LSB Consultation on the Separation Rules

Response to the Consultation by Sue Nelson

I have been a member of the Council of the Law Society for 11 years and have been a member of its Management Board since its inception, before that a member of its Main Board and prior to that a member of its Standards Board.

I entirely endorse Peter Adams' argument concerning –

- the philosophy and the need for evidence based regulation, rather than a reliance on 'avoiding perception';

- the management of resources, shared services, monitoring, supervisory arrangements, intervention, and compliance.

I wish to adopt the representations made to you by Peter with one exception and one elaboration.

The exception

Where I am at odds with Peter, and from my local law society and the Law Society, concerns the composition of the Board of what is currently the SRA. When I served on the Standards Board it had a lay component as did our Council. What struck me was how useful it was to have a mix of solicitors and lay members and how we never divided along those lines when votes were taken.

I find it hard to argue that the desire to achieve the best possible mix should start from the premise that either lay or solicitor members should be in the majority or that the Chair should come from one sector or the other. I believe that what is vital is that the Board and its Chair should be appointed on merit. The composition of the Board needs to be balanced with care to include a wide range of experience and expertise, both lay and solicitor. That careful balance ought also to penetrate to the Committees below the Board who carry out much of the Board's work under delegation. What I do believe is necessary is that there be sufficient solicitor members to ensure that the expertise likely to be found among the profession are adequately represented. In the fullness of time applicants may come from non-lawyer heads of ABS's as well as from non-lawyer Heads of Law Schools or from professions closely akin to the legal profession such as medicine and accountancy and from the growing sector of non executive directors who describes themselves as 'I am a regulator'. How are they to be classified? It is unhealthy to

perpetuate a myth that lawyers are somehow 'of a kind' and that non-lawyers are the only people who the public can rely on to check any all too human tendency to self-interest.

The correct balance can only be determined by the selection panels involved who have the full range of candidates in front of them. If the LSA thinks it necessary to regulate on this issue, rather than issue guidance (in which I have a greater belief perhaps than Peter Adams), then it should be on the make up of selection panels and the criteria which they need to apply to appoint a talented and meritorious Board. I believe it would be satisfactory to issue guidance requiring the Board to be -

- balanced as between members of the regulated and unregulated community and to reflect the wide range of skills required;
- that a significant majority either way was likely to be less effective;
- that in determining the balance of the Board the selection panel should mindful of the experience, skills and background of the Chair.

The point of elaboration

To be effective the regulation of solicitor needs to be based upon a shared understanding between the regulator and regulated. I use the word understanding with particularity because I do not mean 'agreement'. While agreement is often highly desirable it is not always possible to achieve, hence the need for appeal to the LSB. If the regulator and regulated are to achieve the nirvana of shared understanding they need to work in a way which enhances the exchange of information. I describe this as nirvana because I believe the public will benefit from having a regulated profession which shares the regulators understanding it is likely to lead to greater self regulation with less reliance on costly external regulation.

While the project to separate regulation away from improper interference from those charged with representing the profession has had many successes it has also had areas from which more could and should be learned. One of those areas has been the absence of transparency which has come, I believe, from a failure to understand the value to the regulator of working in a way which is likely to enhance a shared understanding. The representative body has responded to the regulators retreat from a commitment to openness by responding in a like manner and that is to be regretted.

Whilst therefore I support the representations made to you by Peter Adams concerning monitoring, supervisory arrangements, intervention, and compliance, what is most important is not the terms of the separation regulations in these areas but arriving at a shared understanding of the principles that underpin them. Neither party to this endeavour should need to resort to the regulations but should be willingly working well within scope. I believe there is still much work to be done in this area.

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