



The Law Society

Legal Regulation Review – Call for Evidence

The Law Society's response

April 2009

SUPPORTING
solicitors

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The Law Society's response to the Call for Evidence of the Legal Regulation Review

Introduction

The Law Society is the approved regulator for solicitors in England and Wales; its regulatory functions in turn being delegated to the Solicitors Regulation Authority (SRA). The Law Society is the representative body for over 130,000 solicitors in England and Wales. The Society represents and supports the profession and lobbies on their behalf to regulators, government and others.

It is important that the profession remains independent from government both in reality and perception. If the profession is perceived to lack independence, there is a potential for harm to the £15 billion legal services market as well as problems for firms seeking to practise internationally.

We welcome the opportunity to provide a response to the Call for Evidence of the Legal Regulation Review. The Call for Evidence attempts to address two questions. First, what new regulatory challenges and opportunities does the Legal Services Act 2007 (LSA) create? Second, what are the characteristics of good regulation?

In addressing the first question, it is necessary to consider the implications of introducing the Legal Services Board (LSB) and alternative business structures (ABSs). The LSB is an oversight regulator of the approved regulators. The approved regulators remain responsible for the day-to-day regulation of the professions and the LSB should only intervene in this function where the approved regulators act unreasonably. Ensuring that these regulators interact effectively will be a major challenge. The LSA also introduces a new form of business entity, ABSs. By enabling lawyers to form partnerships with non-lawyers, and to accept outside investment or operate under external ownership, ABSs provide both new regulatory challenges and opportunities.

A number of issues must be considered when addressing the second question about the characteristics of good regulation. First, it is necessary to consider what should be the basis of regulation. The Law Society supports principles-based regulation. This involves moving away from reliance on detailed prescriptive rules and relying more on high-level 'principles' to set the standards by which regulated firms must conduct business. Second, it is necessary to consider how the Better Regulation Principles should be applied. While the Law Society supports these principles, it is important to remember that some of them, particularly proportionality and targeting, have a strong element of subjectivity. Accordingly, there will need to be more guidance from approved regulators on how these concepts are assessed and implemented. Finally, it is necessary to consider the role of the regulator. The regulator should work closely with the profession through the representative body to ensure that there is sufficient communication on regulatory objectives and developments.

Two documents that consider on some of the issues below have recently been released. On 1 April 2009 Nick Smedley published his *Review of the Regulation of Corporate Legal Work*, while on 25 March 2009 the LSB released a consultation document on

regulatory independence. The Law Society will consider submitting comments about these documents to the Legal Regulation Review at a later stage.

The Legal Services Board

What should be the nature of the relationship between the profession and the regulators of legal services?

The profession and regulators of legal services should establish and maintain close working relationships to develop more effective regulation. These relationships should facilitate the flow of information between them to ensure that there is shared knowledge on regulatory objectives and developments. This would also help to ensure that regulators can be held to account. Effective communication will help the profession to understand the reasoning that underlies the regulatory framework and will make it easier for the regulators to take account of the profession's concerns while developing the rules. Consequently, the profession is likely to have a greater level of confidence in the regulators. Greater contact with the profession will also enable the regulators to be more responsive to the changes in the profession and the marketplace.

The Law Society is concerned about the current lack of communication between the SRA and the profession. In particular, there is insufficient communication about regulatory objectives, and the SRA is not sufficiently transparent in its consideration of feedback from the profession. The Law Society is keen to collaborate with the SRA to improve the current situation.

What criteria should the LSB use when considering the level and presentation of the practising fee? What should be the extent of the analysis it undertakes?

The LSA makes the Law Society the approved regulator. The Law Society is responsible for making the arrangements to ensure that regulation is carried out according to the regulatory objectives of the LSA. This includes appointing the SRA Board, ensuring that the SRA is provided with sufficient resources to undertake its responsibilities, and monitoring its performance to ensure that it is indeed performing satisfactorily. The LSA requires approved regulators which have both representative and regulatory functions (such as the Law Society) to ensure that decisions about regulation are as far as practicable taken separately from decisions about representation. The Law Society has done this by establishing the SRA Board, and by giving it full delegated authority. The Law Society Council retains no concurrent authority in respect of the matters delegated to the SRA.

The SRA Board – none of whose members are drawn from the Law Society Council, and all of whom are appointed on merit after open competition – is responsible for all decisions on regulatory matters, including not just individual casework but policies and rules. The Law Society (together with a range of other stakeholders both inside and outside the profession) is consulted about SRA proposals on policy matters, but the decision is for the SRA Board alone.

The Practising Fee set by the Law Society subject to the approval of the LSB will include a number of elements:

- the sums required for the activities of the SRA
- the sums required for the Law Society's non regulatory public interest functions, as defined in Section 51 of the LSA
- the levies needed to meet the costs of the LSB and the Office for Legal Complaints
- the costs of the Solicitors Disciplinary Tribunal.

The Law Society Council will determine the level of fee for which the Law Society seeks approval. However, the Law Society will act on the advice of the SRA in deciding how the fee required for regulatory purposes should be apportioned between different categories of practitioner.

In these circumstances, the role of the LSB should be fairly limited – just as the role of the previous approving agencies (the Master of the Rolls and the Lord Chancellor) has been. The LSB needs in theory to consider:

- whether the fee (and in particular the amount of it intended for the SRA) is sufficient for the SRA to carry out its responsibilities effectively
- whether the overall fee is too large.

But in reality the LSB will not need to make its own detailed enquiries on these issues. The arrangements the Law Society has agreed with the SRA mean that the LSB would automatically be informed if the SRA Board considered the budget for regulation approved by the Law Society Council to be inadequate. The LSB would then need to make its decision on the basis of the respective contentions. So far as the amount required for the Law Society's non regulatory public interest purposes is concerned, the sum will have been approved by the elected Council. The LSB should not need to make any further enquiries about it except in the extreme and unlikely circumstance that it considered the sum so large as to have a potentially detrimental regulatory effect.

The Law Society and the Solicitors Regulation Authority

Are the respective roles of the SRA and Law Society with regard to regulation clear and readily understood?

The Law Society considers that the respective roles of the SRA and of the Law Society with regard to regulation are clear, but the Society recognises that they are not universally understood. This is not surprising given there have been significant changes over recent years, and that the current arrangements are quite unusual compared with other regulatory approaches.

In the Law Society's view, the LSA makes it clear that the Law Society is an approved regulator, not the SRA. Part 1 of Schedule 4 to the LSA states that the Law Society is the approved regulator in relation to the reserved activities of: the exercise of a right of audience; the conduct of litigation; reserved instrument activities; probate activities; and the administration of oaths.

How should a legal regulator regulate?

How can a regulator improve access to justice?

A regulator can improve access to justice by considering the impact of its policies and minimising regulatory costs. It should use Regulatory Impact Assessments to ensure that the impact of its policies does not have a negative effect on access to justice. A regulator should also act to minimise regulatory costs. These costs are ultimately borne by solicitors' clients. In the current economic downturn, increased regulatory costs could force the closure of some businesses and deter new entrants into the market, which would in turn, impact negatively on access to justice.

The introduction of ABSs will pose significant risks to continued access to justice. These risks are discussed below. In issuing licences for ABSs and in regulating their activities moving forward, regulators will have to actively consider the specific impact on access to justice, while at the same time bearing in mind the other regulatory objectives.

Are the standards that the SRA require applicants to meet sufficiently robust and quality assured to secure the public's confidence in the profession?

The Law Society's Education and Training Committee (the Committee) has assisted in the preparation of the response to this question. The Committee is responsible for setting and overseeing the implementation of policy for the promotion of solicitors' interests in regulatory matters relating to education and training.

The Law Society is confident that the standards set by the SRA for entry to the profession are sufficiently robust to secure the public's confidence in the profession. However we are concerned that the regulations are too prescriptive and do not allow the regulator to respond quickly to changes in the profession. Education and training does not need to be regulated in a way that is stifling. One of the major problems with the design of the current system of education and training regulation is that it is not responsive to developments in the profession. An example of this is with the development of the work-based learning scheme. Work-based learning is designed to respond to the problems created by the current lack of training contracts available to Legal Practice Course (LPC) graduates. Work-based learning enables graduates to qualify as solicitors by meeting a set of outcomes outside the formal training contract environment. The concept of work-based learning emerged from a 2001 piece of work; however the work-based learning pilot is not scheduled to end until 2011, with full implementation of the scheme not expected for some time after this. This is one of the biggest challenges facing those wishing to enter the profession; however a fully implemented solution to this problem will not be in place for a number of years.

Changing the current system of education and training is cumbersome; therefore it takes considerable time to remodel the system. As the profession starts to change as a consequence of the LSA, the design of the entry requirements needs to be changed in a faster and more sure-footed way than in the past.

One of the impacts of the new opportunities presented to non-lawyers under the ABS regime may be that potential law students or law graduates may not see the necessity of studying law or proceeding to qualification if they are able to follow an equivalent career

path within an ABS. The structure of the ABS could allow individuals to forego legal training altogether, in favour of another 'easier' qualification. It also provides the ability to pick up the knowledge and expertise required for legal services 'on the job'.

The SRA has been undertaking a piece of work looking at 'What is a solicitor?', however it is not clear how this work has influenced its approach to regulation. Given the changing nature of legal work with the introduction of ABSs, it is vital that the essential characteristics of a solicitor are identified and built into the entry requirements for the profession. This would ensure that the 'brand' of solicitor remains synonymous with quality, and remains desirable to the best and most capable individuals.

The regulator must balance the need to impose requirements for education and training in order to maintain and promote public confidence in the profession against the objective of not creating unnecessary barriers to entry, other than those which are necessary and proportionate to secure the regulatory objectives.

Legal education and training should be regulated in a way that is innovative. This can be difficult when there are so many stakeholders involved in the process, for example the multitude of LPC providers that need to plan their courses and curriculum years in advance. However, an innovative regulator could develop changes to education and training processes and market them to providers, ensuring even smaller providers are able to remain competitive and attract the best quality students. LPC providers could take their lead from medical schools who share developments in training techniques for the benefit of those seeking to enter the profession. The Law Society is very keen to ensure that smaller providers remain competitive to maintain the current geographical spread and variety, and to avoid the market shrinking to two or three providers. Sharing innovations in teaching and curriculum will enable smaller providers to remain competitive.

The regulator should be fully engaged with the regulation of legal education and training both in the entry to the profession, and going forward from qualification. This means appropriate regulation of the academic stage, the LPC and the training contract or period of work-based learning. It also includes effective regulation of Continuing Professional Development (CPD). As with other areas of regulation, it is essential to have clear standards, as well as guidance about how these standards are being applied and by whom.

Quality assurance

As with regulation of the education and training system, quality assurance measures should also be flexible, able to respond quickly to changes in the profession and be innovative. The Law Society is concerned that the SRA does not have reliable data on which to base its quality assurance measures. As such, it has no way of knowing where to focus its attentions. It is difficult to put quality assurance measures in place when figures are not known about, for example, how many students are enrolled in the various stages of the system, how many of these students are failing or the areas in which they are failing.

The Law Society believes that the education and training system in England and Wales is divorced from legal practice in a way that is damaging to the profession. A regulator

should ensure that the practising profession is involved in the education process to ensure that those in training learn from those currently in practice. For example, using experienced, skilled and trained senior practitioners for training purposes or encouraging participation in clinical legal education would encourage greater links between the education and practice stages.

Academic stage

The Law Society is concerned that the SRA exercises very little control over the academic stage. The Law Society believes that it is for academia to decide on the content of the degree that institutions offer, but it is for the regulator to decide whether a degree constitutes a qualifying law degree. The SRA has considerable confidence in the work of the Quality Assurance Agency (QAA), but it does not engage with the QAA in relation to standards and quality assurance. The quality of degrees varies enormously between different awarding institutions. This is very unhelpful to those seeking to recruit graduates. Employers find it impossible to differentiate between students based on results, so they make judgements on the quality of universities solely based on anecdotal evidence and reputation. Common standards across the board would enable a better informed view of the performance and capabilities of graduating students, including whether they are sufficiently competent to pass the LPC.

The regulation of the Qualifying Law Degree and the Common Professional Examination appears to lack transparency. For example, the SRA has not made available any papers for meetings of the Joint Academic Stage Board since a meeting in June 2008 or minutes since the Board met in February 2008.

Legal Practice Course

There needs to be greater rigour and clarity in the assessment process for the LPC. Currently assessments are set and run by individual LPC providers. The Law Society believes that the assessment process should have integrity, greater robustness and be transparent, with the SRA taking a keener interest in ensuring that the standards are those that the practising profession expect. Training establishments often complain about the poor level of literacy and skills. The SRA has failed to establish effective mechanisms to ensure that external examiners are aware of the experience and expectations of those employing trainees.

Character requirements and standards

The regulator should introduce clear guidelines about how it applies the character requirements for qualification as a solicitor. This would ensure that the process is transparent and that there is greater certainty for those seeking to enter the profession about the convictions or behaviour that will normally preclude qualification.

Following the introduction of Legal Disciplinary Practices (LDPs) on 31 March 2009, non-lawyers are able to be managers of legal practices. It is vital for the reputation of the profession that the SRA ensures that its processes for setting and applying character requirements and standards for non-lawyer managers are robust. The public will likely

view LDPs no differently from other legal practices, and therefore any breaches by non-lawyer managers will reflect poorly on the profession as a whole.

Continuing Professional Development

The Law Society does not think that the current regulation of CPD is sufficient to ensure that the scheme is effective and meets its aims. To ensure that the scheme is credible, there should be effective regulation of both the recipients of CPD and the providers. The CPD scheme must be properly monitored, however this should not affect the ability of firms to self-supply CPD training where possible, by providing training that is tailored to the needs of their practices. The regulator needs to ensure that the scheme is one that the profession can be proud of and that the public has confidence in. The references to this in the LSB's draft plan are a timely reminder that a review is overdue. As with other aspects of legal regulation, there needs to be transparency about the standards that the regulator is applying when monitoring CPD provision.

The Law Society considers that those members of the profession who go forward to be principals in firms, and are accordingly subject to Rule 5, should be required to undertake some training in compliance and management issues which affect them in completely different ways as business owners. This will help them to discharge their responsibilities, and will protect and assist them in their new roles generally. The Law Society of Scotland has for a long time required all members to take a two-day course in this regard within a short period either side of their acquiring ownership responsibilities.

Is the career of solicitor accessible to all, regardless of background, gender, ethnic origin and sexual orientation?

Rule 6 of the Solicitors' Code of Conduct imposes a duty on solicitors not to discriminate. Solicitors, in their professional dealings with employees, partners, members, directors, barristers, other lawyers, clients or third parties must not discriminate, without lawful cause, against any person, nor victimise or harass them on the grounds of race, sex, sexual orientation, religion or belief, age or disability.

A career as a solicitor has become substantially more accessible in the last ten years. For example, in 2008 10 per cent of those holding a practising certificate were from black and minority ethnic (BME) groups and 44.4 per cent were female. Whereas in 1990 only 1.3 per cent of practising certificate holders were from BME groups and 23 per cent were female.¹

Regulators have become more mindful of equality and diversity issues when regulating entry to the profession, and the Law Society itself is committed to achieving fair access to the profession both from a diversity and social mobility perspective. For example, the Law Society runs the Diversity Access Scheme, which provides a full scholarship for the LPC course for students who will have to overcome exceptional obstacles to qualifying,

¹ Between 1990 and 2008 there was an increase of 294 per cent in the number of female practising certificate holders and an increase of 1353 per cent in the number of BME practising certificate holders.

which may include extreme financial hardship or disability. Since 2004 it has helped nearly 50 such students and through the Client Care programme agreed with the Legal Services Commissioner, ten additional places will be made available through the scheme over the next five years.

There are many programmes and initiatives, supported by firms of all sizes and in-house legal departments within the profession, which assist in breaking down some of the identified barriers to the profession either directly or indirectly. These initiatives include employee volunteering and community investment programmes in economically challenged communities; legal literacy programmes; careers, recruitment and information events and initiatives; and mentoring and work experience schemes.

However, while the profession is now much more accessible than ten years ago, much work still needs to be done on equality and diversity issues. Retention and career progression are still problems. For example, while there are now more women entering the profession than ten years ago, they are still under-represented at partner level. In 2008, 56.8 per cent of male solicitors were either partner equivalent or sole practitioners. However, only 25.8 per cent of female solicitors had reached the same level.² There is a more even spread on the basis of ethnicity, with 35.3 per cent of BME solicitors at partner or sole practitioner level, compared with 44.5 per cent of white Europeans. However, these figures do not take into account factors such as firm size or location or a solicitor's motivation for setting up as a sole practitioner, for example because they have been unable to find employment. The trend is for women to leave the profession in higher numbers and sooner than men. It is also extremely difficult to return after any lengthy period out of practice. This represents a considerable waste of talent. The Law Society fully supports equality and diversity within the profession as the advances stated above demonstrate. There is however a perception that not all firms are aware of or compliant with the requirements to promote diversity within their workforce and within all fields of work. The SRA should ensure that all firms comply with the obligations under the Solicitors' Code of Conduct.

Proportionality

How might the characteristics of a proportionate regulatory regime manifest themselves in the context of legal regulation?

The LSB should regulate authorised regulators and representative bodies in a proportionate manner. As set out in the LSA, the LSB should intervene with an approved regulator where they have behaved unreasonably. Similarly, the LSB should not intervene in the relationship between the representative and regulatory bodies unless the representative functions are prejudicing the regulatory functions.

The SRA should regulate the profession in a proportionate manner. It should regulate according to risk and only intervene where necessary. It should also minimise regulatory costs. In many cases the SRA's proposals lack proportionality.

² Most partners have 10 to 19 years post-qualification experience (PQE). In this experience band, 77.3 per cent of male solicitors are partner equivalent or sole practitioners, and 48.2 per cent of female solicitors are at the same level.

What is the balance to be struck between regulation of individuals and regulation of entities? Should there be a hybrid system?

The Law Society is keen to ensure that firm-based regulation, introduced by the LSA, is implemented in accordance with the Better Regulation Principles. In particular, care needs to be taken to avoid increasing the costs of regulation and placing an unfair double burden of liability on the principals, when sanctions on the firm and certain individuals in the firm are a possibility.

The shift in emphasis towards firm-based regulation has raised interesting questions about the relationship between personal and firm-based liability. Legal regulation has historically been focused on the individual. Investigating entities will be a new experience for the SRA. The SRA will have to change its regulatory mindset to fulfil the requirements of the LSA.

Most systemic failures will involve some degree of personal culpability. A consequence of this is that almost any breach of the rules could be interpreted as involving individual misconduct, thus allowing the approved regulator to investigate the individual or individuals concerned as well as, or instead of, the firm.

The SRA recently consulted on how the shift towards firm-based regulation will affect the way it regulates. The consultation paper proposes a set of criteria which determine the focus of an investigation and the circumstances in which the SRA should investigate the individual as well as, or instead of, the firm. If caseworkers decide to employ a strict interpretation of the criteria then it is highly probable that all investigations could be focused on both a firm and individuals within that firm.

The Law Society sees a real danger in this approach. One of the advantages of firm-based regulation is that it should prevent individuals from being blamed for failures of the organisation. The criteria may lead to the 'worst of both worlds'. Our response to the SRA's current consultation states that we believe that the guidance should also include examples of where it is inappropriate for individuals to be investigated along with their firm. This statement is true for any proposed form of firm and individual-based regulation under the LSA. Without this, it will be difficult for the approved regulator to ensure that a proportionate, transparent and consistent approach to applying the criteria is achieved.

The Financial Services Authority (FSA) has grappled with getting the balance right between regulating an individual and the firm. At the start of its existence, the FSA was focused on organisations but over the last few years, it has been placing greater emphasis on regulating 'approved persons.' We would recommend that legal regulators consider the practices of other regulators when attempting to strike a balance between the regulation of individuals and regulation of entities.

There is a risk that enforcement will continue much as it has done in the past. If this were to be the case, prosecuting the firm itself would be no more than an extra layer of the existing system of compliance. Duplication of processes would also lead to an increase in the costs involved in regulatory enforcement. This is particularly inequitable given the SRA's proposal to charge for the cost of certain investigations.

It is conceivable that in some cases a decision to investigate only the firm may be reversed if the prospects of securing a successful judgement appear remote. Starting a new procedure against an individual would significantly prolong an investigation and in many cases would be unfair. Practitioners may also take the view that the approved regulator will pursue all avenues of redress until they get the desired result rather than choosing the correct approach in the first instance. There should be guidance to avoid this.

Accountability

How can the LSB ensure that the front-line regulators are fully accountable?

The approved regulators themselves (such as the Law Society) are accountable in two ways. First, they are accountable to the LSB, which has a range of powers available should they fail to ensure that the regulatory functions are carried out effectively, or if they should improperly interfere with the independence of a regulatory arm. Secondly, approved regulators are accountable to their members in the sense that members of the governing Council are subject to periodic election.

The regulatory arms themselves are in a slightly different position. None of their members is subject to election – properly so since there is a risk (highlighted by Dame Janet Smith's report following the Shipman case) that electing professional members to a regulatory body may lead to a blurring of representative and regulatory roles. In these circumstances, it is important that there is effective scrutiny of the regulatory arm by the Law Society, as well as by the LSB. Although the Law Society will not have direct power to intervene in the SRA's regulatory decisions or policies, it will be open to the Law Society to draw matters of concern to the attention of the LSB, and to discuss with it the appropriate way forward.

Consistency

How can the various parts of the regulatory regime ensure consistency of approach and work together in a joined-up way?

There needs to be clarity about how the LSB should operate vis-à-vis the approved regulators. The LSA provides that the LSB is an oversight regulator of the approved regulators. The approved regulators remain responsible for the day-to-day regulation of the professions. The LSB should only intervene in this function where the approved regulators act unreasonably. A more intrusive LSB would be significantly more expensive, not achieve any public benefit and cause regulatory paralysis by second guessing the approved regulators.

How can regulators demonstrate consistency in their decision-making?

Regulators should issue guidance to ensure that rules and regulations are interpreted consistently. There should be proper training and monitoring to ensure a consistent approach by decision-makers. Reports on the finding of these monitoring procedures should also be produced to assure the profession and the public that the regulator's decision-making process is consistent.

Can the same regulatory policies and methods be applied right across that spectrum?

One of the characteristics of good regulation is for rules to be principles-based. However, there is debate about how detailed and prescriptive the rules flowing from the principles should be. The Better Regulation Commission found that principles-based regulation, that focuses on outcomes and uses a risk-based approach to enforcement, can stimulate innovation. This approach requires organisations and individuals to find their own ways of achieving the required outcomes and to develop solutions that best meet their own circumstances.

The principles should be drafted at a high level of generality, with the intention that they should be overarching requirements that can be applied flexibly to a rapidly changing industry. They should contain terms that are qualitative, not quantitative. These are general, usually evaluative terms (such as 'fair', 'reasonable', 'suitable') as opposed to rules (such as 'within 2 business days', 'turnover of £20 million').

The principles-based approach must be accompanied by sufficient guidance on compliance. Without such guidance, it would be difficult for firms to comply with the principles. While not mandatory, this guidance would give firms the comfort that they 'cannot go wrong' if they follow it. This should include ethical guidance to each sector within the regulated community, perhaps drawing on the recent report commissioned by the Law Society from Professor Kim Economides and Justine Rogers.

A risk-based approach to enforcement can reduce the burden of regulation significantly and also allow regulators to increase operational efficiency. However, developing an understanding of what the risks are requires the continued investment of time and resources. For instance, a risk-based model must continually evolve to keep pace with changes in the profession. The focus for a regulator should be to ensure that those being regulated meet minimum standards of good practice. Risk-based regulation necessitates a greater reliance on self-assessment by firms. Regulators cannot and should not try to guarantee the removal of all risk. They therefore need the courage to tolerate a certain level of risk, accidents and hazards.

This arrangement would require a major change in attitude by the regulator away from a compliance, tick-box based culture. The regulator must be serious about considering different approaches to complying with the high level principles.

Should the same rules and approach to compliance apply to all firms, or should account be taken of their size, degree of specialism and/or the characteristics of their clients?

The Law Society commissioned Nick Smedley to review the regulation of corporate legal work. This report has been submitted in response to the Call for Evidence. While the report considers how corporate law firms should be regulated, it may also be the case that sole practitioners require a tailored regulatory approach. We believe that as a general principle regulation should be sufficiently flexible to take account of the characteristics of the firms to it applies. Such adaptations might relate to the nature of the firm; the type(s) of work being done by them; or the type of clients they are serving.

A regulator must have a detailed understanding of all parts of the profession to be able to apply its rules flexibly. This understanding is best achieved if the regulator works closely with those representing the regulated community, as representative bodies are likely to have this detailed understanding. The regulator should also employ and retain people with recent in-practice work experience across the various parts of the profession to advise on rule making and enforcement. In particular, corporate law firms and sole practitioners have unique features that distinguish them from other types of firms. These firms should be regulated by people who have sufficient knowledge and capabilities to understand their needs. The Law Society believes that the SRA lacks sufficient skills, understanding and flexibility to effectively regulate all parts of the profession, in particular, sole practitioners and large corporate firms.

Regardless of whether the rules and approaches to compliance apply to all firms, or in a more targeted manner, it is essential for the entry requirements to remain the same for the entire solicitors' profession. This will ensure that there is an element of commonality in the training for solicitors and that people do not find that their options for moving from one sector to another are unduly restricted.

Which areas of regulation have potential for duplication or overlap?

The Law Society is concerned about the potential for duplication between the LSB and the approved regulators. Duplication increases regulatory costs without any benefit. A possible area of duplication is the provision of public education. In its draft plan, the LSB has undertaken to develop public legal education strategies. This is an area where many approved regulators already carry out a significant amount of work. For example, the Law Society publishes guides on common legal problems. We think this is an area where further work is required and look forward to working with the LSB on this. Another area where duplication is likely to arise is in the regulation of ABSs, where multiple regulators may be responsible for regulating the individuals within an ABS and the firms as a whole. Further comments about this are made below. Openness between the LSB and the approved regulators will be essential to avoid this wasteful duplication.

What can be done to ensure that regulation is carried out in accordance with BRTF principles in all circumstances?

Regulators must embrace the Better Regulation Principles in regulating the legal services market. Regulators should ensure the viability of measures by carrying out a thorough Regulatory Impact Assessment for each policy initiative in accordance with the Better Regulation Executive's guidance. They should also review their plans and decisions to ensure that they uphold the principles. The LSB should ensure that both it and the approved regulators adhere to these principles in regulating the profession. There is currently a lack of evidence to show that the SRA is complying with these principles.

What are the dangers of regulatory competition? How can the LSB or approved regulator negate any such dangers?

The introduction of ABSs will give rise to regulatory competition. Depending on the services they want to provide, ABSs might have a choice of practice regulator. Once authorised by a particular body, the ABS would be subject to that body's rules, which will prevail over any conflicting standards that might be imposed by individual regulators.

There is a danger that regulatory competition will lower the regulatory standards imposed on legal service providers. ABS firms that have a choice of licensing authority are likely to choose the authority with the least restrictive regulatory regime. This may encourage licensing authorities to make their rules less onerous and in turn, may undermine the professionalism and quality of the legal profession.

The LSB should encourage the approved regulators to adopt consistent standards that protect regulatory standards. Greater consistency will minimise the likelihood of conflict in regulatory standards, as well as reduce confusion for the public and regulated community. The proposed rules must also be sufficient to protect regulatory objectives. While standards should not be too relaxed, the LSB should also ensure that there is justification for imposing more onerous regulatory requirements. It will be particularly important to ensure that regulators use consistent standards in relation to ABSs, given that individuals within an ABS may be subject to a different regulator to the firm as a whole.

The LSB will be well placed to consider and help resolve cross-industry issues and conflicts that arise between approved regulators. Referral fees provide an example of where a possible conflict might arise. Some view them as a normal part of ordinary business practice, whilst others view them as an improper inducement, with potentially negative effects on their ability to act in the best interests of the client. Arguably referral fees could compromise the quality of work and the integrity and impartiality of the legal service provider. However, if solicitors were prohibited from using referral fees they would lose business to competitors in the legal market who are permitted to pay referral fees. There therefore needs to be a consistent cross-industry approach on this and other related issues.

Transparency

What role should there be for the representative arm of the Law Society in keeping legal practitioners fully informed about regulatory developments?

The representative arm of the Law Society has a central role to play as the interface between legal practitioners and the SRA. This is important to keep practitioners informed on regulatory developments and then subsequently to assist them to understand and comply with the new regulation. For example, the SRA and Law Society should collaborate in providing guidance and best practice principles to comply with regulation. This will reduce the potential for conflict between the SRA's views and the guidance provided by the Law Society. However, the SRA is currently providing insufficient guidance to the profession. There is also a lack of communication and concordance between the SRA and the Law Society about what is best practice. Both organisations need to continue to work to rectify this.

What information should each regulator promulgate?

Regulators should communicate information to the profession about the way in which they prioritise their sometimes conflicting regulatory objectives and principles. This would assist the profession to comply with the rules. The Law Society believes that the SRA currently does not provide sufficient information in this area. Such information

would help to understand its rationale for pursuing certain agendas or highlighting particular issues.

Alternative Business Structures

Currently many believe that legal advice is only available to the very rich or to the poor. How can this be remedied? Do Alternative Business Structures provide a potential means for widening access to legal services?

ABSs provide a potential means for widening access to legal services. They are likely to do so by reducing prices, operating longer opening hours and providing more services via the internet or phone. ABSs provide consumers with a single point of convenient and potentially complementary services with banks, retailers and others.

This potential benefit will only be realised if the regulators give full effect to the safeguards in the LSA. Otherwise, ABSs may in fact restrict access to justice in certain areas. ABS firms are likely to want to focus on only the most lucrative areas of the legal services market. There is a risk that consolidation in these areas could eliminate smaller firms that rely on these areas to supplement less profitable lines of work. This could potentially result in fewer sources of this type of advice, particularly in rural communities. It is essential that the impact of ABSs on these less profitable areas of work is carefully considered so that there is not further erosion of services in these areas and a consequential reduction in access to justice.

What does the licensing regime need to include?

The regulators' development and enforcement of the licensing regime for ABSs are central to maintaining and widening access to justice. In issuing licences, the LSA requires regulators to actively consider the specific impact on access to justice issues, in addition to the other regulatory objectives. To do so, regulators must monitor firms and attach conditions to licences as necessary to ensure that the public has continuing access to a wide range of services.

What conflict of interests could exist within an ABS, how might they cause detriment and how can regulation effectively police and prevent them?

Conflicts could arise within an ABS where individuals' professional obligations conflict. While day-to-day regulation of each ABS will be handled by a single regulator, in a mixed partnership each individual remains accountable to their own professional body for conduct and disciplinary matters. To an extent this happens already but these conflicts are likely to become more prevalent, particularly where different professionals become managers of practices.

Conflicts could arise between lawyers who are subject to professional obligations and the commercial interests of non-lawyers. For instance, there is the potential for conflict between those within an ABS whose primary focus is on profit and others, such as solicitors who, whilst legitimately seeking profit, remain subject to the additional duties of the Solicitors' Code of Conduct.

These conflicts could ultimately put the public interest at risk. Individuals in ABSs that are subject to rigorous standards are likely to be disadvantaged if these conflicts arise. This is likely to put increased pressure on these individuals to compromise their core duties, which in turn, would put the public interest at risk.

Regulators must act to avoid these conflicts. They have a statutory duty to do so as far as is reasonably practicable. They should ensure that firms remain accountable through the nominated Head of Legal Practice and Head of Finance and Administration. They should also actively manage the relationship between lawyers and non lawyers to ensure that non-lawyers do not exert improper influence on lawyers. If non-lawyers fail to meet prescribed standards, then the regulators may use their powers of sanction.

Where ABSs are concerned, should the ‘legal’ part be separately regulated, and the ‘non-legal’ parts be subject to entity-based regulation?

The Law Society supports the current position whereby an ABS is regulated by a single licensing authority and individuals within that ABS are subject to their own professional obligations. Individuals who hold themselves out to the public as a solicitor should be subject to the Solicitors’ Code of Conduct and be regulated by the SRA, regardless of the licensing authority responsible for regulating the ABS as a whole.

Should everyone within an ABS be expected to adhere to the professional principles?

To avoid compromising professional standards, non-lawyers in ABSs should be subject to the same standards that are imposed on lawyers. For instance, the SRA should use the same criteria to assess the character and suitability of non-lawyers as it uses to assess solicitors, apart from the need to demonstrate legal competence or qualifications.