Response to the Legal Services Board's consultation 'Reviewing the Internal Governance Rules'

Introduction

The CLC shares the Legal Services Board's (LSB) view, as set out in the consultation document to which we are now responding, that regulation should be 'structurally, legally and culturally independent of the professions and government'. We join the Ministry of Justice in urging the Legal Services Board to make full use of all of its powers to make faster progress towards that goal.

It is widely recognised that this has not yet been achieved across the legal sector and so the CLC welcomes the Legal Services Board's consultation on how more effective independence of regulation of the legal sector could be established and safeguarded.

The CLC was established under the Administration of Justice Act 1985 to have a purely regulatory function, protecting consumers and fostering competition. As such, we enjoy complete independence and have a perspective and experience that is unique in the legal sector.

We have regular and frequent meetings with bodies representing the lawyers we regulate, the Conveyancing Association and the Society of Licensed Conveyancers. They provide constructive challenge to us and are also valuable partners in engagement with the sector and on issues where we have a shared approach. But both we and they benefit from clear and unmistakably distinct missions and responsibilities.

We know that our clarity of purpose as a regulator with no representative role is central to stakeholder confidence in our work. It must also be a benefit to representative bodies for their objectives not to be confused by regulatory responsibilities.

Securing independence of regulation across the sector is not bureaucratic tidy-mindedness. It is vital for progressive reform of the legal sector driven by a focus on evolving risk , changing consumer expectation, consumer protection, and promotion of the public interest. The role of Approved Regulators can slow the pace of reform.

Observations on the current framework: confused consumers and lawyers

It is widely understood that the current separation arrangements do not work effectively. We hear this frequently from other front line regulators that do not enjoy the same degree of independence as the CLC. Where the current arrangements have been made to work, that is only because of the personalities in place being able to find ways to work together better. But we cannot rely on a framework that can only work with the right personnel. Legal services deserve regulatory structures and governance that are robust and that cannot be subverted.

Where a representative body is also and Approved Regulator, we know that this leads to confusion, even amongst lawyers represented by that body. In the example with which we are most familiar, several solicitors have, in conversation with us, referred to the Conveyancing Quality Scheme as belonging to the SRA. That may be because it is understood to be regulatory in effect. If so, that underlines another challenge around Approved Regulator status.

Although the CQS can be described as quasi-regulatory in effect, it is not subject to the checks and balances that come from being within the purview of the Legal Services Board, who have told us that they cannot consider the work of the Approved Regulators.

This kind of anomaly deserves attention, but it is not clear to us that can be achieved through the IGR framework. Activities that are regulatory in effect but are outside the framework lack accountability and transparency. Should the LSB not seek to bring them within its oversight? Is it appropriate for an Approved Regulator to undertake regulation rather than their frontline regulator child?

Observations on the current framework: lack of financial/resource transparency

Independent governance needs to be reinforced by clear financial independence and transparency. As long as a regulator does not have financial independence it cannot be truly independent from its representative body parent.

The CLC publishes Annual Financial Statements[1] which set out its source of income (regulatory fees) and how those fees are applied in carrying out its regulatory functions. It aims to have a balanced budget so that the fees charged reflect the costs of regulation.

It is not clear that approach has been taken with other approved regulators. Where regulated individuals or practices do not pay fees which only reflect the costs of regulation of their sector, they will either benefit or be prejudiced in comparison individuals and practices where this is not the case if those fees are artificially lower or higher than dictated by the full costs of regulation alone. This is not simply about cash because the problem occurs also where there is not clarity about how regulatory and representative activities are staffed.

Answers to consultation questions

We have provided our views to the LSB over the course of 2017 through informal consultations and indeed over a longer period as we have engaged in discussions around the framework for legal services regulation.

Questions 1 and 2

We are not in a position to provide the kind of evidence the Legal Services Board is seeking here but we are aware that other organisations that do not enjoy our complete independence have many examples of the negative impact of the current IGRs. We note that the Legal Services Board reports some of those in its consultation document.

[1] http://www.clc-uk.org/about/corporate-documents/

Questions 3 to 13

The CLC believes that the current IGR framework should be re-drawn to require the maximum possible separation between regulatory and representative bodies and to enable the front line regulators to demonstrate full separation.

Therefore, we support option 2c, as it would appear that options 2a and 2b would only secure lower degrees of independence for regulators. They would represent slower progress to towards complete independence.

It seems to us that revised IGRs could require front line regulators to be established as separate legal entities from their parent Approved Regulator. This will increase transparency of the relations between ARs and their children and support clearer financial reporting, in particular. It will also be a useful stepping stone for the complete independence that we and the LSB agree is the ideal end state.

Questions 14 to 25

If the IGR framework is to be redrawn with the aim of securing greater independence of regulation from representation, this is almost certain to require revision of the definition of regulatory independence. The revised definition should extend to the maximum possible within the terms of the Legal Services Act 2007.

We believe that it would be useful for the LSB to set standards and define channels for the provision of information by regulators to ARs and to arbitrate in disputes arising from the flow of information and so we support a 'gateways' approach.

We also agree that compliance with IGRs should be part of the LSB's periodic assessments of performance. If front line regulators do not have the independence that should be safeguarded by AR compliance with the IGRs, that must surely be an indication that a regulator may not have the freedom of action that its responsibilities demand. In such cases, the sanction must be on the AR.

In light of the MoJ's exhortation that the LSB should make use of all of its powers we note that, under the 2007 Act, the LSB may recommend derecognition of an AR. This ultimate sanction must be a real possibility in a scenario which sees an effective regulator suffering from interference from their AR. Surely a new entity seeking to become a frontline regulator would have their application refused if their independence was not assured to the standards required by the LSB?

Establishing ARs as separate legal entities would enable the LSB to recommend derecognition of a non-compliant AR without risking the continuity of regulation by the regulator. Thus, LSB's hand in enforcing compliance with IGRs would be significantly strengthened.