DESIGNATING NEW APPROVED REGULATORS

AND APPROVING RULE CHANGES

A RESPONSE BY THE INSTITUTE OF LEGAL EXECUTIVES AND ILEX PROFESSIONAL STANDARDS LIMITED

CONSULTATION BY THE LEGAL SERVICES BOARD ON DEVELOPING RULES TO APPROVE APPLICATIONS FOR DESIGNATION AS AN APPROVED REGULATOR AND TO APPROVE CHANGES TO THE RULES OF APPROVED REGULATORS

DATED: 13 OCTOBER 2009

Introduction

This Response represents the joint views of the Institute of Legal Executives (ILEX) an Approved Regulator under the Legal Services Act 2007 (the Act), and its regulatory arm ILEX Professional Standards Limited (IPS). There was no difference of significance between the two organisations in their comments on the consultation, and so a joint Response is tendered.

ILEX is pleased to note the emphasis in the Executive Summary on the responsibilities of the Approved Regulators to ensure that those that they regulate are properly qualified and supervised, and that individuals and businesses comply with rules defined for them by the Approved Regulators. ILEX has always emphasised the importance of setting standards and of supervising and enforcing those standards for the benefit of consumers and in the public interest. IPS has been established for the purpose of, and is committed to regulation in the public interest and in support of the regulatory objectives in the Act.

We are not sure that all of those who become regulated by virtue of undertaking a reserved legal activity would normally come within the term 'lawyer' as defined in the Oxford Dictionary. However, for the purposes of these consultations, we will follow the LSB lead as a form of shorthand.

ILEX and IPS are also pleased to find at paragraph 1.9 a reference to competition between Approved Regulators. This concept of competition, particularly when alluding to standard setting or benchmarking and good practice, is often ignored in discussion forums.

We accept that the expansion in the numbers of Approved Regulators may lead to a new regulatory maze. That said, we doubt that the consumer will need to be overly subjected to public legal education; the key for most consumers is to know whether a provider of legal services is authorised and regulated and who to complain to when things go wrong. The establishment of one Office of Legal Complaints will address the issue of 'regulatory maze' to a very great extent. We believe that it is unrealistic to expect the Approved Regulators themselves, who are in competition with one another, to

compensate for this anticipated outcome of the Legal Services Act by disproportionate resources going into public legal education.

Regulatory competition may well drive up regulatory standards. ILEX has the expectation that regulatory competition will also reduce regulatory costs. However, this will only be the case if the goal is minimum harmonisation i.e. the same activity regulated by different Approved Regulators is regulated to a minimum acceptable standard. There should be no expectation that, should one Regulator change an element of their regulatory practice to raise a standard, all other Regulators would be expected to follow suit.

We are pleased to see within the Executive Summary reference to issues such as protection and ownership of title as more Regulators enter the field to deal with a particular activity. ILEX has quietly striven for many years to achieve protection of the title Legal Executive. There is nothing in law to stop any legal adviser, whether employed within a legal services business or independently, calling themselves a Legal Executive. Given the standards of qualification, education and training which an individual Legal Executive must undertake prior to qualification, and the consumer protection afforded by this process, ILEX and IPS believe it to be misleading to the public to allow the term to be used by anybody and everybody.

QUESTIONS 1 - 6

Legal Framework and Drafting Principles

ILEX and IPS are generally supportive of the proposals made by the LSB in this chapter.

New Designation Applications

ILEX and IPS broadly support the approach taken by the LSB at paragraphs 3.3 and 3.4.

We have considered the issue of the prescribed fee and in particular the examples given at paragraph 3.5. We do not find the suggestions on page 14 at bullet point 3 and 4 to be realistic and recommend that debate focuses on the first two bullet points. The attraction of the first bullet point is that it would

be simple for both the LSB to administer and the applicant to understand. Presumably this works on the swings and roundabouts argument. The second bullet point would certainly be more accurate than the first. Although it may be more onerous than bullet point one for the LSB itself, we would point out that all lawyers have to do this when estimating fees whether on a contentious or non-contentious fee basis.

At paragraph 3.6 the LSB is proposing they should bring in external advisers to deal with issues that are technically complex, unusually data intense, poorly prepared or urgent. In principle we have no objection to the notion of using external expert advisers from time to time. It is realistic when applications may be technically complex or where data is unusually intense. However, we would not expect the LSB to consider at all poorly prepared applications, and we would imagine that the occasions of an application needing to be made urgently will be very few indeed. Even where these are required by virtue of legislative changes which affect Rules, the changes for the most part will have been flagged up in advance of the legislation coming into force and so give time for consideration. More detailed guidance from the LSB as to when external advisers might be utilised would be welcome. Otherwise there may be an opportunity for disputes between the LSB and Approved Regulators as to whether an external adviser is required, what the terms of their appointment should be and the level of expertise the adviser should have, particularly as the Approved Regulator will bear the burden of the costs.

We do not object to the principle of fees being assessed on a case by case basis where an existing Approved Regulator applies to be permitted to carry out an additional reserved legal activity. It would be helpful to have guidance in addition to rules (e.g. does the LSB wish to see full consultation responses or a summary; what format should business plans be presented in; what information would be required of an existing Approved Regulator as opposed to a new prospective Approved Regulator). Guidance would also help Approved Regulators to determine the amount of detail to put in applications and therefore minimise any costs to the LSB.

QUESTIONS 7, 8 AND 9

Processes, Procedures and Determinations

The approach in the consultation appears to be sensible with regard to oral representations. We suggest there should be criteria to support Rule 51 against which the LSB should determine whether to adjourn a hearing.

Otherwise the criteria for determining applications appear to be reasonable. We would welcome some guidance from the Board as to what the Board might consider to be a valid objection to an application. Guidance would also be helpful on the use of optional consultees and who that optional consultee might be in any specific circumstance. It is also unclear as to whether the Board will ever seek an oral hearing of its own volition.

In relation to the administrative information in the draft Schedule, we have the following comments to make:

We draw the LSB's attention to page 38 paragraph 14. Schedule 4 charges the Board only to grant applications in relation to reserved legal activities if the Board is satisfied that the applicant would be competent and have sufficient resources to perform the role. We have no particular objection, in relation to new Approved Regulators, as opposed to an Approved Regulator seeking to be approved in a new area of activity, to the Board expecting a three year forward look as well as current business plan; statement regarding resources and risk management strategy. We are however somewhat concerned to see 'staff development and retention strategies', as we would consider this information to be disproportionate to the exercise in hand.

At page 40 Principle 3 'Legal services should only be delivered by regulated persons of appropriate skill and competence', we take this as a form of shorthand, but hope that the wording will be changed in any final documentation. Legal services can be delivered by unregulated persons, both in terms of the general law which states that legal services may be delivered

by anyone unless they are reserved activities under the Legal Services Act 2007; and are, of course, delivered by unregulated persons in the form of legal assistants/paralegals/law clerks etc. We accept that Approved Regulators must ensure in terms of the regulated community and regulated services that definitions of appropriate skill and competence are proportionate in order to ensure both value and professionalism; but is there a suggestion here that an application might be rejected if the standards are set 'too high'; and how will that be measured?

QUESTION 10

Rule Change Applications

This is an area that is currently rather vague in relation to the Courts and Legal Services Act and applications to the Legal Services Consultative Panel/Lord Chancellor. Any attempt to give greater certainty as to when an application needs to be made and what that application needs to say is welcomed. However, the ambition to attain certainty appears to be at the expense of proportionality.

The LSB will need to address what kinds of rules change need to go through a full approval procedure and which can be expedited or exempt as provided for in the Act. It would useful to gain the view of the LSB at an early stage as to whether a full application is required. This needs to be part of the process. Otherwise the Approved Regulator may incur additional costs in making a short application followed by a full application. Rule 10 on page 44 appears to indicate that an application will not be granted if there has been a representation from an Approved Regulator. The Board will need to be very clear that the representations it has received are valid and constructive, rather than aimed at protecting market position, reducing competition, consumer choice and so forth. We would prefer to see the Board allowing an application provided it has received no valid representation from any other Approved Regulator. This would follow the earlier approach to new applications (page 28 Rule 13).

QUESTION 11

Contents of Application

We agree broadly with the criteria regarding the contents of an application for rule change. However, we have some difficulty with the suggestion that the applicant should provide evidence of consultation with, and responses from, other Approved Regulators, which consultation should deal with the possibility of any regulatory conflicts and the possibility of harmonising the regulatory arrangements of Approved Regulators. The object of sharing best practice is one we support. However, we would be concerned if 'harmonisation' of the regulatory arrangements of Approved Regulators moves too far towards all regulation looking the same, and removing appropriate areas of competition.

QUESTIONS 12 AND 13

Processes and Procedure

ILEX and IPS broadly support the processes and procedures set out in the consultation. We reiterate again whether the draft Rule 45 should be supported by guidance or criteria for deciding on adjournments.

The criteria for determination seem appropriate.

We would like to see in the rules a statement that approval of an application will not be unreasonably withheld or refused by the LSB. We would certainly expect to see in guidance a fair bit of the detail in this area, not least to save the time of those potentially being consulted on a rule change application, and to save time and effort on the part of the applicants.

Transitional Arrangements

ILEX and IPS are concerned at the proposals for transitional arrangements. ILEX/IPS currently has three applications before the Ministry of Justice/Legal Services Consultative Panel. These were submitted at the end of July. It is unclear whether they will be concluded before the LSB comes into its powers. This will mean that the applications will need to start again with the LSB and in a new format, and be consulted upon even if that consultation has already been conducted by the Legal Services Consultative Panel.

We appreciate the LSB's determination to deal with applications swiftly and on average within six months. This will be an immense improvement upon the current system. However we would urge that the transitional arrangements should allow the LSB to consider applications such as our own with supplementary material geared around the regulatory objectives and possibly the consultations. There is a real danger, otherwise, that the LSB will be faced with a substantial number of entirely new applications immediately, which will put its own performance at risk.

13 October 2009