

ALLEN & OVERY

ALLEN & OVERY LLP

LONDON

REVIEW OF THE REGULATORY FRAMEWORK FOR LEGAL SERVICES IN ENGLAND AND WALES

RESPONSE BY ALLEN & OVERY LLP TO THE CONSULTATION PAPER PUBLISHED BY THE INDEPENDENT REVIEWER IN MARCH 2004

Introduction

1. Allen & Overy LLP (“Allen & Overy”) is an international law practice with over 4800 staff and more than 450 partners, practising in 25 major centres world-wide, primarily serving businesses, financial institutions and governments. The practice has very recently (1st May 2004) converted to LLP status and, subject to local regulatory requirements, operates as a single practice internationally. Allen & Overy welcomes the opportunity to comment on the Consultation Paper from the perspective of an international law practice serving a sophisticated corporate client base in the UK and in many other jurisdictions.
2. The UK legal profession has been outstandingly successful in adapting and innovating in order to meet the requirements of clients in the corporate and financial sectors. The leading UK-headquartered law firms have increased their resources, invested heavily in technology and internationalised their operations in order to meet the requirements of an increasingly global, demanding and discerning client base. Such clients have a wealth of data sources and techniques available to them to ensure that they get best quality service and value for money from their chosen legal advisers. There has been a proliferation of legal directories which analyse and compare the performance and reputation of law firms and individual lawyers in all areas of practice relevant to the corporate client. Corporate clients regularly require firms to compete to become, or to remain, members of a chosen panel of advisers. Beauty parades for specific projects are increasingly common. Formal tendering is used by both public and private sector clients when retaining their legal advisers.
3. In creating international practices or networks, the UK firms have responded to client demand for a consistent quality and style of delivery of legal services on an international basis in a world where business transactions and disputes routinely have cross-border implications. By the same token, UK law practices face competition from an international set of competitors. This is particularly true in London which, as one of the world’s leading financial centre, has attracted a very high level of new entry by law firms serving corporate clients. For example, *Legal Business* recently profiled the top 50 major US law firms who have invested substantial resources in London.
4. These preliminary points are made not to suggest that regulatory reform of the legal profession in England and Wales is not required (we believe it is) but rather to emphasise that the dynamic and competitive markets in which the international law practices operate have very different characteristics from those described in “Competition and Regulation in the Legal Services Market”, which appeared to focus chiefly on the needs of the individual, occasional consumer of legal services in the domestic market. The issues identified by the

DCA in relation to such consumers are not generally applicable when considering sophisticated corporate clients and the law firms which compete to supply their needs.

5. In the next section of this response we identify what we consider to be the key issues arising in relation to the present review. In the appendix we provide brief answers to the specific questions set out in the Consultation Paper.

Overview

6. There are a number of respects in which the current regulatory system neither operates efficiently nor commands public confidence. It is unduly complex and as a result is insufficiently accessible and responsive both to clients and to the legal practices and practitioners who are subject to regulation. A fundamental structural flaw in the system is the mixing of representative and regulatory functions, which can lead to confusion as to objectives and priorities and to operational inefficiency.
7. Whilst many factors affecting the regulation of the legal profession have parallels in the regulation of other professions (such as the need for high professional standards, integrity, consumer protection and the avoidance of conflicts of interest), some are unique to the legal profession. The most fundamental of these is the need to preserve the independence of the legal profession from State control, so to ensure that clients can be assured of independent and uncompromised legal representation in order to assert and protect their rights against the State in all its emanations. This need for independence, which is as important to the corporate as to the private client, is also important in order to maintain the international recognition of the UK legal profession and creates particular difficulties in designing the appropriate regulatory structures. On the one hand, the public interest in the quality, accessibility and competitiveness of legal services must be served (and be seen to be served). On the other hand, the means by which these ends are served must not subject the individual practice or practitioner to an inappropriate level of State regulation. Self-regulation should therefore continue to play an important role in marrying the need for professional independence with serving the public interest.
8. Professional organisations serving purely representative functions should be encouraged to develop and need not be regulated in performing their representative role. Their effective de-regulation should allow representative organisations to develop which more truly reflect a dynamic and changing profession. It seems to us that such organisations can also most efficiently take responsibility for setting standards for entry to the profession and for continuing professional education, subject to appropriate regulatory oversight in respect of this aspect of their role.
9. It does, however, appear to us that effective regulation and public confidence in the system make it necessary for other regulatory functions to be carried out by bodies which are wholly separate from the representative bodies. The chief of these regulatory functions are client complaints, disciplinary matters and the setting of practice rules. We address the issues concerning each of these functions in turn.
10. The client is not well served by the complexity of the current regulatory system when he wishes to make a complaint. So far as possible, clients should have access to a single body in order to make complaints, irrespective of the type of practice or practitioner concerned. Practical considerations may dictate that this cannot be achieved in the short term but, as a general principle, consolidation of regulatory functions so that, for a single function, the entire legal marketplace is covered, is in principle likely to be more efficient and to avoid distorting the market. The complaints body needs to be seen not to be practitioner-dominated and a very substantial non-lawyer membership (possibly a majority) is required.

11. The disciplinary function is related to, but separate from, the complaints function. Disciplinary matters do not always involve clients directly and may affect the ability of the practitioner to continue to practise. Where disciplinary matters relate to a client complaint, fairness to the practitioner concerned may require that the case is heard by a separate tribunal. The public interest in the fairness and effectiveness of the professional disciplinary system, however, also demands that there be meaningful non-lawyer representation on disciplinary bodies.
12. There is a vital public interest, as well as a professional interest, in an efficient and responsive professional practice rule-making and review function. In order to secure that this function operates in a manner that is calculated to serve the public interest, and not merely to serve the perceived interests of the profession, this function needs to be carried out by a body which is separate from the professional representative organisations. The objectives of this regulatory function should include ensuring that rules of practice are not unduly restrictive and avoid unnecessary distortion of competition. Rules of practice should include appropriate measures for client protection, but should be sufficiently flexible to reflect the needs of different categories of client, in particular distinguishing between the sophisticated and frequent purchaser of legal services (typically corporate client) and the less sophisticated, infrequent purchaser (typically an individual or small business client). For this function, the need for substantial non-lawyer representation is less apparent.
13. Practice rules can regulate, among other things, the forms of organisation through which lawyers can practise. The Consultation Paper addresses issues affecting LDPs and MDPs. It is anomalous that English solicitors are free to practise in partnership with lawyers qualified in most other jurisdictions, who may have higher court rights of audience in the jurisdictions in which they are qualified (Allen & Overy is such a practice), but cannot practise in partnership with English barristers. It is also anomalous that legal practices which employ highly qualified members of other professions in either an executive or a client service capacity (for example as directors of finance, marketing or human resources or as economic consultants) are unable to offer such professionals the status of partnership within the practice. To do so would not appreciably alter the character of such legal practices and would facilitate the recruitment of higher quality people to fill these roles, to the benefit of the profession and ultimately of clients.
14. As regards MDPs, our assessment is that little demand exists for such practices from corporate clients. It would appear, however, that there is a need to find more efficient ways of delivering high quality legal services to individual and small business clients, particularly where the purchase of such services is self-financed. It may therefore be necessary to remain open-minded about the benefits which MDPs might bring to the consumer market.
15. We consider that there should be a single regulator with the responsibility to oversee the performance of the regulatory functions described above and that this regulator should be a board, rather than an individual. The system of appointment to membership of the regulatory board and of the regulatory bodies responsible to it, needs to be carefully structured so as to combine independence with effective regulation in the public interest. These regulatory bodies are not “representative” and their composition should therefore not be designed with representativeness of the profession primarily in mind. The need for combining independence with serving the public interest is most marked at the level of the regulatory board, where it may be that the solution is for the legal profession (through the professional representative bodies and the judiciary) to have the right to propose the Chairman and other members and the Government, through the Secretary of State, the right to approve them. Approval of membership of the regulatory bodies serving specific functions for the whole or parts of the profession (or of the methods of appointment to those bodies) could be exercised by the regulatory board, but the manner of appointment would differ from case to case. Once appointed, the members of the regulatory board should enjoy security of tenure for a

substantial fixed term and the regulatory board should not in principle be subject to Government intervention in the performance of its functions.

- 16.** We remain at the disposal of the Independent Reviewer to discuss any or all of these issues further.

Appendix

Responses to Questions and Consultation Paper

Question A1

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

We consider that all the objectives set out in the consultation paper are appropriate. However, as set out in the executive summary, from our perspective perhaps the key objective is the need to maintain the independence and integrity of the legal profession and to balance this correctly with serving the public interest. The international environment in which law firms such as Allen & Overy operate is a competitive one and we would welcome a system which recognises this fact and is flexible enough to allow us to adapt to an ever-changing market place. Any perceived reduction in the independence of the profession would potentially reduce the standing of the profession on the international stage.

We would welcome clarification as to what is meant by "protection for consumers" – in our areas of practice the "protection" required (or indeed expected) by our clients will be of a very different nature from that required by the average "man on the street". We assume that a distinction will be made between the sophisticated and the non-sophisticated consumer of legal services.

Question 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?

Again, we agree with all the principles set out in the paper. We have already commented on the importance, in particular, of maintaining independence. We confirm that we believe legal professional privilege is important to the proper functioning of the lawyer-client relationship and we think that the regulatory system should give as much support as possible to this continuing. We would welcome regulatory bodies which are open and consultative so that there is improved access to the regulatory board for those being regulated.

Question A3

Do you consider that risks to the regulatory objectives should be a central consideration in determining how regulatory powers and resources should be used?

Yes. At times it is hard to explain to our clients the relevance of certain of the rules which apply to us. This often appears [to them] to frustrate their commercial objectives by limiting their choice of legal advisers. We would very much welcome a predictable and proportionate system of regulation which recognises different types of consumer and different types of providers of legal services and regulates accordingly.

Question B1

What do you see as the broad advantages and disadvantages of Model A in comparison with Model B? In particular, what do you see as the strengths and weaknesses of (i) combination and (ii) separation of regulatory from representative functions?

Whilst we can see merit in the longer term of perhaps having a more radically different structure, we think it is important to pick a model which works in the shorter term. In our view this means being

pragmatic and using the best of what is currently available whilst avoiding the problems which the current system has - a profession which is entirely self-regulated is we think untenable and the current integration of representative and regulatory functions has become discredited.

Question B2

Which model best meets the criteria of the terms of reference?

Again we come back to the need for independence and for the correct balance between the "public interest" and independence of the profession. In our view Model A at this stage would lead to a perception (albeit perhaps not entirely justifiably) of loss of independence and we think Model B fails the public interest test. This leaves us supporting Model B+ or a variation thereof. We believe that, over time, Model B+ may move closer to Model A.

Question B3

If it were felt appropriate to separate regulatory and representative functions within professional bodies as is envisaged under Model B+, how might it best be achieved?

We support the separation of the regulatory and representative functions. We do not think that the Law Society's assertion that ring-fencing of the representative function within the same entity is workable – this is too much a continuation of the status quo – and we would suggest that the representative function should be with a separate body. We would leave open the possibility of additional representative organisations, subject to approval of their arrangements for overseeing entry to the profession if this function is devolved to them.

This split would also facilitate consolidation of the regulatory function leading to a reduction in the overall number of regulatory bodies.

Question B4

What powers would you wish to see delegated from the Government to the Regulator?

Given our concerns relating to independence, we would expect all powers to be delegated to the regulatory board with the Government retaining only the right, through primary legislation, to determine the scope of regulation and to alter the objectives and/or duties of the regulatory board.

Question B5

What powers to instruct the Regulator would you wish to see Government retain?

None (see above).

Question B6

What international considerations should influence the design of appropriate regulatory arrangement of legal services within England and Wales?

Given the international arena in which we operate, it is important for us to be able to establish that we are regulated by a professional body as part of a "liberal profession" and we would have concerns in the short term that a Model A structure may be difficult for us in terms of mutual recognition of professions and directives such as the EU establishment directive. We think it is in the public interest for us to be competitive in an international context and that the regulatory structure should support that.

Question C1

Should service complaints (which are consumer centred) be operationally split from professional conduct and disciplinary issues (which are centred on the practitioners and their professional bodies)?

We believe that as a practical matter there will need to be operational separation of the two but have no particular views as to whether there should be complete separation of consumer complaints from mis-conduct. We agree that, regardless of structure, there will always be some inter-relationship between the handling of complaints and the dispensing of discipline. Our principal concerns here are the reputation of the profession as a whole and the allocation of costs (see below). It is clear that an essential aspect of the new regulatory regime must be to ensure consumer confidence in the complaints handling process whilst having a system which is proportionate (i.e. risk-based) and demonstrably fair to those being regulated.

Question C2

In connection with complaints, what are the advantages and disadvantages of (a) having a uniform complaints organisation, independent of the bodies, similar to the FOS or (b) each body remaining responsible for its own complaints? Is the New South Wales example a useful model?

We can see some merit in having a common portal for all complaints since this would in the longer term facilitate consolidation of complaints-handling. Such a portal would then determine whether the matter is one which should be resolved at the professional body level or which should be dealt with directly by the Legal Standards Board (or equivalent). This is likely to be more attractive to the consumer since it is independent from the professions and it could be more consumer-focussed than under the current regime. It seems to us that the key question is perhaps not what form the entity is but to ensure that it is populated with people with appropriate management skills.

Possible disadvantages of this approach would be additional costs, possible delays in the process and the scope for tension/disagreement between that portal and the professional bodies.

Question C3

If you believe that each body should remain responsible for its own complaints, what form of regulatory oversight would you wish to see?

If each professional body retains responsibility for its own complaints then the Legal Standards Board (or equivalent) would need to oversee the process.

Question C4

How do you think that disciplinary arrangements should relate to the underlying practitioner bodies? Is there a case for one single uniform disciplinary body for all lawyers?

We have no strong views either way.

Question C5

What should be the mechanism for funding the handling of complaints?

We accept that there will need to be a general levy on the profession but would like to see a system where, so far as possible, the costs are paid by those against whom a complaint is successfully made. To ensure independence we do not think it appropriate for there to be public funding.

Question C6

What should be the mechanism for funding the handling of disciplinary processes?

Again, we would like to see a system where, so far as possible, the costs are paid by those against whom a complaint is successfully made but accept that, if the complaint is dismissed, the profession as a whole will have to pick up the costs.

If there is a single body then such residual costs would need to be divided between the professional bodies proportionately to the workload of that single body represented by members of that professional body.

Question D1

Should the Regulator be a board or an individual?

We believe that the Regulator should be a board. This will enable a suitable range of skills and experience. It will also enable the regulatory board to take account of the various different interests in the legal profession.

Question 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 the industry?

Members of the board should be appointed on merit and should not be representative. The board must be small enough to be effective. Selection on merit should not be incompatible with having a cross-section of practitioners on the board but acceptance that they are not there in a representative capacity would be key. There should be broad equality of practitioner and lay membership. The lay members should also be selected on merit but must be individuals who have the confidence and respect of the profession.

Question 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?

As set out in our summary, we believe that the best solution may be for the legal profession (through the professional representative bodies and the judiciary) to have the right to propose the chairman and other members and the Government, through the Secretary of State, the right to approve them. Approval of membership of the regulatory bodies serving specific functions for the whole or parts of the profession (or of the methods of appointment to those bodies) could be exercised by the regulatory board, but the manner of appointment would differ from case to case. Once appointed, the members of the regulatory board should enjoy security of tenure for a substantial fixed term (see below) and the regulatory board should not in principle be subject to Government intervention in the performance of its functions.

Question D4

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

We would have thought at a minimum the term of appointment should be 5 years. We would expect there to be only limited circumstances for automatic loss of office – broadly those outlined by the Law Society in its response.

Question 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?

We do not think it would be appropriate for someone with no experience of the legal profession to be the chairman of the regulatory body and do not think that someone with legal qualifications should be automatically excluded. The chairman will need to carry the lay element of the board with him and will accordingly need to be someone who commands public confidence whether legally qualified or not.

Question 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?

Parliament should determine the powers of the regulatory board. It should be required to publish an annual report.

Meetings of the regulatory board should be public and minutes should be published.

In addition to the three categories listed, we think that the regulatory board should be accountable to the professions (not least since we will be paying for it).

Question D7

What consultations arrangements would you wish to see the Regulator follow before exercising its powers?

We would wish to see the regulatory board publish proposals and consult those affected, in particular with the professional bodies, before exercising its powers.

Question D8

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

Decisions of the regulatory board should be subject to review by the High Court. Individual practitioners and practices should also have rights of appeal in relation to complaints and disciplinary matters.

Question D9

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

We think it is consistent with a risk-based approach to regulation that the funding by the professions of the regulatory body would also be risk-based and not just a straight split according to practitioner numbers. There must however be operational limits on the ability of the regulatory body to levy charges on the professional bodies.

Question D10

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

Since we see it as crucial that the regulatory board be independent from Government, we do not think the Law Officers should have any function within the new regulatory regime.

Questions E1, E2 and E3

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?

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

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

Since the purpose of regulation is essentially to provide uninformed consumers with confidence that the supplier of services is competent to do so and to provide redress if things go wrong, regulatory gaps are probably not a prime concern of firms such as Allen & Overy. Our clients are sophisticated consumers, in most cases well able to protect themselves and we are perhaps more interested in de-regulation – in terms of our ability to be, and remain, competitive. In fact, we think the review could usefully consider whether the current range of services which are currently regulated need to be so regulated.

To facilitate dealing with perceived gaps, we think that it would be helpful to define "legal services" in a sufficiently broad way in primary legislation so as to enable additional areas to be brought within the regulatory framework through secondary legislation, if thought necessary. We would have thought that Parliament should ultimately determine whether a particular "legal service" needs to be regulated or not but should do so having regard to the views of the regulatory board, the providers of legal services and relevant consumer groups before doing so.

The critical issue when determining whether something needs to be regulated is public interest but maintenance of a level playing field and the cost:benefit in doing so are also relevant. We would have thought that the regulatory board could be empowered to licence other bodies to regulate or it could itself regulate service providers directly.

Questions F1, F2, F3, F4 and F5

Is there potential demand, from users and providers, for Legal Disciplinary Practices (LDPs)?

How do you see the advantages and disadvantages of LDPs? Can the current restrictions (by professional bodies) preventing the development of these practices still be justified?

What restrictions, if any, would you wish to see imposed on LDPs in the area of management? What restrictions, if any, would you wish to see imposed on LDPs in the area of ownership (i.e. moving from the top left hand box of the matrix in paragraph 9 to the top right)?

Is there any reason why the regulatory system should distinguish between practices in the commercial and the not-for-profit sector?

What body would you expect to regulate LDPs? What, if any, additional safeguards do you believe need to be put in place to protect the consumer?

We think there is demand from providers of legal services for LDPs. It is anomalous that English solicitors are free to practise in partnership with lawyers qualified in most other jurisdictions, who may have higher court rights of audience in the jurisdictions in which they are qualified (Allen &

Overly is such a practice), but cannot practise in partnership with English barristers. It is also anomalous that legal practices which employ highly qualified members of other professions in either an executive or a client service capacity (for example as directors of finance, marketing or human resources or as economic consultants) are unable to offer such professionals the status of partnership within the practice. To do so would not appreciably alter the character of such legal practices and would facilitate the recruitment of higher quality people to fill these roles, to the benefit of the profession and ultimately of clients.

We do not see any justification for the restrictions by professional bodies preventing the development of LDPs. We do not see the need for absolute restrictions on ownership but believe that liberalisation must be accompanied by detailed regulations regarding fitness of the controlling individuals, anti-trust considerations, independence, transparency and conflicts. These will provide a major challenge!

Questions F6, F7, F8 and F9

Is there potential demand, from users and providers, for MDPs?

How do you see the advantages and disadvantages of MDPs? Can the current restrictions (by professional bodies) preventing the development of these practices still be justified?

What restrictions, if any, would you wish to see imposed on MDPs in the area of management? What restrictions, if any, would you wish to see imposed on MDPs in the area of ownership (i.e. moving from the bottom left hand box of the matrix in paragraph 9 to the bottom right)?

What body would you expect to regulate MDPs? Would your answer be different if lawyers were not in a majority? What, if any, additional safeguards do you believe need to be put in place to protect the consumer, and to ensure respect for independence and integrity in the exercise of professional judgment?

As regards MDPs, our assessment is that little demand exists for such practices from corporate clients. It would appear, however, that there is a need to find more efficient ways of delivering high quality legal services to individual and small business clients, particularly where the purchase of such services is self-financed. It may therefore be necessary to remain open-minded about the benefits which MDPs might bring to the consumer market.

Question F10

What are the international implications for the legal professions in England and Wales if legal services were allowed to be delivered through alternative business structures?

We do not perceive there to be any particular interest, in an international context, for MDPs. Any opening up of ownership would clearly need to be balanced with the need to demonstrably maintain independence.