteria against which any application is to be assessed and then set requirements for each approved regulator to agree arrangements with the Board on the content and timing necessary for considering any application; in the form of a publicised Memorandum of Understanding so that the public at large will be aware of the relevant arrangements.

Finally, they question whether the process should include a process of consultation prior to the application being made.

A11/12. These appear to be appropriate and reasonable requirements. Particularly when the cost of the fee will in many cases be reflected in fees paid by the public and other users of legal services. There is also a need to ensure that the work undertaken and activities of the regulator are appropriate and proportionate to the cost and regulated risks as perceived by the regulator; and thereby reflected in the amount of fee proposed.

Q13.If approved, what should the memorandum of understanding contain.

A13. As suggested it should set out the criteria against which funds can be expended so that the application clarifies what amount of money is to be expended for any stated purpose. This should be supported with reasoning for that expenditure both in principle and the stated amount in particular. It will also enable the Board to assess the appropriateness of this item of application. After the first year this will enable the Board to test the application and justification given against the outturn expenditure of the approved regulator in the previous year.

Q14. Should there be a requirement to consult prior to submission of the application each year, and if so, who should be consulted?

A14. A process of consultation with the regulated sector does not appear unreasonable including such other interested bodies such as complaints handling bodies and insurers. This should provide external information against which the relevance and appropriateness of the intended expenditure may be tested by the approved regulator.

Q15. What degree of detail would be appropriate to require when seeking to maximise transparency but be proportionate in terms of bureaucracy when considering a fee application.

It is acknowledged that the fees paid by private practitioners will come from the paying public. Consequently the organisations which spend the money should be held to account. The LSB propose to oblige approved regulators to set out for each person required to pay a PC fee a range of information.

This includes:-

a) the amount to be raised by that body

b) the cost of the PC

c) the proportion of that sum to be applied for the discharge of regulatory functions

d) the proportion to be applied for permitted purposes discharged by the representative body

e) the proportion to be applied for shared services

f) any additional voluntary payment requested

A15.It seeking to exercise an overview and control on the amount of the PC fee and its application it is quite reasonable to require this type of information. This will enable interested persons and bodies to be able to hold the regulator to account and question whether the expenditure is proportionate. From the perspective of SLG the information disclosed in respect of (c) above would assist the argument for a reduced fee for its members as there is minimal engagement of its members with the regulatory (disciplinary) activities. This is an area that is worth further examination in the future when more informative data may be available.

Q16. Are there any issues in respect of practising certificate fees that you think we should consider as part of this consultative exercise?

A16. Although it is clear that the regulated profession must produce the funds to support the regulator the central question is whether the cost of the PC should be the same for each regulated person. Is it reasonable that some legal practitioners should be exempt from paying the PC fee and others only have to pay a reduced fee? The starting point should be that all regulated practitioners should be liable to pay the full PC fee and then carry out a general review of the whole profession to determine which sector, if any, should pay a reduced fee.

In addition to that review and taking into account the six categories at Q15 for which information should be provided is it appropriate to require that all/any expenditure related to the investigation and prosecution of complaints should be recharged to the `guilty` party. If this position were to be adopted then the profession generally would only have to carry the general overhead costs of the regulatory function.

Q18. Are there any comments that you wish to make in relation to our draft impact assessment?

In the consultation paper the point is made that the Law Society, like the Bar has made some steps to implementing arrangements that are the subject of this consultation exercise. It cannot be presumed that what has been done will satisfy the ultimate requirements of the LSB. Further changes to both elements of the Law Society, representative and regulatory may be required.

A18. It is unknown what may be required of the Law Society as a consequence of the outcome of this exercise; the results of which are yet to be determined. Consequently it is not really possible in any significant way to comment on the drat impact assessment other than to acknowledge that the nature of the business and activities of the Law Society and its structure will, more than likely, require fundamental review when the outcome of this exercise is known.

Finally we are asked at Q19 are there any other issues that you would raise in respect of this consultation exercise not otherwise covered.

A19. I am not aware of any.

The closing date for any response to this consultation process is 26 June 2009

4. Financial Implications

There are no direct financial implications for SLG

5. Equality and Diversity Issues

There are no direct equality and diversity issues for SLG. However the report does highlight the need for account to be taken of these matters in the process of appointments mentioned.

George Curran

Council Member

8 June 2009