Solicitors Regulation Authority

SRA response

"Internal Governance and Practising Fee Rules", Legal Services Board (supplementary) consultation

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Covering letter

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Dear David

Supplementary consultation 'Internal Governance and Practising Fee Rules'

I enclose the comments of the Board of the Solicitors Regulation Authority (SRA) in response to the supplementary consultation on the proposed rules to be made under sections 30 and 51 of the Legal Services Act 2007. We are very grateful for the clarity of the documentation which the Legal Services Board has provided.

As you will be aware from our previous responses, our preference is for the retention of the provision for internal ringfencing of regulation through the mechanism of an independent oversight body (which could also act as an objective forum for shared services and monitoring) which appeared in the original draft rules. Nevertheless, we note that the approach taken in the proposed rules is sufficiently flexible to allow individual applicable approved regulators (AAR) and regulatory boards to develop such arrangements tailored to their particular circumstances.

We are pleased with the progress that we and the Law Society are making through the establishment of the Support Services Resolution Board, which includes some independent members; and encouraged that the Society's recently-published Hunt Report recommends progress towards a fully-fledged, balanced Law Society Corporate Board. We consider that that should be established as a priority.

Under Lord Hunt's proposals the Corporate Board will oversee SRA Board appointments and the provision of agreed shared services, deal with issues

relating to the scope of the regulatory functions and approve the regulatory budget. For the avoidance of doubt, I should make clear that we do not consider that the proposals entail any change to the arrangements whereby the Chief Executive of the SRA and the Chief Executive of the Law Society report to their respective boards, with neither reporting to the other, and would not support such a change. We have noted your statement that the Hunt recommendations are compatible with the proposed rules, and we agree.

In relation to shared services we have suggested in our response that it should be made explicit in guidance that, where a shared services regime is in place, it is for the regulatory organisation to determine the services it requires, not for the AAR to use its role as supplier to second guess the regulatory organisation's requirements. The regulatory board should control the budget to purchase those services.

We believe that the dual self-certification mechanism is potentially a powerful tool, and gives a firm incentive to both AARs and regulatory boards to work together over the next few months to develop arrangements which will both work effectively and entrench independent regulation in the public interest. The members of the current SRA Board and, I am sure, our successors (who formally take up their appointments on 1 January 2010) look forward to working with the LSB and the Law Society to achieve these goals.

Yours sincerely

PETER J WILLIAMSON

Chair of the SRA Board

The SRA's Comments

1. Comments on Schedule to Internal Governance Rules (page 21 onwards of the consultation paper)

Principle 1, Rule A

1.1

We agree with the proposed rule and guidance.

Principle 1, Rule B

1.2

We agree with the proposed rule.

Principle 1, Rule C

1.3

As we said in our response to the Legal Services Board [http://www.legalservicesboard.org.uk/] 's (LSB) previous consultation on proposed rules under section 30 of the Legal Services Act 2007 [http://www.legislation.gov.uk/ukpga/2007/29/contents] , we can see the weight of the argument that providing for a built-in majority of non-lawyers on a regulatory board may be important in securing confidence in the independence of regulation from the regulated profession. We think it is right that no restriction should be placed on the appointment of the board's chair on the basis of whether or not a legal qualification is held.

Principle 2, Rule A

1.4

We agree with the proposed rule.

1.5

Our preference is that the guidance should specify that the regulatory board should always lead on the appointments process, but that that should not preclude its making use of the assistance of the applicable approved regulator (AAR). This would enable the board to utilise the expertise and resources of the AAR to help it administer and design the process, whilst ensuring that it maintained overall control. Short of this, however, the guidance should be strengthened to make clear that "strong involvement" (page 22 of the consultation paper) must entail genuine partnership between the AAR and the regulatory board in all aspects of the appointments process.

Principle 2, Rule B

1.6

We agree with the proposed rule.

1.7

The guidance for this rule should make clear that the chair of the regulatory board referred to is the current/outgoing chair, though it would be appropriate for it to state that where a change of chair is occurring it would be right for the incoming chair also to be a selection panel member.

Principle 2, Rule C

1.8

We agree with the proposed rule and guidance.

Principle 2, Rule D

1.9

We agree with the proposed rule.

1.10

We believe that guidance should specify that AARs and regulatory boards ought in any event to have considered together and agreed fair and transparent disciplinary procedures.

Principle 2, Rule E

1.11

We agree with the proposed rule and guidance.

Principle 3, Rule A

1.12

We agree with the proposed rule and guidance.

Principle 3, Rule B

1.13

We agree with the proposed rule.

Principle 3, Rule C

1.14

We agree with the proposed rule and guidance.

1.15

We consider that it should be made clear in guidance that the regulatory arm must be responsible for proposing its own budget to the AAR.

Principle 3, Rule D

1.16

We agree with the proposed rule.

1.17

However, in our view, it would be better if there were provision for the explicit approval of all shared services schemes between AARs and regulatory boards by the LSB. We think that guidance ought to provide that a regulatory board should be able to opt out of sharing services with an AAR if it is able to show that its independence or effectiveness are impaired. Tests might include evidence that alternative provision can be obtained more cheaply elsewhere; or of persistent failure by the AAR to deliver services of the standard the board reasonably requires; or persistent breach by the AAR of the provisions governing its relationship with the board.

1.18

We suggest that the guidance ought to be completely explicit on the point that the AAR is the provider or supplier of services to its regulatory board for the purposes of enabling the board to deliver its own strategy. For example, it is proper for a regulatory board to be able to use the personnel and expertise of the AAR's Human Resources function, but it is the regulatory board, not the AAR, which should be responsible for determining the policies which the Human Resources function administers in relation to such matters as the regulatory board's own staff's remuneration and other terms of service. Similar examples are applicable to other shared services.

Principle 4, Rule A

1.19

We agree with the proposed rule.

1.20

In our view it would be desirable for guidance to make clear that there must be a clear separation between arrangements for oversight and monitoring by the AAR, and arrangements for the AARs quite different function of representing the interests and views of its members on regulatory policy and practice to the regulatory board.

Principle 4, Rule B

1.21

We agree with the proposed rule and guidance.

2. Comments on practising fee rules

2.1

We consider—as we have previously explained in detail—that section 51 [http://www.legislation.gov.uk/ukpga/2007/29/section/51] of the Legal Services Act 2007 makes it clear that the setting of mandatory practising fees is a regulatory function, and so like other regulatory functions will be the responsibility of the regulatory board. We believe that this ought to be referred to in the Rules.

2.2

We broadly support the conclusions reached on the basis of the responses to the previous LSB consultation on this issue. They are practical and pragmatic. We have one query. In paragraph 4.97 of the LSB's responses document it is suggested that having to link cost to regulatory objectives would be "…irrelevant for non-regulatory purposes". It is unclear whether this means that the LSB considers that it has absolutely no role in relation to the money raised through mandatory fees to fund "permitted purposes" that are not delivered by the regulatory arm, but through the representative arm of the approved regulator. We would find that conclusion surprising.

2.3

Feedback in the miscellaneous section of the responses document referred to comments made by the Legal Services Policy Institute (paragraph 4.115 on page 44) suggesting that certain statutory fees might be "… unregulated", in that they fall outside section 51 of the Legal Services Act 2007. It is true that the SRA, and other regulators, have powers to charge a range of application fees in addition to the annual practising certificate and recognised body renewal fees. Some of these application fees, although one-off in nature, will be subject to the section 51 provisions because payment will be conditional on gaining authorisation. Others might not be. However it is clear that even fees that are not subject to approval under section 51 are still part of the 'regulatory arrangements' and Schedule 4 includes provision requiring LSB approval for changes to such regulatory arrangements. The SRA does not consider that there are any statutory fees that are not subject to the supervision of the LSB.

Applicable persons

2.4

The new definition of 'applicable persons', as set out on page 27 of the consultation paper, is helpful to deal with the gaps recognised in the Bar Standards Board [http://www.barstandardsboard.org.uk/] 's supplementary response (described in paragraphs 4.89 – 4.91 of the LSB's consultation responses document) and a supplemental letter from the SRA raising similar but slightly different points. As some of those over whom the SRA has regulatory powers are not and may not have been 'members' of the

approved regulator we consider that the words "or otherwise" should be added to the page 27 definition of "applicable persons", or that the words "…by virtue of current or previous membership of the Approved Regulator…" should be deleted.

2.5

The SRA's supplemental letter raised the issues of the resources used to "police the perimeter", and the definition of 'applicable persons' goes some way towards that. It would not help, however, in relation to the important consumer protection work of identifying and taking action in relation to those who are not and have never been authorised, but who pretend to be —often a criminal offence. The definition of permitted purposes (as described in paragraph 3.26 of the consultation paper) now refers to "the regulation …of those either holding themselves out as…such persons..". As long as the term "regulation" encompasses investigatory work leading potentially to criminal action then this would seen to deal with the potential gap. It is important that there should be no doubt in this important area of public protection.

2.6

The SRA has no further comment on the draft rules save given that, as referred to above, some applications may relate solely to a one-off application fee, which may simply being changed to reflect increases (or decreases) in the cost of dealing with the application (e.g. in line with the requirements of the Framework Services Directive), it is unlikely that the full evidential requirements will be necessary. However we believe the wording (as set out on page 21 of the consultation paper) of the current rules, requiring regulators to "…have regard to…" the guidance and various factors, allows for the necessary flexibility.