Section 15 discussion paper
Legal Services Board
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24 April 2015

Dear Sirs

GC100 response: consultation on regulatory restrictions in practising rules for in-house lawyers

GC100

This response to the LSB discussion paper "Are regulatory restrictions in practising rules for in-house lawyers justified?" is provided on behalf of the Association of General Counsel and Company Secretaries of the FTSE 100, generally known as the GC100. The GC100 was officially launched on 9 March 2005 and brings together the senior legal officers of more than 80 FTSE 100 companies. The main objectives of the GC100 are to:

- Provide a forum for practical and business-focused input on key areas of legislative and policy reform common to UK listed companies; and
- Enable members to share best practice in relation to law, risk management, compliance and other areas of common interest.

Please note that the views expressed in this response do not necessarily reflect those of each and every individual member of the GC100 or the companies they work for.

In-house practice within GC100 entities

The vast majority of GC100 members are in-house lawyers practising as solicitors (qualified in England and Wales) in legal departments. They are therefore regulated by the Solicitors Regulation Authority ("SRA") as individuals practising as solicitors in accordance with Rule 1.1 (e) or 1.2 (f) of the SRA Practice Framework Rules 2011 (the "SRA Practice Framework Rules") and practise in accordance with the provisions set out in Rules 4.1 to 4.11 and 4.25 to 4.27 SRA Practice Framework Rules. In other words, they primarily act for their employer or for related bodies or for work colleagues and do not advise the public or a section of the public, other than on a pro bono basis. Further, their employer is not, as an entity, regulated by the SRA.

The purpose of this consultation and our response

The LSB paper is fairly limited in its remit. Essentially it takes s15 Legal Services Act 2007 ("LSA") (which sets out minimum restrictions on those working in-house by not allowing them to provide reserved legal activities to anyone other than their employer or those connected to their employer) and then questions whether the other restrictions imposed by regulators (including the SRA) on those practising in-house are justified.

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In this response, GC100 focuses primarily on the questions raised in paragraph 48 of the LSB paper which concern the restrictions imposed by the SRA Handbook 2011 (the "SRA Handbook") and whether these are justified.

However, GC100 also wish to draw to the LSB's attention two further restrictions that impact on in-house lawyers' ability to advise on a pro bono basis. These are explored in paragraph 6 below.

Restrictions created by the SRA Practice Framework Rules

The LSB paper notes in paragraph 9 that there is nothing in s15 LSA to prevent an in-house lawyer providing unreserved legal activities to persons who are not connected to its employer. Paragraph 36 in table 4 of the paper summarises the restrictions set out in the SRA Practice Framework Rules which, by limiting the types of clients an in-house lawyer can advise (rather than the type of work, either reserved or unreserved), appear to exceed the restrictions in s15 LSA.

GC100's view is that the restrictions on in-house lawyers to limit their practice broadly to their employer, related bodies and work colleagues (see Rule 4 SRA Practice Framework Rules) reflect the reality of being employed by a client. An in-house lawyer will often be forbidden by their contract of employment to earn income from other activities and therefore would, in practical terms, be unable to advise anyone else outside the employer group.

However, there may be circumstances where the interests of a client and a member of the public (for example, a customer of the client) may be sufficiently aligned that they would benefit from being advised by the same lawyer. Before an in-house lawyer could agree to act for both clients in these circumstances, questions of whether acting for both would be in the best interest of each client (SRA Principle 4) or whether duties of confidentiality or disclosure could be observed would need to be carefully considered. For these reasons, GC100 does not consider that removing these restrictions on being able to act for members of the public on work that is unreserved would necessarily change the practice of in-house lawyers.

However, GC100 would encourage the LSB and the SRA to take this opportunity to consider whether the rules defining related bodies both under Rule 4.7 and Rule 4.25 of the SRA Practice Framework Rules could be simplified and harmonised. As currently drafted Rule 4.7 allows an in-house lawyer to act for the employer's holding, associated or subsidiary company (Rule 4.7(a)) or a partnership, syndicate, LLP or company by way of joint venture in which their employer and others have an interest (Rule 4.7(b)). In many large corporations, the actual employer may be a service company which is not the head or even a central member of a particular group. Although in-house lawyers are entitled to act for companies associated with their employer, it is not as clear as it might be that the definitions would allow in-house lawyers employed by one company to act for sister companies of a common parent or to act for group members (but not an employer) who own an interest in another company. This does not assist with the reality of an in-house legal department which must be free (subject to conflicts and confidentiality obligations) to act for all members of the group.

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In addition, the definition of related bodies is different where an in-house lawyer is practising overseas. Rule 4.25 of the SRA Practice Framework Rules allows in-house lawyers to act for the employer, a company or organisation controlled by their employer or in which their employer has a substantial measure of control. This would seem to be narrower than the definition in Rule 4.7(b) which allows an in-house lawyer to act for entities in which their employer has an interest. Again, it should be clear and beyond doubt that in-house lawyers working within a large organisation should, subject to other professional obligations, be entitled to act for any member of the group.

Restrictions created by the SRA Code of Conduct

The LSB paper also notes in paragraph 39 that the SRA Code of Conduct 2011 ("SRA Code of Conduct") describes outcomes that solicitors should achieve to aid compliance with the ten overarching SRA Principles. At the time that the SRA Handbook was being consulted on, the GC100 issued a response which highlighted its concerns that the SRA Handbook in general, and SRA Code of Conduct in particular, was not drafted with in-house lawyers in mind and much of the detail of the rules was simply irrelevant. For example, in-house lawyers do not ever hold client monies and yet the SRA Accounts Rules 2011 are expressed to apply to them. In respect of the SRA Code of Conduct there are many examples of outcomes which do not translate well to the in-house environment and yet are stated to apply:

- outcomes relating to duties to inform clients of their right to complain are inappropriate in the context of a relationship where the in-house lawyer is employed by the client;
- in-house lawyers do not as a general rule advertise their services to the public and yet the publicity rules in Outcomes 8.1 to 8.4 are stated to apply to them; and
- in the case of conflicts, whilst these may arise in the in-house context, they will often be "saved" by the substantially common interest exemption under Outcome 3.7 SRA Code of Conduct. This, however, requires in-house lawyers to seek the informed written consent of both parties before proceeding, something that within the in-house context seems to be far too onerous.

GC100's view is that businesses place great value in the fact that their in-house lawyers are independent professionals who are properly regulated. They go to lengths to hire lawyers with proper qualifications in place. However, in a risk-based outcomes focused landscape, the rules applied to in-house lawyers should be proportionate and effective in the context of in-house lawyers employed in commerce and industry and many of the Outcomes put in place to protect genuine consumers are not applicable, as employers are able to take steps to protect themselves in a way that members of the public may not. GC100 therefore welcomes the SRA's plan to revise the rules applying to in-house lawyers – its view is that much of the detail of the SRA Code of Conduct should not apply to in-house lawyers and that the SRA should consider a more simplified and principles based approach, much in the way it now regulates solicitors practising overseas under the SRA Overseas Regulations 2013. This would have the advantage of preserving the essential ethical duties which all independent England and Wales solicitors must comply with at all times, whilst not obliging in-house solicitors to prescribed outcomes which are irrelevant to their practice, produce some odd results and unnecessarily take up time and attention and therefore (i) are not proportionate, consistent or targeted at cases in which action is needed and (ii) have adverse cost implications.

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Restrictions on providing advice on a pro bono basis

The restriction in s15 LSA prevents a qualified solicitor from providing reserved legal activities to members of the public other than through an authorised entity. This restriction, which is enshrined in Rule 4.10 of the SRA Practice Framework Rules, is designed to protect members of the public where they receive advice on certain types of legal matters. Whilst the interest of protecting consumers of legal services is undisputed, the restriction goes too far as it is prevents in-house lawyers from providing assistance to those who may be unable to otherwise afford representation and could be vulnerable and are therefore most in need.

The restriction in s15 LSA seems to suggest that advising on reserved legal activities requires greater supervision or protection than advising on other matters. This is clearly not the case – a contractual commitment may have far reaching consequences for individuals and yet advising on it is not prevented, whereas advising on a lease may be very straight forward and yet may not be done other than through an authorised body.

At a time where access to justice is under threat, GC100 would welcome a review of s15 LSA to ensure that in-house lawyers are able to fully advise members of the public on a pro bono basis. Where in-house lawyers are England and Wales solicitors, their qualifications and the fact that they are subject to professional standards of conduct by law should be enough to permit them to provide reserved activities as part of this.

In addition, the LSB paper does not mention the effect that the recent changes to the regulation of consumer credit activities has had on the ability of in-house lawyers to advise on a pro bono basis. Under previous rules, the regulation of consumer credit was undertaken by the OFT and, under a group license granted to the Law Society, individual lawyers and firms were able to provide consumer credit activities. In 2014, the OFT transferred the responsibility for regulating consumer credit work to the FCA who has not continued with the group licence facility. Law centres must now apply for licenses directly from the FCA, but guidance issued by the SRA suggests that these licenses may not cover individual lawyers wishing to provide consumer credit advice at such centres on a pro bono basis. This means therefore that individual lawyers wishing to provide consumer credit advice on a pro bono basis would require authorisation from the FCA which in turn would require compliance with a number of provisions of the FCA's sourcebook. The uncertainty with this new regime has meant that in-house lawyers may not be providing valued assistance to those most in need. GC100 would urge the regulators to consider how best to resolve this issue to ensure in-house lawyers may provide this valuable help without having to separately seek authorisation. In this connection the LSB might want to consider the position in other jurisdictions, such as Australia, that are perceived to be leaders in pro bono delivery.

Yours faithfully

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