

To:	Legal Services Board	
Date of Meeting:	26 March 2014	Item: Paper (14) 14

Title:	Investigation into the cost of legal services regulation
Workstream(s):	Workstream(s) (see draft Business Plan B: Strategy development and research, regulatory reform)
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Status:	Unclassified

Summary:
The 2014/15 draft business plan included a proposal for a significant piece of work looking at the cost of legal services regulation. The current proposal is deliberately open in the potential scope of the project. This paper provides an outline of the options for analysis and the suggestions from the executive for taking the work forward. It also updates the Board on the narrower issue of approving Practising Certificate fees under S.51.

Recommendation(s):
The Board is invited to: (1) Comment on their views of the relative priorities for work on the cost of regulation

Risks and mitigations	
Financial:	£80k of research budget is assigned to support this project.
Legal:	N/A
Reputational:	Significant interest from professional bodies in this work.
Resource:	Project will require significant internal resource.

Consultation	Yes	No	Who / why?
Board Members:		x	Lead NEDs not yet assigned for this project
Consumer Panel:	x		Shared with Panel Manager
Others:	n/a		

Freedom of Information Act 2000 (Fol)		
Para ref	Fol exemption and summary	Expires
Annex A	Section 36(2)(b)(ii) – information likely to inhibit the exchange of views for purposes of deliberation	N/A / Date

LEGAL SERVICES BOARD

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Investigation into the cost of legal services regulation

Executive Summary

Background

1. This project was originally included in the 2013/14 Business Plan as part of the cost and complexity work-stream. The cost assessment element was subsequently delayed with the planned resource used on our response to the Ministry of Justice's review of legal regulation. The work is now included in the 2014/15 Business Plan as part of the regulatory reform work-stream. Initial work will define the scope of the project.

Why is this work important

2. There are a number of drivers for taking forward an assessment of the cost of regulation (in its widest sense):
 - a. Understanding total regulatory burdens is essential to support our wider policy agenda on liberalising and removing unnecessary regulation to promote competition, innovation and growth
 - b. Understanding business burdens can help inform our thematic reviews
 - c. We committed to do so in our triennial review response in the context of professional bodies and others challenging the LSB to assess the costs we impose and the value for money we deliver for the regulatory system
 - d. The need for evidence to support the efficiency element of our Blueprint for reforming legal services regulation and our proposal of a single legal services regulator¹
 - e. Cost of regulation is an important part of our evaluation of the Legal Services Act 2007
3. Above all, the justification for looking at the total cost of regulation lies in the regulatory objective on promoting and protecting the interests of consumers and our duty to comply with the better regulation principles of transparency, accountability, proportionality, consistency and targeting. If regulation fails to meet these tests, it will ultimately be a cost burden on producers that is more likely to be passed on to end users rather than competed away.

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http://www.legalservicesboard.org.uk/what_we_do/responses_to_consultations/pdf/A_blueprint_for_reforming_legal_services_regulation_final_09092013.pdf

Prioritisation

4. At its widest this programme could assess the overall cost burden imposed by the Legal Services Act 2007 (including by the LSB, Legal Ombudsman, Ministry of Justice procedures, considering both direct² and indirect³ regulatory burdens), as well as the regulation “passported in” by the Act, but which derives from older statutes.
5. However, this represents an expansive, challenging and resource intensive programme of work. It is likely that prioritisation will be required to deliver results within the proposed one year time frame and within existing resource. Prioritisation decisions are likely to be influenced by factors including:
 - a. Relative importance that the Board places on each of the drivers set out in paragraph 2
 - b. Availability of data and/or practicality of collecting and robustly assessing new data
 - c. Extent to which regulators are willing and able to work collaboratively in identifying ways of assessing the direct and indirect costs of their own activities.
6. It is proposed that final decisions on prioritisation are made at project phase 2 (please see paragraph 11 below).
7. There are several ways in which we may choose to refine programme scope in light of prioritisation decisions:
 - a. Limit the scope to direct and indirect regulatory costs on businesses only (ignoring the wider regulatory system). The most significant regulatory burden is on firms, suggesting an exploration of these burdens could be the most important priority
 - b. Focus on the broader regulatory structure and in particular the burdens caused by the almost inevitable duplication inherent in the multiple regulator system with oversight. This is important in the context of the Blueprint recommendation for a single legal services regulator
8. What we look at within the areas of analysis will be equally important. There have been consistent calls from professional bodies and others for the burdens that the LSB places on the regulators and those they regulate to be explored. This was also a key theme within responses to the Ministry of Justice call for evidence for their review of the regulatory framework. This would require analysis of the LSB’s areas of work and how they translate into additional work for others beyond that strictly required by the Act. We are also likely to wish to consider any work that was transferred to the LSB from the previous system of 12 oversight bodies including Government and judiciary. However, we need to be mindful that our direct and indirect impact on costs for business and hence consumers are very small and that we are already significantly more transparent about our costs and budget than the other regulators. Proper scrutiny and accountability of our costs must not allow us to be diverted from identification of the more major drivers elsewhere.

² We define direct burdens as regulatory costs charged to firms/individuals to pay for regulators

³ We define indirect burdens as the costs that firms/individuals face complying with regulation

9. Option a (analysis of burdens on businesses) could be significantly more challenging than option b. Unpicking additional costs that occur solely because of the behaviour of the LSB or frontline regulators will be a key challenge for the project. We need to identify regulatory compliance burdens that are **additional** to activities businesses would have undertaken anyway in the absence of regulation. SRA research into the cost of outcomes focused regulation showed that firms would often attribute costs to regulation, but then claim that good business practice necessitated the intended outcome of the regulatory requirement in any event⁴.
10. While any evaluation of the efficacy of regulation must consider both costs and benefits, this project will necessarily be limited in scope. Subject to views from the Board, it is intended that it will look at the cost of regulation only (please see paragraph 6 of the draft project plan summary at Annex A). It is possible to envisage future work looking at how effectively regulators seek to establish and cost benefit before intervention – and how effectively they establish whether those benefits were secured in reality, but that would be for future years.

Proposal

11. We propose to taken this forward in six phases:
 - a. **Phase 1**: collection and analysis of available data
 - b. **Phase 2**: gap analysis and prioritisation decisions
 - c. **Phase 3**: research (internal and externally commissioned)
 - d. **Phase 4**: analysis and reporting
 - e. **Phase 5**: consultation
 - f. **Phase 6**: final report and recommendations
12. Several responses to the draft 2014/15 Business Plan consultation welcomed the proposal to undertake this work but highlighted the ambition of the timetable and/or the difficulty of the task⁵. For example, the Bar Standards Board said:

We note with interest the significant piece of work proposed in relation to regulatory costs. We support this activity in principle and think the Legal Services Board is uniquely placed to undertake it. However, we have reservations about whether the range of aspects can be completed within the timeframe indicated, especially if our interpretation that you are also looking at compliance costs when assessing indirect costs is correct. We suggest that doing this work well is more important than doing it quickly and the timeframe may need be extended to allow for this.
13. Against that background, work will commence in March, led by Chris Handford. We will aim to complete phase 6 in March 2015, A full timetable is included in Annex A. The timetable is intentionally aspirational. It will be reviewed as the LSB's 2015 -18 strategic plan is developed. The timetable and/or resource levels may be recast as prioritisation decisions are made during **Phase 2** of this project.

⁴ <http://www.sra.org.uk/reports/>

⁵ Responses to the Business Plan Consultation will be available on the LSB web-site w/c 17 March 2014: http://www.legalservicesboard.org.uk/what_we_do/consultations/closed/index.htm

Working with regulators

14. Inevitably, part of the success of this project will be determined by the strength of the working partnerships formed with the frontline regulators. Their participation will be essential both to the extent that we decide to focus on the costs imposed by the LSB, and also in supporting our analysis of the regulatory burdens on firms. As we start phase 1 of the project we will seek immediate engagement with the frontline regulators to look for their support in designing and taking forward the later phases of the project.

Related current work

15. In the context of the “Blueprint”, we have questioned whether it is appropriate for Practising Certificate Fee (PCF) income to be collected for non-regulatory purposes, rather than these being discretionary items which professional and firms can choose or not to fund at their own discretion. Progress on that issue may be slow, however, so we need to consider whether we should adjust the way we approach our current approval of the level of the PCF.
16. As part of our work on the approval of practising certificate fees (PCF), we will shortly be writing to approved regulators to highlight two areas on which we will have a particular focus in the next assessment – assurance on the allocation of PCF income to permitted purposes and the need for greater transparency (through consultation) with the fee payers on the level of the PCF and where the income is spent.
17. We will also use this as an opportunity to remind approved regulators that PCF income may only be spent on permitted purposes. This arises from a specific question from the Solicitors Regulation Authority on unused PCF income that is applied to reserves. We have responded to the SRA that the provisions of the Act and our rules are clear and that PCF income can only be applied to permitted purposes, irrespective of where that money is held and when it was collected. Therefore the Law Society and the SRA need to be able to assure themselves and us that any reserves that consist of unused PCF income are subsequently only applied to permitted purposes. We are considering whether there may need to be more general guidance on use of PCF to build up reserves and its subsequent use.
18. The future strategic issue in this area will be how hard we should press on the level of the budget which underpins the PCF calculation. To generalise very widely, our concerns in the past tended to focus on whether Approved Regulators had the intent or ability to restrain necessary regulatory investment. It is likely that, in future, the focus will increasingly be on regulators’ ability to use their income to maximum effect and avoid unnecessary cost burdens on the profession. The focus on transparency, consultation and systems robustness in 2014-15 may well prepare the way for rather more challenging conversations on use and quantum in future years, taking account of not only of how this project progresses, but also how our strategy for 2015-18 as a whole develops and the future evolution of the regulatory standards programme.

Next steps

19. Subject to the Board's views on relative priorities for this project we will commence work on phase 1 of the project and initiate contact with frontline regulators to discuss their participation in the project.
20. Two Board members will take an active role in the project by sitting on a project steering group and providing the link between executive and Board. For this reason we are breaking from convention and are annexing a summary of the draft project plan to this document for consideration by the Board.

14.03.14