

## **Tunbridge Wells, Tonbridge and District Law Society**

### ***Response to the Legal Services Board Consultation on proposed rules to be made under sections 30 and 51 of the Legal Services Act 2007.***

This response to the consultation has been prepared for and on behalf of the Council of the Tunbridge Wells, Tonbridge and District Law Society. Due to the time available for responses to be given to the consultation, these responses have not been considered by the full council of the Tunbridge Wells and Tonbridge and District Law Society.

**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)?

*Answer:*

The question pre-supposes agreement with the manner in which proposals have been made by the LSB. It is our view that the regulation of any professional body should be conducted principally by the members of that professional body. Adopting the proposals of the LSB could result in an unacceptable degree of political control of the Regulator by the Government of the day, perhaps with policies that are hostile to the profession or to the independence of the profession.

It is our view that appointment to the Regulatory Body should be made principally by the membership of the Law Society of England and Wales and that in addition to those appointees, additional lay members of the Regulatory Board should be appointed on the recommendation of a committee of appointment established by the Master of the Rolls.

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

*Answer:*

Whilst most of the principles set out in paragraph 3.15 have merit, it should be clear that appointments to the Regulatory Board should be made on the basis set out in the answer to Question 1. To have a Regulatory Board composed of "the great and the good" who may not be members of the profession would not be in the best interests of the public.

It is often the case that members of committees can be seen to be drawn from a small group of like-minded and interested parties. This is a particularly dangerous position where there is a government with a large majority or is in power for some considerable time.

We consider that the appointments made to the Regulatory Board by The Law Society should be made on the basis of merit, transparency and so forth and should not be members of the Council of The Law Society of England and Wales. Appointments would be made from amongst members of the profession who do not hold a representative function. As to whether these appointees should be elected is a matter for further consideration.

**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?

*Answer:*

The question suggests that a chairman of a Regulatory Board who is also a member of the profession is incapable of demonstrating impartiality and fairness. There is no adequate evidence for such an assertion and there is no basis in the consultation paper to support such an argument. Furthermore, to introduce an overly complex series of rules concerning

the composition and chairmanship of regulatory bodies could, in our view, result in unforeseen difficulties in recruitment of persons of the right calibre and independence from political or other influences. Any chair person should be suitably qualified and a lawyer would have a better understanding of the profession and its workings. There is no basis for believing that membership of the profession would compromise their judgment.

**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 outside such arrangements as suggested in paragraph 3.22?

*Answer:*

We are wholly against increasing the costs of membership of the profession, which costs inevitably have to be passed on to the general public. Costs of the Regulatory Body must be maintained at a minimum level necessary to carry out its functions and in this regard, we are of the view that a shared resources and services model is appropriate. We support the establishment of service levels in respect of the work of a Regulatory Body but do not consider this to be a reason for having a separate organisation, which would have an incentive to develop new areas of activity and be self-perpetuating. Such a model would undoubtedly lead to an increase in costs which would make the provision of legal services more expensive to the public.

**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?

*Answer:*

Perhaps the model adopted by the Financial Services Authority is one the LSB has in mind here. Written guidance in respect of rules is always of advantage so long as it is capable of being comprehended by the user and is not overly complex. Clearly, a telephone helpline would also be of advantage. It is our experience that a telephone help line offers an immediate source of assistance and aids compliance.

**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?

*Answer:*

The question seems to have been posed assuming that the Regulator would be controlled by representatives. As we have outlined above, we take the view that members of the profession who serve on the Regulatory Board would not be representative of any constituency but would have regard to the requirements of the profession and of the public.

**Question 7** – In principle, what do you think about the concept of dual self-certification?

*Answer:*

As a principle, dual self-certification has merits and one of the principal concerns for the profession would be the creation of a self-perpetuating separate regulatory function which would undoubtedly increase the costs of the provision of legal services. Anything which can be done to minimise those costs should be pursued.

**Question 8** – If a dual self-certification model were adopted, how should it work in practice? Or would alternative arrangements be more appropriate, either in the short or longer term?

*Answer:*

We do not think it is within our competence to comment on matters of detail in respect of one aspect in isolation of others. We think this should be a matter which is given due consideration by representatives of the Law Society of England and Wales.

**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?

*Answer:*

The permitted purposes should be kept to a minimum in order that the work of the LSB should be directed to the purposes for which it is established. Once again, we are minded that many of the questions which are posed in the consultation suggest that the LSB wishes to undertake numerous roles which were not originally intended. In the event that there is a demonstrable need for further permitted purposes, this should be addressed at the time. At the present, however, there seems to be no adequate justification for the broadening of the remit of the LSB.

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

*Answer:*

Unless a need is demonstrated, we find it difficult to understand why other purposes should be permitted. The fact that the question has been asked suggests that the LSB wishes to undertake other functions which were not intended by the Act.

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

*Answer:*

We are conscious of the need to ensure that the system adopted is not overly complex and which results in additional cost to the consumer and to members of the profession. To this extent, the means by which that part of the practising fee which is proposed to be apportioned to the work of the Regulatory Body should be justified but the manner in which justification is established should not be overly complex and expensive to administer.

**Question 12** – What criteria should the Board use to assess applications submitted to it?

*Answer:*

It will be necessary to establish that service levels, once agreed, have been adhered to and that the Regulatory Body is carrying out its functions in accordance with those service levels. Furthermore, it should be demonstrated that the Regulatory Body has carried out its functions transparently and in a fair and cost effective manner as is reasonable in the circumstances.

**Question 13** – If they are adopted, what should Memoranda of Understanding between the Board and approved regulators contain? For approved regulators in particular, are there any particular implications for your organisations?

*Answer:*

It is unclear from the consultation document that what is intended by the Memoranda of Understanding to which the question refers. If this is in relation to an informal adoption of principles on which the Regulator is to approach its work, then these matters of detail should be the subject of discussion between the representatives of The Law Society of England and Wales and the LSB. Anything that aided the proper regulation of the profession should be encouraged.

**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?

*Answer:*

In respect of both issues we believe not.

**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?

*Answer:*

We are against having a separate practising fee distinct between the costs of regulation and other costs. We consider that the regulatory aspects of practice should be shown as a part of the calculation of the practice fee in each year and this is a matter of considerable importance to us. To have a separately distinguished "precept" in respect of regulatory work would undoubtedly lead to the LSB controlling its own budget and issuing separate practising certificates. In our view that would be a retrograde step. The question must be whether the service levels have been achieved. If they have, why would it be necessary to have further levels of bureaucracy in this regard?

**Question 16** – Are there any issues in respect of practising certificate fees that you think we should consider as part of this consultation exercise?

*Answer:*

These are matters of detail which should be addressed by representatives of The Law Society of England and Wales.

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

*Answer:*

Again, these are matters of detail which should be addressed once matters of principle have been established.

**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?

*Answer:*

Again, these are matters of detail which should be addressed by representatives of The Law Society of England and Wales.

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

*Answer:*

We consider the consultation period to have been inadequate for the considerable amount of time needed for members of the profession to fully understand the impact of the proposals. We would suggest that once this consultation has been concluded and the summary response is published in October that a further consultation be carried out with the profession in the light of the responses received by the LSB to this consultation and not simply focussed on the proposed rules.

**Martin Varley for and on behalf of**

**Tunbridge Wells and Tonbridge and District Law Society**

25<sup>th</sup> June 2009