

<b>To:</b>	Legal Services Board	
<b>Date of Meeting:</b>	27 January 2015	<b>Item:</b> Paper (15) 03

<b>Title:</b>	Section 15: update and discussion paper on initial findings	
<b>Workstream(s):</b>	Thematic review	
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<b>Status:</b>	Unclassified	

### Summary:

Concerns have been expressed over a number of years about the impact on competition in the legal services market of regulatory restrictions on in-house lawyers.

The circumstances in which an employer would need to be authorised for provision of reserved legal activities are outlined in section 15 of the Legal Services Act 2007.

The Legal Services Board's Business Plan 2014/15 identified the need for a thematic review on "the extent to which restrictions on forms of practice are consistent with section 15 to the Act".

This paper provides an update on progress with the review. Initial analysis reveals there is variation between the provisions of section 15 and the practising rules of three regulators: the Bar Standards Board, the Intellectual Property Regulation Board and the Solicitors Regulation Authority.

It seeks approval from the Board for the publication of a discussion paper inviting comments on the initial analysis, seeking views on the rationale for and impact of current practising restrictions and what options may be explored to improve arrangements in the interests of a competitive legal services market.

### Recommendation(s):

The Board is invited:

- (1) note this update
- (2) note the discussion paper and delegate approval of the final document to the Chairman and the Chief Executive.

### Risks and mitigations

**Financial:** N/A

**Legal:** N/A

**Reputational:** There may be some disagreement with the initial analysis but as the work is at an exploratory stage no firm conclusions have been reached.

<b>Resource:</b> N/A
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<b>Consultation</b>	<b>Yes</b>	<b>No</b>	<b>Who / why?</b>
<b>Board Members:</b>	x		David Eveleigh
<b>Consumer Panel:</b>		x	
<b>Others:</b>			

<b>Freedom of Information Act 2000 (Fol)</b>		
<b>Para ref</b>	<b>Fol exemption and summary</b>	<b>Expires</b>
Annex A	Section 22 – information intended for future publication	

## LEGAL SERVICES BOARD

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Thematic review - Section 15: update and discussion paper on initial findings

### Executive Summary

#### Background

1. Concerns have been expressed over a number of years about the impact on competition in the legal services market of regulatory restrictions on in-house lawyers. For example, the 2001 Office of Fair Trading report *Competition in professions* noted that restrictions around employed solicitors may have the effect of limiting competition “from organisations other than solicitors’ firms”.<sup>1</sup> More specifically, in 2013 when the Legal Services Board (LSB) considered the Solicitors Regulation Authority (SRA) rule change for solicitors working for local authorities, we were given examples of how its in-house rules may be stifling innovation by local authority legal teams.<sup>2</sup>
2. In LSB’s response to the Ministry of Justice call for evidence in 2013 (the *Blueprint*), we argued that fewer restrictions on in-house solicitors acting directly for the public could create more competition and diversity in the legal services market.<sup>3</sup> Current restrictions may have consequences for membership organisations, charities and local authorities, preventing them from providing legal advice to consumers at an affordable price.

#### The scope of the review

3. Against this background, LSB committed to a thematic review of practising frameworks for in-house lawyers to examine these issues in greater detail. In particular, the review seeks to establish the extent to which current rules are consistent with section 15 of the Legal Services Act 2007 (the Act) and to understand the rationale for any additional restrictions.
4. Section 15 the Act outlines the circumstances in which an employer would need to be authorised for provision of reserved legal activities. The key provision is section 15(4).<sup>4</sup> This requires an employer to be authorised if, through its authorised employees, it is providing services including reserved legal activities to the public. Therefore, the legislation does not require an employer to be

<sup>1</sup> OFT. 2001. *Competition in professions*. Annex p59, para 191

<sup>2</sup> LSB 2013. *Decision notice: The Solicitors Regulation Authority (SRA) rule change application for approval to alterations to the SRA’s regulatory arrangements relating to its Red Tape Initiative*. Available at:

[http://www.legalservicesboard.org.uk/what\\_we\\_do/regulation/pdf/20130328\\_decision\\_notice\\_sra\\_red\\_tape\\_final.pdf](http://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/20130328_decision_notice_sra_red_tape_final.pdf)

<sup>3</sup> LSB. 2013. *A blueprint for reforming legal services regulation*. Available at:

[http://www.legalservicesboard.org.uk/what\\_we\\_do/responses\\_to\\_consultations/pdf/a\\_blueprint\\_for\\_reforming\\_legal\\_services\\_regulation\\_lsb\\_09092013.pdf](http://www.legalservicesboard.org.uk/what_we_do/responses_to_consultations/pdf/a_blueprint_for_reforming_legal_services_regulation_lsb_09092013.pdf)

<sup>4</sup> 15(4) - P [the employer] does not carry on an activity (“the relevant activity”) which is a reserved legal activity by virtue of E [the employee] carrying it on in E’s capacity as an employee of P, unless the provision of relevant services to the public or a section of the public (with or without a view to profit) is part of P’s business.

authorised if it is offering unreserved legal activities to the public, and it does not require authorisation if the employer is offering services including reserved legal activities to those consumers not defined as the public, or a section of the public.

5. The review supports two broad aims of the framework established by the Act. Firstly, as the oversight regulator, it demonstrates the LSB's role in taking a sector-wide view of the impact of regulation on the provision of legal services and identifying areas for improvement in the interests of a competitive market. Second, it highlights the obligation placed on legal services regulators, and the LSB, by the Act to act in a manner compatible with the regulatory objectives and in a way most appropriate for meeting those objectives, while having regard to the principles of good regulation and any other principle of best regulatory practice.
6. The approach we can take in a thematic review is broader than that permitted by the LSB's statutory role in approving individual rule changes. The LSB has considered applications to approve rule changes relating to in-house restrictions. As mentioned above, in 2013, the SRA requested changes to restrictions on those working for local authorities (in our decision notice we asked the SRA to consider reviewing these proposals, perhaps as part of a wider review). We approved the Bar Standards Board (BSB) handbook revisions in 2013. However, there are limits to our powers in the rule approval process and requests may only be refused if certain criteria are met; the LSB does not have the power to "call in" rules for review. By contrast, a thematic review provides the opportunity to examine specific issues in greater depth, in the context of regulators' statutory obligations and in the context of the risks associated with provision of legal services. Depending upon the findings, a review permits us to identify areas for improvement in the context of current regulatory arrangements in a systemic manner. It may also support work being undertaken by others on this issue: the SRA have committed to a full review of their in-house rules in 2015.
7. The concerns raised about in-house practising restrictions have been framed in terms of limiting competition in the market. Clearly, unjustified limits on competition would be contrary to the regulatory objectives, but the need to promote competition has to be balanced against other objectives. We would expect regulators to be able to demonstrate that there is an evidence base for any practising restrictions and that they are necessary because there is a risk to the regulatory objectives. Further, when regulators opt to apply restrictions to employees working for a non-authorised employer, we would expect to see regulatory arrangements that are proportionate to the risk posed, consistent, transparent, and targeted, and that a regulator can account for its decision to act.

## **Progress**

8. The initial stages of the project have considered the scope of section 15(4) and reviewed regulators' current regulatory arrangements. Three of the eight regulators apply similar but not identical practising restrictions to in-house lawyers – the BSB, the Intellectual Property Regulation Board and the SRA. Using an analytical approach derived from the Oxera legal services market segmentation framework<sup>5</sup>, our initial findings suggest that these practising rules

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<sup>5</sup> For background and detail on the Oxera framework Oxera. 2011. A framework to monitor the legal services sector. <https://research.legalservicesboard.org.uk/wp-content/media/A-framework-to-monitor-the-legal-services-sector.pdf>

may not be completely aligned with the provisions of section 15(4) and in places go beyond the minimum restrictions required to give effect to the Act, both in terms of the groups of consumers who may access services and the types of activities that in-house lawyers may carry out. The approach we have taken to analysing the various arrangements is driven by a need to take a sector-wide view and allow for comparison between different approaches.

9. To explore the impact of these findings further we intend, subject to the Board's approval, to publish our initial results in a discussion paper for comment in early February (Annex A). This is the starting point for the review. The analysis presented in the paper describes, at a high-level, the variation observed between different practising arrangements applying to in-house lawyers and the provisions of section 15(4).
10. We consider that our initial findings allow us to focus discussions with the regulators and other stakeholders with an interest, on the rationale and value of current approaches, the risks associated with in-house practice, and also to explore whether there may be opportunities to meet the regulatory objectives better with improvements to the regulatory framework.
11. At this stage, we have reached no conclusions on the necessity of the current restrictions or the need for change. There may be reasons why practising restrictions are deemed necessary. However, given the obligations under section 28 of the Act, and other legislation, we would anticipate that regulators are able to make a case for additional rules with reference to evidence of risk to the regulatory objectives and the better regulation principles.

### **Conclusion / 'next steps'**

12. The responses and feedback we receive will inform and complement further analysis of the issues around in-house practice and to identify whether action is needed, and if so, what form that action should take. This will involve consideration of the appropriateness of issuing guidance or using other powers in the Act, or making a recommendation to the Lord Chancellor.<sup>6</sup> We will explore the merits of different options before making recommendations to the Board in early summer 2015.
13. The Board is invited to:
  - a. note this update
  - b. note the discussion paper and delegate approval of the final document to the Chairman and the Chief Executive.

16.01.15

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LSB. 2012. Measuring change in the legal services – the Oxera segmentation framework summary. <https://research.legalservicesboard.org.uk/wp-content/media/Summary-Oxera-June-12.pdf>

<sup>6</sup> LSB may, under section 15(10), make recommendations to Lord Chancellor around the scope of 'excepted membership services', what constitutes (or does not) a section of the public, and when provision of services to public does not form part of employer's business.