

The City of Westminster and Holborn Law Society

The Future of Legal Services: Putting Consumers First

A response by the City of Westminster and Holborn Law Society

The City of Westminster and Holborn Law Society is a local law society representing around 1,000 lawyers in those areas of Central London. Its membership includes not only solicitors in private practice, but also in-house lawyers, and those in the government legal service.

This Society notes that the White Paper makes proposals which go beyond the recommendations made by Sir David Clementi, for example in relation to multi-disciplinary partnerships. We feel free to comment on those aspects which have not been fully consulted upon as part of the Clementi review process.

CWHLS supports the objectives and principles for the regulation of legal services which are set out on page 25 and 26 of the paper.

We comment on the issues in the paper of greatest concern, as follows:

Changes to proposals – CWHLS objects to the proposal that the objectives and principles will be made by secondary legislation. These principles and objectives (as set out in the paper) underpin the rule of law and access to justice in this jurisdiction, and should only be changed after full scrutiny by Parliament. While all objectives and principles are supported, the ones to which this comment applies in particular are: all the principles, and the first 2 objectives (supporting the rule of law and improving access to justice). We consider it to be constitutionally objectionable to allow that supporting the rule of law may be a concept which is susceptible to change other than through the democratic process. We have commented below on the importance of the independence of the provision of legal services. It is wholly unacceptable that this, together with the other objectives and principles, is subject to the possibility of change by secondary legislation, as set out on page 27 at 4.1. This also detracts from the stated aim of the paper of putting consumers first. The interests of consumers, and the public interest, require that there should be clear principles supporting the rule of law and access to justice, and it is therefore in the interests of the public that these should be enshrined in legislation which cannot be altered without full consultation and scrutiny. The objectives and principles must stand as set out in the White Paper, subject only to change through primary legislation.

Independence of the Legal Profession – the independence of the legal profession is of critical importance in any democratic society. Legal Professional Associations in other jurisdictions are not recognised in this Country as such unless they can show independence of regulation and freedom from control by others (including the Executive). Therefore, the Legal Services Board should be a body which acts as a backstop, to ensure that the Front Line Regulators are carrying out their regulatory function effectively and expeditiously. The proposal is for the chair of the Legal Services Board to be appointed by the Secretary of State, who will also appoint members of the Legal Services Board. This body is therefore not a body which constitutes regulation of the legal profession by the profession. It is recognised that such a body has a useful role to play in protecting the interests of the clients of the legal profession, but it should not have regulatory powers itself, and if its membership is appointed by the Secretary of State, then this undermines the independence of the legal profession as a whole. There

may also be a conflict of interest if an individual has sought advice on the actions of the Government itself, and rights of individuals to challenge the Government within the law should not be undermined. We suggest that a body such as the Judicial Appointments Commission would be a more appropriate body to make such appointments, being at one remove from the Executive. This is consistent with the statement that the Legal Services Board will ...be independent of Government (page 20).

Polluter pays principle - the paper assumes that the legal professional will always be the polluter. However, there are many complaints which are not upheld. In some cases, there are vexatious complainants, whose complaints are not only rejected but are entirely without merit or substance. It must be acknowledged that in these circumstances the polluter is not the legal professional but the consumer, and in theory costs ought to be payable by the consumer in such cases. We suggest that there should be a discretion for the complainant to be required to pay costs, or a contribution of such costs. Where this is not appropriate then the cost of vexatious or frivolous complaints should be borne by providers of legal services as whole, rather than by the specific provider complained of. This is essential, in the interests of access to justice, if legal services are to be available to all. Areas of law such as matrimonial or child case cases tend to generate a higher proportion of complaints than other areas, and in the absence of such a provision, practitioners would be deterred from providing legal services in such areas.

Proposed HOLP and HOFA (page 44) – With regard to the proposal that there must be a Head of Legal Practice and a Head of Finance and Administration, CWHLs considers that it is detrimental to the aims of the paper to require a single individual in an organisation to be responsible for these matters. At present, professional responsibilities on solicitors mean that all are bound by professional rules, and the partners share responsibility for the running of the organisation and in particular for compliance with the Solicitors' Accounts Rules. It is unfair to make only one individual accountable, which would have the effect of reducing the responsibility of other lawyers. The paper does not contain detail of how this would be implemented. It is important that the sanctions relating to any breaches of the rules of the Front Line Regulator would go to the licence for the Alternative Business Structure, rather than only to any breaches of professional rules by the individual HOLP or HOFA.

Cost – on the figures provided in the paper, there is a small reduction in the cost of overall services. A significant transition cost is also identified (pp 68-69). The paper refers to reducing the regulatory maze, but it is not clear where any reduction in cost would come from. The text concentrates on the powers of the Legal Services Board and Office for Legal Complaints, and their relationship with, in particular, Front Line Regulators. The diagram at Figure 2 showing how the new arrangements will work does not include the individual Front Line Regulators and other regulators shown in Figure 1, the current balance. In the absence of further comment, it appears that an additional regulatory layer has been proposed, without any reduction in regulation or regulatory consultation. Cost is not given as one of the major underlying reasons for review, but efficiency must be an important consideration. One of the principles on which the proposals are based is moving regulatory functions from the Master of the Rolls, who is paid for from government funds, to the Legal Services Board, the cost of which will be levied on providers of legal services. As this will necessarily increase the base costs of provision of legal services, the cost to the consumer will increase as a result of these changes. While a driving force for the review and these proposals was to improve the position of claimants about the legal service, other of the principles for regulation (such as improving access to justice) will be harmed if the cost of regulation to the professions is increased significantly.

Concern on the competitiveness of the UK's international earnings from the profession - the increase in the cost imposed by these measures must raise a concern on the UK profession's competitiveness in the international arena. We have raised questions above on the increase on costs imposed on the profession and the Law Society of England and Wales has raised the issue of the transfer of the cost of the functions of the Master of the Rolls, etc. There can be little doubt that costs will increase. The UK has seen huge advantages in the export of "legal" earnings from the growth of energy related expertise due to the UK's oil and gas resources, and from the experience of privatisation. Just as expensive US legal expertise moved to the UK with the development of the North Sea, both of these, and other areas of particular expertise are contestable by good lawyers in other jurisdictions. In addition, if the English profession is seen to be losing its independence from Government, even to a small degree, that will encourage multinational clients to seek advice elsewhere. The visible independence of the profession is of huge importance to the export-earnings capability of the UK's service based economy.

On more detailed points:

In 9.1 there is no reference to any scrutiny of any change in determining the balance of the general levy, and this needs to be included.

In 8.3, we assume that the phrase "OLC [Office for Legal Complaints]...will be expected to comply with the Independent Commission's Good Governance Standard for Public Services" will mean that a requirement to this effect will be imposed in primary legislation.

With regard to 5.6, if the powers under the Enterprise Act are to be useable by the regulator, then it is crucial that there be an appeal against the use of those powers. The powers are extremely wide ranging, and can mean that a business ceases to function. There must be appropriate safeguards for the business as well as for the consumer.

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