

<b>To:</b>	Board
<b>Date of Meeting:</b>	23 May 2013
<b>Item:</b>	Paper (13) 28

<b>Title:</b>	Oversight Regulation
<b>Workstream(s):</b>	
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<b>Status:</b>	Protect

<b>Summary:</b>
The purpose of this paper is to set out the Executive's approach to the concept of "oversight" regulation and to invite the Board to confirm that it supports that interpretation.

<b>Recommendation(s):</b>
The Board is invited: <ul style="list-style-type: none"> <li>(1) Note the analysis contained herein; and</li> <li>(2) Confirm that it supports the Executive's view as to the proactive nature of oversight.</li> <li>(3) Agree that the Chairman should put this view on the public record via a letter to regulator chairs.</li> </ul>

<b>Risks and mitigations</b>	
<b>Financial:</b>	N/A
<b>Legal:</b>	The contents of this paper are based on interpretation of statutory provisions and therefore represent opinion. The approach has been subject to internal and external legal advice.
<b>Reputational:</b>	
<b>Resource:</b>	

Consultation	Yes	No	Who / why?
<b>Board Members:</b>			
<b>Consumer Panel:</b>			
<b>Others:</b>			

<b>Freedom of Information Act 2000 (Fol)</b>		
<b>Para ref</b>	<b>Fol exemption and summary</b>	<b>Expires</b>
N/A		

## LEGAL SERVICES BOARD

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### Oversight Regulation

#### Summary

1. The Executive has undertaken detailed analysis of the term “oversight”, as it relates to the regulatory regime created by the Legal Services Act 2007 (“the Act”). The opinions set out below have been the subject of external legal advice.
2. The purpose of this paper is to clarify the concept of oversight and illustrate the various tools available to the LSB in its oversight role.

#### Background

3. The government’s 2005 White Paper on reform of the market for legal services recommended that the LSB be created to “*provide consistent oversight of front-line professional bodies*”<sup>1</sup>. At that time, government envisaged that each of those frontline bodies (now referred to as “approved regulators”) would have to be authorised by the LSB, but only where it was satisfied they were “*fit for purpose*”<sup>2</sup>. On passing the Act, however, the regulatory arrangements of the approved regulators were treated as having been approved by the LSB<sup>3</sup>.

#### The narrow interpretation

4. In the course of performing its functions, the LSB has received assertions from approved regulators that it has gone beyond “oversight” by:
  - micro-managing at a level of detail more appropriately left to approved regulators;
  - seeking to substitute its judgment for that of the approved regulators; and
  - choosing to act in policy areas without waiting to be asked for assistance by an approved regulator.
5. The LSB responded to these criticisms following its consultation on the draft Business Plan 2013/14. It has made clear that it considers the examples given of

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<sup>1</sup> Paragraph 2.2, <http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/legalsys/folwp.pdf>

<sup>2</sup> Ibid, paragraph 5.1.

<sup>3</sup> By the coming into force of paragraph 2 of Schedule 4 to the Act.

“micro-management” have been significantly less interventionist than action taken by regulators in other sectors, for example, and has also emphasised that it will, in the main, seek to examine issues in the level of detail more appropriate to an approved regulator, when their processes have clearly been fit for purpose. For example, in relation to the charge of micro-management, the LSB stated “*the Board rejects this allegation, as it has on previous occasions. We do not accept that oversight is a passive responsibility - although we continue to be clear that regulators have the primary responsibility for taking the decisions necessary to deliver appropriate regulation in their own sectors*”.<sup>4</sup>

6. This is an important distinction. Ultimately oversight requires that the LSB both has the power – and indeed, the obligation, to assert what it believes to be the most appropriate way for the regulatory objectives to be met. Whilst day-to-day performance of oversight will necessarily give regulators a very considerable degree of appreciation therefore, we need to be clear that responding to criticism of over intervention does not lead to our accepting a narrower role for ourselves than Parliament clearly envisaged in our founding legislation.

### **Proactive oversight**

7. The LSB therefore believes that oversight requires it to do more than take a reactive or subordinate role. The LSB sits at the head of the regulatory framework<sup>5</sup>. It has a duty to promote the regulatory objectives<sup>6</sup>. In so doing, it must consider the most appropriate way of meeting those objectives having regard to the Better Regulation Principles and best regulatory practice.
8. In support of the Legal Services Bill, the Minister explained that the regulatory regime “*is not about light touch, but about proportionality*”<sup>7</sup>. Regulators in a similar position to LSB have recently started to talk about “right touch” and “agile” regulation, both of which seem appropriate to the LSB’s modus operandi as well.

### **A range of powers**

9. Part 4 of The Act, *Regulation of Approved Regulators*, governs the duties and responsibilities of the approved regulators and the powers of the Board as an oversight regulator. It covers independence (requiring the LSB to make internal governance rules), approved regulators’ duties to promote the regulatory objectives, practising fees, information gathering and enforcement.
10. The LSB can discharge its oversight role in a number of ways, including by:

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<sup>4</sup> See paragraph 10, [http://www.legalservicesboard.org.uk/what\\_we\\_do/consultations/closed/pdf/2013-14\\_BP\\_consultation\\_response\\_summary\\_FINAL.pdf](http://www.legalservicesboard.org.uk/what_we_do/consultations/closed/pdf/2013-14_BP_consultation_response_summary_FINAL.pdf)

<sup>5</sup> See paragraph 33, Explanatory Notes to the legal Services Act 2007.

<sup>6</sup> See section 3 the Act.

<sup>7</sup> See comments of Bridget Prentice (*Parliamentary Under-Secretary of State for Justice*), Hansard, Public Bill Committee, Thursday 14 June 2007, Column number 93

- statutory decision-making, for example, in relation to approval of practising certificates; the approval of changes to regulatory arrangements; or the recommendation of designation as approved regulator/licensing authority;
- giving Guidance about any matter relating to the LSB's functions or for the purpose of meeting the regulatory objectives;
- assisting in the setting of standards of regulation, education and training;
- providing feedback to approved regulators on their assessments of their own performance in relation to the regulatory objectives; and
- investigating actual (or the likelihood of) detriment to the regulatory objectives to identify ways in which approved regulators can improve their performance.

In other words, the reading of our role sometimes urged by regulators and others – i.e. that we have to be no more than passive monitors or interveners of last resort – is clearly mistaken if we are to be in a position to properly and proportionately discharge our responsibilities.

11. In addition to those powers, the LSB has a range of specific powers that allow it to ensure that its oversight leads to the desired outcomes in terms of the regulatory objectives. These include setting of performance targets, censure and directions for example.

### **Promoting the regulatory objectives**

12. Given the proactive nature of the LSB's duties, it need not await for detriment to the regulatory objectives to occur before considering an issue. The LSB has powers to require approved regulators to provide information. It is likely that these will be used to enable the LSB to investigate whether an approved regulator's acts/omissions have the potential to have an adverse impact on the regulatory objectives. Hence, in addition to calling for reports on specific issues, they can and should be used to call for "raw" documentary evidence. Indeed such calls may well be both more targeted for the LSB and less costly for regulator to comply with than the commissioning of work per se.
13. Ultimately, an LSB investigation may lead to consideration of enforcement action. If this was considered to be appropriate, the LSB would have regard to its Statement of Policy on Enforcement and Compliance. Where the LSB is monitoring an issue by receiving regular information updates from an approved regulator and can observe improvements in the approved regulator's performance, enforcement action may not be proportionate: any cases would have to be judged on its own facts.

## **Conclusion**

14. The Board is asked to consider the concept of regulatory 'oversight' and confirm that it supports the proactive role of oversight set out above.
15. If it does, it is suggested that the Chairman writes to regulatory chairs, perhaps to coincide with publication of the Annual Report on 11 June, to make sure that the clearest possible statement of our position is on the record.

10 May 2013