

<b>To:</b>	Legal Services Board	
<b>Date of Meeting:</b>	30 May 2012	<b>Item:</b> Paper (12) 35

<b>Title:</b>	Activity Based Regulation - Introduction
<b>Workstream(s):</b>	Strategy, Development and Research
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<b>Status:</b>	Restricted

<b>Summary:</b>
This paper introduces our work on activity based regulation to facilitate a discussion in advance of a broader strategy session to be held on 12 September 2012.

<b>Recommendation(s):</b>
The Board is invited: <ul style="list-style-type: none"> <li>(1) to consider the attached paper on activity based regulation and provide feedback on issues that they would like considered in the September strategy session.</li> <li>(2) Comment in particular on the potential implications of increasing activity based regulation for authorisation, supervision and regulation by title and entity.</li> </ul>

<b>Risks and mitigations</b>	
<b>Financial:</b>	N/A
<b>Legal:</b>	N/A
<b>Reputational:</b>	N/A
<b>Resource:</b>	N/A

Consultation	Yes	No	Who / why?
<b>Board Members:</b>		X	Initial discussion only
<b>Consumer Panel:</b>		X	Initial discussion only
<b>Others:</b>	n/a		

<b>Freedom of Information Act 2000 (Fol)</b>		
Para ref	Fol exemption and summary	Expires
Annex A – paragraphs 19-21	Exemption s36 - on grounds of full and frank Board discussion	

## LEGAL SERVICES BOARD

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### Activity Based Regulation - Introduction Executive Summary

#### Background

1. The Board has a strategy session this September where we will be considering activity based regulation. This paper provides some initial context for the Board in advance of that discussion and allows the Board to raise questions for consideration in the September session.

#### Why look at activity based regulation?

2. A number of areas of our work have illustrated the growing importance of the specific legal activities in the way that legal services are regulated, most obviously our work on will-writing and estate administration. Here our analysis revealed quite different regulatory risks arising between will-writing and estate administration. Therefore in our consultation we have proposed using those risks to differentiate the regulatory approaches between the activities. We made it clear that we expected any future regulator to tailor their approach to the risks identified in each activity or explain why they have chosen a different approach. This we believe makes the proposed regulation more consistent with better regulation principles requiring regulation to be proportionate and targeted.
3. Of course, by highlighting the differing risks between will-writing and estate administration we necessarily raise the potential for applying this type of activity based approach to the wider regulation of legal services. In places, we recognise that the start of such an approach has already been adopted. But, we are inclined to believe that a more consistent integration of activity based regulation across all regulation is required to fully realise the benefits of such an approach.
4. In particular we believe further analysis is required to consider the potential implications for activity based regulation on regulation by: authorisation, supervision, title and entity.

#### Next steps

5. **Annex A** is an initial discussion of the issue. A further more in-depth discussion paper will be brought to the Board as part of the September strategy session. At this stage we are interested in getting initial feedback from the Board to help inform the development of the September strategy session.

18.05.12

**Activity based regulation – introductory paper**

1. The Board has, over the last three years, focused on improving the effectiveness of regulation in legal services. Whether it be the removal of restrictions on external ownership and control or the consideration of scope of regulation, one of the overriding themes has been a shift away from one size fits all regulation towards targeting and risk based regulation.
2. The clear steer to regulators that only an outcome focused or risk based approach is likely to meet the requirements of the Legal Services Act has been particularly direct in the regulatory effectiveness work. In this strand of activity the LSB pushing regulators to consider their performance against for key areas:
  - An outcomes focused code
  - Risk based segmentation of regulated community
  - Targeted authorisation and supervision
  - Proportionate and effective enforcement that incentives compliance and punishes transgression
3. In addition the regulators are asked, ideally seeking independent assurance, to assess their capability and capacity to deliver reform and regulate in a manner that meets the standards.
4. The LSB has argued that as the legal market becomes increasingly plural it must be fleet of foot in responding to risk. The change in culture that LSB seeks goes much further and asks that the regulatory regime no longer considers issues in terms of how the current regime can be applied but challenges itself to start its analysis of required regulatory interventions from “none” or „less’ rather than „more’ regulation, both in terms of the erection of barriers to entry and in restrictions on the methods of operation of those who can practice.
5. The question, increasingly, is how best to consider risk. Over the coming months the executive will start to develop its thinking on how an activities based approach can play a crucial role in understanding risk and ensuring that regulation is proportionate and targeted in response.
6. There are no areas of the LSBs work programme that are unaffected. However, some areas bring the issue to the fore more fundamentally:

- Scope of regulation
  - Education and training
  - Regulatory effectiveness
  - Designation of new regulators and new reserved activities.
7. In these areas the LSB is asking questions of itself and the regulators, about how much the current approach to regulation can really be described as risk based.
  8. With will writing and estate administration the Board has in effect already set out for consultation a commitment to an activities-based approach to regulation of these areas. This rejects the automatic authorisation of any currently authorised person based on past qualification or regulatory oversight in favour of an approach to authorisation that is very much targeted at an evidence based analysis of risks to consumers and the regulatory objectives.
  9. The education and training review is, with a significant push from the LSB, asking challenging questions about how authorisation and post qualification training and specialisation may need to be very different for particular legal activities. It is considering how much this varies even for the same activity where the consumers vary between informed commercial body and individual consumer. Furthermore the review is properly examining the relative emphasis of entity versus individual and, similarly, the whole workforce rather than the titled professions and between initial authorisation and potential revalidation.
  10. The regulatory effectiveness work, as highlighted above, is pushing regulators to ask themselves how much their current regulatory approach can be properly shown to fit the better regulation principles.
  11. The Board's decisions on designation of CLC and IPS shows its resolve to ensure that regulators start with risk in designing their regulatory regimes. Other regulators are increasingly clear that the focus on risk is central to effective regulation. As a wide range of current and potential new regulators consider the Board's consultation on will writing, it is clear that the narrative is beginning to shift towards an activity based approach. The challenge is to ensure that this extends beyond new designations and becomes the core way of thinking for each regulator
  12. However, the shift towards risk based regulation is not smooth. Barriers to identifying risk at the level of both individual entity and practitioner and regulating with reference to activity are quite pervasive. The history of regulation in the sector is tightly entwined with the separate professional titles. The titles themselves - or, more precisely, the way they are currently deployed - present particular barriers because they make authorisation and

award of title broadly synonymous. This might be overcome but history binds even independent regulators to the professional bodies and titles that they have emerged from. These structural problems could of course be overcome: if any of the regulators are to be designated in the future to regulate will writers then they will have to be. Yet the legislative framework – especially the fact that the LSA was added to the existing legislative framework as opposed to any consolidation or reconsideration of its relevance – creates additional issues to solve. However, it is the cultural expression of these various barriers that is perhaps most challenging. Unless the regulators and their professional bodies want to embrace a more risk and activity based approach it will forever be fettered by some of the barriers currently in place.

13. Our expectation is that an activity based approach will allow regulators to work effectively and efficiently at targeting their regulation. This is not simply about different education and training requirements for different activities, though that may well be part of it. Nor is it only about authorisation requirements being tailored. Our expectation is that an activity based approach will serve as a strong foundation for further liberalisation and for more effective regulation – i.e. removing regulatory restrictions where they cannot be justified but enhancing it where the risks are not currently being tackled effectively. Thus it has been a theme across our work on immigration, will writing and estate administration, special bodies and conveyancing.
14. It is too early to reach any conclusion as to the extent to which regulators are already using this approach. We can be confident that it is not the foundation of any regulator at present but there are signs that some regulators are thinking along similar lines as they develop their own approaches in particular circumstances.
  - Some supervisory work at CLC/SRA in particular
  - Some post authorisation activity based entry to specific areas (such as QASA)
  - Very little by way of activity based authorisation beyond those that regulate only one or two reserved activities – though IPS and CLC are developing it as their expansion route
  - SRA education is clearly grappling with it among the senior executive team as it considers the education and training review
  - Some initial thinking at the BSB with regard to direct access
15. The regulatory effectiveness work will give us much better evidence that will allow us to start to develop a more rigorous assessment of the regulators.

16. In the meantime it is important that the Board starts to develop its own thinking about what is meant by activity based regulation; the extent to which it fits alongside title based education, authorisation and regulation or may gradually supersede aspects of the current architecture over time; the appropriate level of risk at which to aggregate and how the Board can use its work streams to deliver any outcomes that are sought.

17. This paper is therefore simply an introduction to the issue and an opportunity to explore the subject of activity based regulation. In September at the Board's strategy session, the executive plans to present:

- A paper on the role of activity based regulation and what it entails
- Papers on how it fits and is being taken forward with each of
- Scope work
- Education review
- Regulatory effectiveness
- Designations

18. This should allow the Board to consider how the objectives or more targeted regulation can be driven through the next business plan for 2013/14 and the two years beyond that.

19. [Redacted text block]

20. [Redacted text block]

21. [Redacted text block]