

## **The Legal Services Consultative Panel**

### **Response to Sir David Clementi's Consultation Paper on the Review of the Regulatory Framework for Legal Services in England and Wales**

**June 2004**

#### **The Legal Services Consultative Panel**

1. The Legal Services Consultative Panel (the Panel) was established by the Access to Justice Act 1999 in January 2000.
2. The Panel has considered Sir David Clementi's Consultation Paper on the Review of the Regulatory Framework for Legal Services in England and Wales. The panel's response was given in *May / June* 2004.
3. The response is published on behalf of the Panel by the Department for Constitutional Affairs. The document is also available in hard copy.
4. Further copies of the Panel's response are available from the Panel Secretariat (*telephone*: Louise Joyce, on 020 7210 8816).
5. The Panel comprises:

Lord Justice Potter (Chairman)  
Mr Jonathan Acton Davis QC  
Professor John Bell QC (Hon)  
Professor Hugh Brayne  
Mr Jonathan Goldsmith  
Mr John Hannam  
Mr David McIntosh  
Ms Karen Mackay

Mr Richard Moorhead  
Mr John Randall  
Mr John Randall QC  
Mr Simon Sapper  
Mr Alan Street  
Ms Peta Sweet  
Dr Matthew Weait  
Mr John Young CBE

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The Panel provides below its answers to the questions posed in Sections A, D and E. It refrains from answering the questions posed in Sections B, C and F because of its concern not to prejudice, or to give the appearance of having prejudiced, its independence in relation to issues which might arise in relation to applications to the Panel in the future.

*A1 What objectives do you believe should form the cornerstone of a regulatory system for legal services?*

1. The Panel agrees with the objectives mentioned in the consultation document. However, the Panel wishes to highlight some objectives and to mention others which are not there.

#### 1.1 Rule of law

- 1.1.1 Although the consultation document mentions 'maintaining the rule of law' among the objectives which it canvasses, that objective is mentioned without emphasis. For a society to be free, fair, open and democratic, the rule of law is essential. For the rule of law to operate justly and efficiently, providers of legal services must not only be reliable and independent of external pressures; they must also be trusted by the state and society at large, and thus required by regulation, to operate in an ethical manner in a variety of situations in which, to a greater extent than any other profession or provider of services, they are subject to conflicting influences and duties, and hence to temptation to deviate from their relevant codes of conduct.
- 1.1.2 Lawyers have a distinct set of obligations and a distinct context of working, which requires a distinct form of regulation. Features of the work of lawyers which give rise to the risk of unethical conduct, or which may permit such unethical conduct to go undiscovered, include the following:
  - (a) Most lay clients, and a significant proportion of commercial purchasers of legal services, rely on lawyers during periods of considerable stress and in situations with which they are usually unfamiliar. Numerically, most users of legal services are first time users, without experience or knowledge of lawyers or the law. Even experienced purchasers of professional services find it difficult to gauge the quality and integrity of

their lawyers. Although the Panel believes that the majority of lawyers provide a good service, their clients are vulnerable to, and in need of protection from, the possibilities of poor advice, delay, inefficient conduct of their dispute, or overcharging by the lawyer whom they consult.

- (b) Lawyers advise and act for their clients in areas where their advice and expertise are unlikely to be open to effective challenge by the client. Further, the investigation of complaints as to their conduct by third parties is hampered by the doctrine of legal privilege. Although privilege may be waived by the client, he or she may have no motive to do so in a situation where the lawyer's unethical conduct has obtained an advantage for the client.
- (c) In any dispute resulting in litigation, lawyers face a potential conflict between their general duties to pursue and protect their clients' interests and their particular duties of frankness both to the court and the opposing party in conducting their clients' case. Such duties include advising and requiring the client to give disclosure of all relevant documents and to make a full and honest witness statement (in a situation where some clients may be inclined to do neither). Lawyers are also under an overriding duty not to mislead the court in the conduct of the trial or presentation of the case. The temptations for lawyer to close their eyes to dishonesty or lack of frankness on the part of the client, or to leave uncorrected an apparent error on the part of the court favourable to the clients' case, need to be discouraged by means which are clear and enforceable.
- (d) It is in the nature of most lawyers to approach prohibitory legislation or rules of court as 'black letter' law which permits that which it does not forbid. Indeed, the requirement to act wherever possible in the client's interests is interpreted by some as requiring this approach. Such an approach, if applied to relevant rules within the Code of Conduct or to the wording of a 'loose' undertaking given by the lawyer to the court or to a third party, may be used by lawyers to defend conduct on their part which the majority of lawyers would regard as plainly unethical and contrary to the true intent of the rule or undertaking. This is one of the reasons why the Panel considers regulation should be founded on clearly stated principles as well as rules, as stated below.

1.1.3 Whereas we have referred above to the position of 'lawyers', similar considerations apply to others who are, or will in future be, providers of legal services.

1.1.4 The necessity for public trust and the requisite of ethical awareness and performance on the part of providers of legal services leads in the Panel's view to two particular consequences:

- (i) The distinctive position of the supplier of legal services is different from other service industries and means that legal services cannot simply be treated like financial or other services. The high standards of ethical behaviour rightly expected of providers of legal services and crucial to the operation of our legal system, require careful protection and will need to be maintained and applied more broadly as the supplier-base expands.
- (ii) The need to protect the interests of the consumer renders a strong lay element necessary to any regulatory system which is to enjoy public confidence. At the same time, because of the nature of legal practice and the many specialist areas in which such regulation must operate, it is equally essential that there should be involvement by professionals in the regulatory and disciplinary decisions taken at all levels, so far as is consistent with those decisions being taken independently.

1.2 Independence. Although independence is mentioned as a principle of the legal profession, its preservation is not within the existing list of objectives for a regulatory system. To the Panel, it is vital to protect the independence both of the system which regulates legal services and of those who supply legal services under that system. This means independence from government, independence from professional self-interest and independence from any other influence which might conflict with the duty to give independent advice in relation to legal transactions. Transparency is an important concomitant to independence. The public must know who appoints the regulators and what principles the regulators apply. In relation to those who provide legal services, the public should also know what training they have and (in the case of corporate providers) who owns them.

1.3 Public confidence. It is rightly the aim of good government and hence should be the aim of the regulator, to increase public confidence in the justice system.

1.4 Competence. A vital objective of the regulatory system should be to ensure that all providers of legal services, whether lawyers or not, are competent to provide the services they offer. The consultation document speaks of a ‘competent, strong and effective legal profession’, and mentions entry standards in this context. However, not all providers of legal services are, or will in the future be, lawyers. This is an area of particular concern to the Panel because of its statutory duties. The Panel is concerned to ensure that people offering services which need to be regulated are all regulated to a uniform, minimum level. It considers that a regulatory system for legal services should set and monitor minimum competencies for particular areas, for all providers, and not just for lawyers. Second, entry standards alone will not ensure competence; a number of other elements are important, including supervision, monitoring and professional development.

- 1.5 Conflicting objectives. In the consultation document, the objectives are listed without priority or indication of how conflicts between them should be resolved. Potential conflicts are already emerging in the market place and are likely to increase with the reduction in legal aid. For instance, there may be conflicts between quality of provider and access to justice (the higher the standard, the fewer the practitioners); also between economic considerations such as competition and justice considerations such as access (c.f. the problem of legal provision in rural areas). In the Panel's view, the objectives should make clear that the first consideration should always be the delivery of justice.
- 2 There are two matters which are not objectives of a regulatory system in the sense of fundamental goals to be achieved, but which the Panel considers should be regarded as important features of such a system.
- 2.1 Principle-based regulation. As already stated, the Panel believes that the regulation of legal services should be based on general principles, as well as being contained in detailed rules. Rules cannot cover all possible situations, whereas principles, clearly stated and carefully drafted, should be able to do so. Rules alone encourage the belief that, if something is not forbidden, it is allowed. The Panel believes that higher standards and better values are best instilled through general principles. If regulation is to work, it should be principled regulation applied by a responsive regulator, armed with the necessary economic resources and legal powers.
- 2.2 Levels of regulation. The Panel considers that if the overall model of regulation eventually adopted includes elements of self-regulation by an effective professional body already in existence, then a lighter touch of regulation could well be adopted in relation to that sector.

*A2 What aspects of professional ethics, or legal precepts, do you feel are essential to a properly functioning legal services industry and in what way should they be reflected in the regulatory system?*

- 3 The Panel is broadly content with the main ethics or precepts covered in the consultation document, but draws attention to two generally accepted core values which the document does not mention.
- 3.1 Avoiding conflicts of interest. The recent *Wouters*<sup>1</sup> case before the European Court of Justice recognised the avoidance of conflicts of interest as one of three core values of the legal profession (the other two being independence, and confidentiality). The Panel believes that it is important for this to be included among the main precepts, to ensure justice and the appearance of justice. There are complications in a conflicts rule, as in all rules, for instance as to when a lawyer should cease to act and how the rule should operate in relation to very large firms with a large number of clients (with

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<sup>1</sup> Case C-309/99, *Wouters, Savelbergh, Price Waterhouse Belastingadviseurs v. Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1577

a correspondingly larger risk of conflict). Nonetheless, the Panel considers that the principle of avoidance of conflicts of interest should be included.

- 3.2 Good standing. European and international standards on the legal profession refer to the ‘honour and dignity’ of lawyers<sup>2</sup>. The Panel has reservations about the use of such terminology in the context of the expanding field of provision of legal services. However, the Panel does believe that the gist of such terminology should be the aim of all providers of legal services. It should be necessary for all professional ethics codes in the field of legal services to include the need for the good standing and continuing good behaviour of providers in order to preserve and promote public confidence in the administration of justice.

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*D1 Should the Regulator be a board or an individual?*

4 The Panel believes that the Regulator should be a board, for two reasons:

- 4.1 Lay and professional. The experience of the Panel is that group discussion between lay and professional people produces good results in professional regulation. As a result, the Regulator should be a board, to take account of a mix of views and perceptions.

4.2 A lawyer or not a lawyer? If the Regulator is an individual, the choice will have to be made as to whether that individual should be a lawyer or not. We have already said that it is essential that lawyers play a substantial (although not exclusive) role in their own regulation. The appointment of a board will avoid the necessity to decide whether the Regulator should be legally qualified or not, and ensure at the same time an appropriate mix of all kinds of experience.

*D2 What sort of Board should the Regulator have and how should it be constituted? What would be an appropriate split between practitioner involvement and lay content in the Board? As regards the practitioner content, would you favour the inclusion of individuals on their merits, or formal representatives from different parts of industry?*

5. In our view, the main factor is that there should be both lay and professional involvement.

5.1 On balance, we favour a narrow majority in favour of the lay element, on the grounds

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<sup>2</sup> See, for instance, Article 29 of the proposed directive on services in the internal market (Commission Proposal for a Directive of the European Parliament and the Council on services in the internal market), and Article 8 of the Directive 2000/31/EC of the European Parliament and of the Council on 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on Electronic Commerce)

that legal services are provided to lay people in the context of a largely lay society and such a majority will tend to increase public confidence in the Board. We reiterate, however, the need for substantial professional involvement. If the size of the Board permits, it would be preferable for practitioner content to include those present on merit alone and those who may be there as formal representatives. However, it should be made clear in all cases, that the individuals owe their duty to the Board, and not to any section of the legal services industry.

*D3 Who should appoint the leadership of the Regulator? With whom should that person consult? How should the appointments of the other directors of the Board be made?*

6. The appointment of the leadership and other directors should take place according to existing protocols, these being the principles set out by the Public Appointments Commissioner.

*D4 What period should the appointments be for? In what circumstances and by whom could directors be removed?*

7. The term of office should be for three years, with the power to serve a single further term of three years, subject to satisfactory performance.
  - 7.1 Directors should sign an acceptance of terms and conditions of service, and should be liable to be removed from office if they act in breach of those conditions.
  - 7.2 The power to remove directors should reside with the body with the power to appoint, subject to appeal to an independent commission.

*D5 Having regard to the need for independence both from Government and providers of legal services, what qualities and background would you wish the leadership of the Regulator to possess? Is there anything you believe it would be important for the leadership of the Regulator not to be?*

8. The regulatory body needs to be collectively independent of sectional interests and seen to be so. In appointing members to the Board of the regulatory body, regard should be paid to the collective sum of their talents and experiences. Whether the Chair is legally qualified or not (and the Panel favours a lay Chair) he or she will need to have considerable knowledge of legal affairs and services.

*D6 What mechanisms would you propose to ensure the accountability of the Regulator: (1) to Parliament; (2) to Ministers; (3) to public interest groups? Is there anyone else to whom a Regulator for legal services should be accountable and how?*

- 9.1 To Parliament: the mechanisms of accountability should be enshrined in the primary

legislation used to create the regulatory body. This should include the duty to make an annual report of activities and finances.

- 9.2 To Ministers: the regulatory body should not be accountable to ministers, as this would potentially compromise its independence. However, it should be obliged to provide clarification and explanation of its activities upon request from Ministers;
- 9.3 To public interest groups: subject to any requirements of the Data Protection Act, accountability will be derived from pursuing a policy of maximum transparency in all the dealings of the the regulatory body. Such accountability will be necessary in order to retain the respect of both public and providers for the authority of the regulatory body.

*D7 What consultation arrangements would you wish to see the Regulator follow before exercising its powers?*

- 10 We believe that an approved list of consultees should be drawn up and regularly reviewed. This should be underpinned by a general duty to consult. The Panel believes that various examples of self-regulation offer positive illustrations of the practical application of this model – for instance, The Independent Committee for the Supervision of Standards in Telephone Information Services (ICSTIS), [www.ictis.org.uk](http://www.ictis.org.uk).

*D8 To where should the right of appeal against decisions made by the Regulator lie? On what matters should appeal be permitted?*

- 11 The powers of the regulator should be circumscribed by legislation, although the regulator itself should have the power to recommend new legislation. The decisions of the regulator should be subject to judicial review.

*D9 This section refers to the funding issues arising from different models. What would be your suggested mechanism for dealing with these issues?*

- 12 The Panel offers no response to this question. It merely observes that to the extent that any regulatory model increases the cost of regulation, unless such costs are met or contributed to by government grant, they will lead inevitably to a corresponding rise in the cost of legal services to the consumer.

*D10 What relationship should there be between the Law Officers, the Regulator and professional bodies with advocacy rights?*

- 13 The role of the regulatory body, as set out in legislation, should be independent of the Law Officers. The Law Officers should hold no “ex officio” position in any

professional organisation whose members provide legal services, so as to avoid the perception of conflicts of interest between government ministers and bodies who lobby them.

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*E1 Should the government have power to determine which legal services should be included in, or removed from, the regulatory framework? What consultation with the Regulator, with the providers of legal services, and with public interest groups, should there be in reaching these decisions?*

- 14 We take it as axiomatic that, in a democracy, Parliament should have the power to determine which legal services should be within or without regulation. We also regard it as essential that there should be consultation with all those likely to be affected by such decisions.
15. However, the absence of a formal definition of legal services (and none is given in the consultation document) will make decisions as to which services should or should not fall within the regulatory structure more difficult to determine. Such definition would give focus to the question of consultation. In this respect absence of a level playing field as between providers of broadly similar services may lead to consumer protection failures. The Panel suggests that, to clarify these difficulties, “legal services” should be statutorily defined when the new regulatory structure is set up. If statute identifies particular providers or areas of activity as subject to the regulatory regime, there should be a power for the Minister to provide by regulation for addition to the statutory list.

*E2 What are the main factors one should consider in determining whether a service requires regulation?*

16. The Panel agrees with the various factors listed in the consultation document. It perceives two further factors not included in that list:
- (i) Level of trust and integrity required. A crucial element arguing in favour of regulation is the level of trust and integrity required of the practitioner. The document speaks about ‘improved quality’. In the Panel’s view, it is essential for any concept of ‘quality’ to embrace questions of trust and integrity. These relate not only to financial trust, but also to more general concepts of integrity, truthfulness and ethical conduct. These are exemplified in professional codes which provide for duties to the court and the client.
  - (ii) Importance of the activity to the individual and the state. Legal services are involved in almost all of the most important transactions affecting individuals’ lives, for example, wills, property purchases, divorces, the resolution of disputes and the administration of the criminal law. If these transactions are not carried out

competently and conscientiously then there is an inevitable loss of public confidence. The British public has a deep sense of justice and rightly expects high standards of its legal system.

*E3 What characteristics of the regulatory framework would facilitate the inclusion of new services with the regulatory net, or the exclusion of a service presently included?*

17. Two of the themes of the previous answers assist in relation to this question.

- (i) Definition of legal services. A careful definition of legal services should be capable of indicating where the boundary should run between regulated and unregulated services. However, it should be for Parliament to define, and where necessary to expand, those boundaries.
  
- (ii) Lay representation. The Panel believes that if lay representation on the board of the Regulator includes a sufficiently representative consumer element, then initiatives and decisions about which services should be regulated or unregulated will be much easier to make. Consumer representatives with a network of contacts and knowledge will be in a position to inform the Regulator about the problem (or non-problem) areas. In this respect the regulator should have the power to make recommendations to the Minister as to the inclusion of any services or providers not hitherto treated as subject to regulation.