

THE LEGAL SERVICES CONSULTATIVE PANEL

ADVICE TO THE SECRETARY OF STATE

**ON AN APPLICATION BY THE LAW SOCIETY FOR APPROVAL OF
RULE 22 - WAIVERS**

**LSCP Ref: No 2/2006
Advice given October 2006**

LEGAL SERVICES CONSULTATIVE PANEL

APPLICATION BY THE LAW SOCIETY FOR APPROVAL OF RULE 22 (WAIVERS)

ADVICE TO THE SECRETARY OF STATE

1) The Panel and publication of advice

- 1.1 The Legal Services Consultative Panel (the Panel) was established by the Access to Justice Act 1999 in January 2000.
- 1.2 The Panel has considered a reference made by the Secretary of State (referral number 2/2006) seeking its advice concerning an application from the Law Society. The application seeks approval of Rule 22 of the Code of Conduct.
- 1.3 The Panel's advice was given in October 2006.
- 1.4 The advice is published on behalf of the Panel by the Department for Constitutional Affairs. The complete document appears on the Department for Constitutional Affairs' website www.dca.gov.uk as well as being available in hard copy.
- 1.5 Further copies of the Panel's advice are available from the Panel Secretariat (*telephone*: Dawn Sanderson on 020 7210 8816).
- 1.6 The Panel comprises:

Lord Justice Moore-Bick (Chairman)
Mr Jonathan Acton Davis QC
Mrs Nina Barakzai
Professor John Bell QC (Hon)
Professor Hugh Brayne
Mr Martin Coleman

Mr Robert Elvin
Mr David Glass
Mr Jonathan Goldsmith
Mr John Hannam
Mrs Valerie Jones
Ms Karen Mackay

Professor Richard Moorhead
Mr John Randall QC
Mr John P Randall
Mr Simon Sapper
Mr Alan Street
Mr John Young CBE

GENERAL PRINCIPLES

2) **Introduction**

- 2.1 In considering and putting forward its advice on the application, the Panel has had regard to the principle central to the policy of the Courts and Legal Services Act 1990 and the Access to Justice Act 1999, namely the development of legal services in England and Wales (and in particular the development of advocacy, litigation, conveyancing and probate services) by making provision for new or better ways of providing such services and a wider choice of persons providing them, while maintaining the proper and efficient administration of justice.
- 2.2 The Panel has also taken account of the five principles of good regulation identified by the Better Regulation Task Force (an independent group established in 1997 to advise the government) against which the appropriateness and effectiveness of any type of regulation should be tested, namely transparency, accountability, targeting, consistency and proportionality.
- 2.3 In addition the Panel has taken into account the message delivered by the Secretary of State in his speech on Legal Services Reform on the 21 March 2005. When setting out his intentions for reform, the Secretary of State said, "...ahead of the creation of the Legal Services Board, we will be looking closely at any rules of the professional bodies that we believe may not be operating fully in the consumers' interest". The Panel kept this in mind to ensure Rule 22 is subject to proper competition considerations and whether it will operate in the best interests of the public.

3) The Law Society's application

- 3.1 This Advice relates to an application by the Law Society to the Secretary of State dated July 2005 to amend its rule on waivers (in relation to its Code of Conduct). The background to this referral is that the Law Society has undertaken a substantial revision of its Guide to Professional Conduct of Solicitors (1999) (the Guide).
- 3.2 The Law Society's application is made under Section 29 of the Courts and Legal Services Act 1990 ("CLSA"). In September 2006 the Secretary of State referred the proposal to the Legal Services Consultative Panel ("the Panel") for advice in accordance with the provisions of paragraph 11(1) of Schedule 4 to the CLSA 1990 as amended. The Panel understands that a similar referral has also been sent to the Office of Fair Trading.

4) The Proposed Amendments

- 4.1 The Law Society considers that draft Rule 22 reflects the current policy on waivers set out in Practice Rule 17. However, the approach adopted in draft Rule 22 (which explicitly states within the Rule itself the restrictions on the application of the Law Society Council's power to waive) achieves greater clarity than the current Practice Rule and, in doing so, removes the potential for misinterpretation.

5) The Panel's observations

- 5.1 The Panel asked the Law Society for a brief summary of the reasons for explicitly restricting its power to waive the provisions of certain rules and how those provisions were identified. In response, the Law Society pointed out that the current waiver power in Practice Rule 17 does not apply to every rule and principle of professional conduct in the Guide but only to the other Practice Rules and Codes made under those rules. Even then there are exceptions.
- 5.2 The restriction on the power to waive under the each new rule was explained as follows:

Rule 1 (core duties)

The core duties are intended to apply at all times, and it would be perverse to grant a waiver of such obligations. Therefore, although in theory current Practice Rule 1 can be waived, no such waiver has been granted. Rule 22 in the new Code merely formalises the position in respect of the core duties.

Rule 3.01 - 3.05 (conflict of interests, excluding provisions relating to alternative dispute resolution, conveyancing and property selling); and (c) rule 4 (confidentiality and disclosure)

These provisions mirror new Practice Rules 16D (conflict of interests) and 16E (confidentiality and disclosure). Both Practice Rules contain provisions which effectively disapply the power of waiver in Practice Rule 17. The reason for this is that conflict and confidentiality are essentially matters of law, and the new rules have been written as far as possible to reflect the law as it stands, making it inappropriate for the Law Society to grant waivers in relation to general conflict obligations. This approach is carried over in the new Code of Conduct. Prior to the introduction of the two new Practice Rules, conflict and confidentiality were dealt with in chapters 15 and 16 of the Guide to Professional Conduct, and the professional obligations they placed on solicitors could not be waived. Therefore, neither the new Practice Rules nor the new Code change anything in this regard. It has always been possible to waive certain conflict provisions - such as those relating to conveyancing - and this approach is carried over in the new Code.

Rule 6 (avoiding discrimination)

As with conflict and confidentiality, this is largely drafted around the law. The current Solicitors' Anti-Discrimination Rules 2004 contain no waiver provisions.

Rules 15.01, 15.03, 15.04, 15.18, 15.22, 15.23 and 15.24

As stated in brackets in the Code, these are overseas practice provisions which apply provisions that cannot be waived for practice in England and Wales.

Rule 18 (property selling)

The obligations set out in this rule mirror those placed on estate agents under the Estate Agents Act 1979, and are part of the reason solicitors are exempted from that Act. It would therefore be inappropriate to waive them.

Rule 22 (waivers)

The power to waive the waiver rule itself has been excluded to avoid the possibility (probably only theoretical) of a solicitor applying under Rule 22.01 for a waiver of one or more of the exclusions on the power to waive set out in Rule 22.02, as this would defeat the purpose of the exclusions.

Rule 23 (application) and Rule 24 (interpretation)

These Rules place no obligations on solicitors which a waiver could relieve.

- 5.3 The Panel also expressed drafting concerns in relation to the interaction of Rule 3.23 (conflicts of interest) and Rule 22 which contains both the power to waive certain rules and disapplies this power in other cases. The Law Society has addressed this issue to the Panel's satisfaction.

6) Recommendations

- 6.1 The Panel has given full consideration to this application and advises that the Rule should be approved.

7) Conclusion

- 7.1 The Panel advises the Secretary of State that the proposed Rule 22 of the Law Society's draft Code of Conduct should be approved.

Signature
Lord Justice Moore-Bick,
Chair of the Legal Services Consultative Panel

Date