



# FOIL UPDATE

April 2009

## Regulation of the Profession – current consultations

The regulation of the legal profession is a lively topic at the moment. As Lord Hunt undertakes his far reaching review of the regulatory framework and prepares proposals to reflect the changing nature of the profession, the Legal Services Board (LSB) and the Solicitors Regulation Authority (SRA) are engaging in an on-going programme of consultation looking at the detail of the regulatory regime.

There are four consultations open at present:

SRA – Decision making criteria – open until 8 May 2009

SRA – Use of enhanced regulatory powers – open until 15 May 2009

LSB – Regulatory independence – open until 26 June 2009

LSB – Funding legal services regulation – open until 2 July 2009

### **SRA – Consultation on decision making criteria**

This consultation is the first in a series on the criteria the SRA will apply when making a range of decisions, including issuing a letter of advice, removing a name from the roll, or referring a solicitor to the Solicitors Disciplinary Tribunal (SDT).

The most detailed provisions focus on a referral to the SDT and the settlement of a disciplinary case. Any matter to be referred to the SDT will need to satisfy a two-part test. Firstly an evidential test will be applied to ensure there is enough evidence to provide a “reasonable prospect” that the solicitor will be found guilty. It is an objective test which means in practice that the SDT is “more likely than not to make a finding of misconduct”.

Where the evidential test is fulfilled the public interest must then be considered. By way of examples, a matter is more likely to be referred if it involves a breach of trust or any form of discrimination and is less likely to be referred if the solicitor is elderly and no longer practising or if the alleged misconduct arose from a genuine mistake or misunderstanding.

### **SRA – Consultation on use of enhanced regulatory powers**

The Legal Services Act 2007 (LSA) granted the SRA additional powers to require solicitors to explain their conduct and produce information. The policy statement which is being consulted upon covers three powers:

- To require a regulated person to provide information – Sec 44B
- To require a regulated person to attend to provide an explanation- known as an “investigation meeting” – Sec 44BA
- To require any person to provide information – court order required- Sec 44BB

The SRA confirms that all powers will be used proportionally: the most common power used will be under Sec 44B with 44BA used primarily for allegations of serious misconduct.

Whilst powers under 44B will be authorised by senior technical and legal staff, only the Chief Executive, Legal Director or Head of Legal will authorise an investigation meeting.

An SRA lawyer will attend to observe the meeting and will be able to state the SRA’s position on any properly raised legal issue. The regulated person will be entitled to be accompanied but any obstruction by the accompanying person could be treated as a failure to co-operate.

If the obstruction continues the accompanying person may be excluded. The meeting will be recorded and a CD provided to the regulated person. No costs will be payable to the regulated person except travel costs in exceptional circumstances.

Powers under Sec 44BB will be exercisable only by the court, authorisation to be given by the Legal Director. The SRA will not be dissuaded by obstruction or threats as to costs. The SRA will look favourably upon a request to pay the reasonable costs of the third party.

### **LSB – Consultation on regulatory independence**

The separation of regulation from representation was a key plank of the reforms that led to the Legal Services Act and the creation of the LSB. This consultation seeks views on rules to be made under two provisions: Sec 30 of the LSA dealing with the internal governance of approved regulators and Sec 51 of the LSA which deals with the control of practising fees paid by regulated practitioners.

The issues raised under Sec 30 include the creation of separate regulatory arms where approved regulators also have representative functions; the 'ring fencing' of the regulatory functions to ensure independence; procedures to ensure fair appointments; and policies on the setting of budgets, the management of resources and the line management of members of staff, to ensure independence. Compliance will be monitored through 'dual self-certification' by both the approved regulators and their regulatory arms, endorsed by the LSB.

Proposals on practising fees include rules on the "permitted purposes" for which the money raised can be used; arrangements to ensure that applications for approval of fees are made in a timely fashion to fit with budget cycles; details of the information to be given to regulated persons on fees; and the introduction of a requirement to observe the regulatory objectives and the principles of better regulation when seeking to agree the level of practising fees. "Permitted purposes", on which the funds may be spent, include regulation, accreditation, education, participation in law reform, the provision of pro-bono legal services to the public, and the promotion of the protection of human rights. It is proposed that "increasing public understanding of citizens' legal rights and duties" be added to this list as that is a regulatory objective under the LSA.

### **LSB – Consultation on funding legal services regulation**

This is a fairly technical consultation on the proposed rules to be made under Sections 173 and 174 of the LSA. The cost of implementing and running the LSB and the Office for Legal Complaints (OLC) will be met by the professions through the practise fees levied by the 'approved regulators' (the Law Society, the Bar Council, the Institute of Legal Executives, the Chartered Institute of Patent Agents, the Institute of Trade Mark Attorneys and the Association of Law Costs Draftsmen). The establishment costs will be payable over three years with 70% payable by February 2010. The establishment costs for the LCB will be apportioned between the approved regulators on the basis of the numbers of authorised persons regulated by each body at 1 April 2009. The establishment costs of the OLC will be apportioned on the basis of the number of complaints each approved regulator has received. Further consultation will be undertaken on the running costs of both organisations in early 2010. The volume of spend does not form part of the consultation.

**If you would like any further information on the consultations or have views on the proposals please contact Shirley Denyer, Director of Information, on [shirley.denyer@foil.org.uk](mailto:shirley.denyer@foil.org.uk)**