

<b>To:</b>	Legal Services Board	
<b>Date of Meeting:</b>	8 September 2015	<b>Item:</b> Paper (15) 45

<b>Title:</b>	<b>Thematic review: are regulatory restrictions in practising rules for in-house lawyers justified? Proposed next steps</b>
<b>Workstream(s):</b>	Reviewing and removing regulatory obligations
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<b>Status:</b>	Unclassified

### Summary:

The Legal Services Board (LSB) is undertaking a thematic review of regulatory restrictions on in-house lawyers and the extent to which these are consistent with section 15 of the Legal Services Act 2007 (the Act), which outlines the circumstances in which an employer would need to be authorised for provision of reserved legal activities by its employees.

At its January meeting, the Board considered a discussion paper that presented an initial analysis of the differences between the provisions of section 15 and the current regulatory arrangements of the legal services regulators.

At its July meeting, the Board considered a document which summarised responses we had received to the discussion paper, as well as an initial analysis of the themes which had emerged from those responses.

Since publication of the summary of responses document in July, we have been considering the merits of different options for this work. This paper considers the various options available and recommends that the Board issues a statement of policy under section 49 of the Act. A draft statement of policy and supporting consultation paper are attached at **Annex A**.

### Recommendation(s):

The Board is invited to:

- 1) Consider the options for next steps for this work.
- 2) Agree to use its powers under section 49 of the Act to issue a statement of policy setting out the high-level principles that the Board will consider relevant in relation to regulatory rules for in-house lawyers.
- 3) Delegate approval of publication of the draft statement of policy and supporting consultation paper to the Chief Executive and Chairman.

<b>Risks and mitigations</b>	
<b>Financial:</b>	N/A
<b>Legal:</b>	N/A
<b>Reputational:</b>	There has not been any disagreement with our analysis of the issues.
<b>Resource:</b>	N/A

<b>Consultation</b>	<b>Yes</b>	<b>No</b>	<b>Who / why?</b>
<b>Board Members:</b>	<b>X</b>		Marina Gibbs and David Eveleigh have been updated on progress
<b>Consumer Panel:</b>	<b>X</b>		The Consumer Panel responded to our discussion paper
<b>Others:</b>			

<b>Freedom of Information Act 2000 (Fol)</b>		
<b>Para ref</b>	<b>Fol exemption and summary</b>	<b>Expires</b>
8, 10-12, 19	Section 44 - restricted information obtained by the Board in the exercise of its functions [and therefore] must not be disclosed (s167 LSA)	October 2015
13, 15, 18	Section 36(2)(b)(ii) – information likely to inhibit the exchange of views for purposes of deliberation	October 2015
Annex A	Section 22 – information is intended for future publication	

## LEGAL SERVICES BOARD

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### **Thematic review: are regulatory restrictions in practising rules for in-house lawyers justified? Proposed next steps**

#### **RECOMMENDATION**

1. The Board is invited to:
  - Consider the options for next steps for this work.
  - Agree to use its powers under section 49 of the Act to issue a statement of policy setting out the high-level principles that the Board will consider relevant in relation to regulatory rules for in-house lawyers.
  - Delegate approval of publication of the draft statement of policy and supporting consultation paper to the Chief Executive and Chairman.

#### **BACKGROUND**

2. In 2013, in response to the Ministry of Justice's call for evidence, LSB expressed a view that fewer restrictions on in-house solicitors acting directly for the public could create more competition and diversity in the legal services market.<sup>1</sup> Current rules may restrict membership organisations, charities and local authorities, from providing legal advice to consumers at an affordable price.
3. We are therefore currently undertaking a thematic review of regulatory restrictions on in-house practitioners, focused on section 15 of the Act. Section 15 the Act outlines the circumstances in which an employer must be authorised for the carrying on of reserved legal activities by its employees. The key provision is section 15(4). This requires an employer to be authorised if, through its authorised employees, it is providing services including reserved legal activities to the public (with or without a view to profit). Therefore, the legislation does not require an employer to be 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.

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<sup>1</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)

4. The first output of the thematic review was a discussion paper considered by the Board at its January 2015 meeting (paper (15)03). The LSB discussion paper considered the impact of section 15(4) of the Act on the provision of legal services and reviewed regulators' current regulatory arrangements in this area. Three regulators place specific practising restrictions on in-house lawyers – the Bar Standards Board (BSB), the Intellectual Property Regulation Board and the Solicitors Regulation Authority (SRA).
5. The discussion paper findings indicated that these practising rules 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 on. Other regulators do not make specific provisions for in-house practice or, due to transitional protections in the Act, are not required to have arrangements.
6. The discussion paper was published for comment in February 2015 and responses were invited from regulators and interested parties over a twelve-week period. We received a total of 18 responses to the discussion paper, including five from legal services regulators. We also received responses from approved regulators, groups representing in-house lawyers and organisations employing in-house lawyers. The Board considered a paper summarising responses at its 7 July meeting (paper (15) 38).

## **FINDINGS FROM RESPONSES TO THE DISCUSSION PAPER**

7. In our response to the discussion paper, we identified three clear themes, which we consider are of particular relevance to the regulation of in-house lawyers:
  - First, the form and extent of the impact of the current regulation of in-house lawyers is too complicated and wide-ranging to be addressed with a simple, isolated change to a definition or rule. For example, the current regulatory arrangements pose challenges for in-house lawyers wishing to provide services directly to the public pro bono, and individual lawyers that are subject to rules for in-house lawyers for some days of the week and not for others. It is therefore likely that any review of the rules for in-house lawyers undertaken by regulators will need to be far reaching.
  - Secondly, there was a clear commitment from respondents that any changes to the current approach to regulating in-house lawyers would need to carefully consider the impact such changes might have on consumers. The removal of regulatory restrictions for in-house lawyers could provide greater access to justice for consumers. However, regulators must balance access to justice against managing risks around potential consumer detriment caused by inadequate protection for when things go wrong. An important area of consideration will be how legal services regulators demonstrate their

understanding of the potential impact on consumers of any changes they make to their rules and how they ensure consumers are kept informed about the consequences of different regulatory approaches.

- Finally, consistency was a clear theme – either across legal services regulators or across lawyers working in-house and those who are not. Consistency in approach is likely to be a key means of ensuring consumer understanding about recourse and is in line with better regulation principles. We recognise that there may be instances where it may be appropriate for different regulators to take a different approach to regulating in-house lawyers to reflect the differing risks posed by their sector, or even take a different approach to regulating those lawyers they regulate who work in-house and those who do not. However, such an approach would have to be an informed one that carefully balances the need to ensure that risks to consumers are managed while at the same time recognising that differences in rules will influence consumers’ access to legal services.

8. [Redacted]

9. SRA’s response noted that it will undertake a fundamental review of its approach to the regulation of solicitors in non-authorized entities. This will also be part of a much wider review of its Handbook.

10. [Redacted]

**OPTIONS FOR NEXT STEPS**

11. [Redacted]

*Option 1 – do nothing for now*

12. [Redacted]

13. [Redacted]

[Redacted]

*Option 2 – issue statutory guidance under section 162 of the Act*

14. Section 162 of the Act places an onus on an approved regulator to comply with guidance issued by LSB under that part of the Act. We could therefore use statutory guidance to require approved regulators to have regard to the three themes we have identified as being of particular importance when considering changes which pertain to section 15(4) of the Act.

15. [Redacted]

*Option 3 – issue a statement of policy under section 49 of the Act (preferred option)*

16. This is the preferred option. Under section 49(2) of the Act, the LSB may prepare and issue a statement of policy with respect to any matter.<sup>2</sup> A statement of policy can set out in a clear and transparent way the areas that we will be particularly mindful of when we exercise our statutory functions. It provides an opportunity for the LSB to set out its views about areas it would consider to be of particular relevance when exercising its functions in a particular area.

17. Issuing a statement of policy is not necessary in every instance of our policy making. However, as we are aware of work planned by BSB and SRA, we consider that a statement of policy is a proportionate approach to take with regulators who are already planning to make improvements.

18. [Redacted]

19. [Redacted]

<sup>2</sup> The Board has in the past issued three statements of policy under section 49 of the Act, all in 2010.

[REDACTED]

20. A draft statement of policy, which sets out principles LSB will consider when exercising its functions, particularly when assessing regulatory arrangements that pertain to section 15(4) of the Act, is at **Annex A**.
21. We have also considered whether it would be appropriate to use our powers under section 15(10) of the Act to make recommendations to the 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 the public does not form part of employer's business. However, feedback from responses to the discussion paper was that clarity about defining the public in particular could be achieved by regulators amending existing regulatory arrangements, and there was no evidence that a recommendation under section 15 would be helpful at this stage.

#### **NEXT STEPS**

22. Under section 50 of the Act, before issuing a statement of policy under section 49, the Board must publish a draft of the proposed statement. The draft must be accompanied by a notice which states that representations about the proposals may be made to the Board within a specified period. A draft consultation paper, constituting a notice under section 50, and an accompanying draft statement of policy are attached at **Annex A** to this paper.
23. Subject to the Board's views, the draft consultation paper and statement of policy will be issued for an eight week consultation commencing before the end of September.

26 August 2015