



DRAFT

A Response by the Forum of Insurance
Lawyers to Lord Hunt's Legal Regulation
Review, Initial Response to Evidence

June 2009



FOIL (The Forum of Insurance Lawyers) exists to provide a forum for communication and the exchange of information between lawyers acting predominantly or exclusively for insurance clients (except legal expenses insurers) within firms of solicitors, as barristers, or as in-house lawyers for insurers or self-insurers. FOIL is an active lobbying organisation on matters concerning insurance litigation.

FOIL has over 2500 members. It is the only organisation which represents solicitors who act for defendants in civil proceedings.

This response has been drafted following consultation with the membership.

Any enquiries in respect of this response should be addressed initially to:

Shirley Denyer
Director of Information

shirley.denyer@foil.org.uk

Sinclair House
2D Park Avenue
Eccleston Park
Prescot
Merseyside
L34 2QZ

A Response by the Forum of Insurance Lawyers to Lord Hunt's Legal Regulation Review , Initial Response to Evidence.

FOIL members have read with great interest Lord Hunt's 'Initial response to Evidence'. FOIL was also delighted to welcome Lord Hunt as a speaker at its Annual Seminar on 10 June, appreciating an opportunity to hear Lord Hunt's views and put forward some of the thoughts of its members.

FOIL members have also had an opportunity to read the two consultation papers on ABSs, published by the LSB and the SRA. Whilst obviously His Lordship's work is separate from those papers they are very much in the minds of members when considering regulatory issues.

Structure and Delivery

The extent of the regulatory net

Lord Hunt indicates that he is considering whether the "edges of the regulatory net should be extended, for example, to cover will-writing, certain commercial work, certain types of legal helpline and all probate work".

The edges of the regulatory 'net' have always seemed to fall arbitrarily. There are obviously any number of legal activities which most members of the community would regard as 'legal services' which are not reserved, and not regulated at all. We do not believe that this fact is well known by consumers and it is likely to be the case that many people believe they are dealing with a regulated organisation because of the nature of the service they are buying, when in effect their provider is not regulated and the consumer is not protected. This is of particular concern in the area of legal services which by their very nature are usually supplied at important time of consumers' lives when they need assistance they can rely upon; and at the same time, in general, it is impossible for consumers to judge the quality of the legal services they are receiving. Whilst accepting that this may be an area where the door has effectively already closed FOIL feels that sound public interest arguments can be made for the regulation of all legal services. The

definition of legal services which commended itself to Sir David Clementi in his report would provide a very sensible starting point.

Looking forward to the new era of the provision of legal services to be introduced from 2011 the general issues mentioned above are brought into sharp focus by the new regulatory regime proposed for ABSs.

We note that the Legal Services Act only requires an ABS to be licensed if it is providing reserved activities. It appears likely that such a licensed organisation would then be able to use the title 'solicitor'. It is of concern to note from the LSB and SRA consultation papers that it is not yet clear whether the regulation of ABSs will extend to any non-reserved legal activities provided by that ABS. FOIL believes that a failure to regulate all the legal activities of an ABS which offers reserved legal services and uses the title of 'solicitor' would create risks for the consumer and have the potential to cause great damage to the reputation of the solicitors' profession. It is hard at present for a consumer to understand the exact regulatory status of an organisation from whom they are buying legal services but at least they can rely upon the fact that a solicitors' firm will be regulated fully. To dilute that protection by allowing the title 'solicitor' to be associated with unregulated legal services would be a serious retrograde step.

In addition, the SRA consultation paper also raises the possibility that an ABS may in future apply for a licence simply for a body which delivers reserved legal work, whilst providing non-reserved legal work through a related but unregulated body. Although the SRA notes that this is a "key public and consumer education issue" it seems unlikely that consumer education itself could enable unsophisticated purchasers of legal services to understand the niceties of the regulatory regime sufficiently to make informed decisions. Purchases will often be made purely on price, thereby disadvantaging those who through regulation offer a far superior, but unrecognised, service to consumers. In FOIL's view the 'separate business' rule preventing practising solicitors from providing non-reserved legal services through a separate non-regulated business should also apply to ABSs.

Training on ethics

It is inevitable that solicitors will find it difficult to differentiate between regulatory and professional duties – their background, training and development will not

normally have required the differentiation to have been made. Training on regulatory and professional standards present two different challenges: the precise rules are often technically difficult and must be thoroughly understood, and the broader aspirational principles need flesh put upon them if they are to be fully understood and applied on a day-by-day basis. They must become a normal part of 'legal thinking', and not remain abstract, distant principles. Steps to achieve these aims should begin at the earliest opportunity in a lawyer's professional life. Ethics must be seen as an integral part of practice, not as a 'bolt-on' extra, or something to be considered before moving on to the 'real work'.

The title of 'solicitor'

FOIL would agree that the title of 'solicitor' should be within the gift of the professional body arm of the Law Society. It should be necessary for an individual to meet both the regulatory requirements and the higher professional requirements before being entitled to use the title.

The Substance of Regulation

The five BTE criteria

Looking at the five principles of good regulation identified by the Better Regulation Executive it is impossible to disagree with the statement that good regulation should be proportionate, accountable, consistent, transparent, and targeted. These are, however, very high level principles and it would be difficult for any organisation to judge itself against those principles in abstract.

FOIL would welcome a continuation of the work which has looked in detail at the regulator's decision making criteria, to bore down into the principles and ensure they are reflected in the day to day activities of the regulator. The consistent application of the correct decision-making principles should then ensure that the higher, broader principles are in turn adhered to. FOIL believes that this will reduce any tendency for 'targets' to unduly influence decisions, which can create injustice.

The Practice Standards Unit

FOIL would welcome a more pro-active approach by the SRA, more focused on advice and working with firms, rather than on post-event discipline. Whilst FOIL is

unable to comment on the current work of the Practice Standards Unit the SRA's figures seem to indicate that it is successful in reducing complaints.

Sanctions

Transparency cannot be achieved without full knowledge of the sanctions available to a regulator. FOIL would agree with the proposal that the SRA should in future be far more explicit about the range of sanctions available to it.

The Solicitors Disciplinary Tribunal

Every opportunity should be taken to improve the guidance and training that can be given to ensure regulatory standards are met. FOIL would agree with the proposal that regulators should ensure that valuable lessons from SDT rulings are noted, learned and promulgated, on an anonymised basis. Specific disciplinary proceedings naming individuals should not be used as an opportunity to warn or train the profession as a whole.

The contents, tenor and general accessibility of the Code of Conduct

The SRA call centre

Creation of a separate complaints function to consider complaints against the regulator.

FOIL is in agreement with this proposal.

Consolidation of the rules into two codes

FOIL is in favour of consolidation if this can achieve simplicity of presentation and ease of understanding without diluting the standards and the guidance provided at present.

'Mandatory self-regulation' for corporate firms

FOIL would agree with the proposal that it would be appropriate for some firms to be regulated through this process. We presume that there would be a process to identify firms for whom this would be appropriate at the outset, and those who subsequently reach the required level of "corporate maturity" to make self-regulation feasible.

FOIL notes that named individuals as well as the firm would be held accountable for meeting the requirements. Obviously this accords with the SRA's reforms to concentrate upon firms rather than exclusively on individuals. Whilst this corporate approach is necessary FOIL would not wish to see this, or the process of naming individuals responsible for self-regulation, reducing the individual responsibility of solicitors to maintain high regulatory and professional standards. Personal accountability is an important element of the current regime.

All ABSs should have a Head of Regulatory Affairs

FOIL would agree with this approach, subject to the comments above concerning the need for authorised persons to also take personal responsibility for regulatory requirements.

ABSs should be subject to the same rigorous standards of governance and mandatory self-regulation as corporate law firms.

FOIL is in agreement with the sentiment expressed in paragraph 50 of the Initial Response, that ABSs "should be expected to match the ethical standards we have rightly come to expect of traditional law firms – both the regulatory and also the professional standards." "The ideal regulatory test for ABSs may not be how different their practices are from the best practices in traditional law firms but how akin to them they can successfully aspire to be."

FOIL believes that this approach combines the best of the benefits to consumers and the public that the reforms can offer whilst preserving the safeguards and the security that society expects from solicitors' firms and those presenting themselves as akin to solicitors' firms.

FOIL notes that Lord Hunt goes on to say that good governance should ensure that "only appropriately trained, qualified and supervised individuals provide regulated services to consumers". FOIL has already set out its concerns above, regarding ABSs and the provision of unregulated services. In FOIL's view the above aspiration should apply to all services an ABS provides as it does to a traditional law firm.

Lord Hunt outlines in some detail how a system of self-regulation would work for corporate firms. He indicates that admittance to such a system "could in time

become a mark of pridesomething to which every law firm might ultimately aspire – a mark, perhaps of corporate maturity”. FOIL recognises that many ABSs will flourish into well-managed providers of legal services, well-capable of self regulation, but the ABS regime is revolutionary and by definition newly licensed entrants will not have ‘corporate maturity’. In FOIL’s view the new structure should be given time to bed-down with a period of ‘hands-on’ regulation. Traditional corporate law firms have honed their skills in meeting regulatory requirements over many years. They will not be ‘better’ than successful ABSs but they will be more experienced. The potential size of ABSs should not allow the question of experience to be overlooked.