

Overseeing regulation

The LSB's approach to its role.

June 2013

Background

1. The Legal Services Act 2007 (the Act) established the Legal Services Board (LSB) to be independent from Government, the approved regulators, and the legal profession. As the LSB, we have been consistent in the way we have approached our responsibilities in relation to overseeing regulation from our beginning, but there remains debate about the nature of 'oversight' and, in particular, the extent to which it is a passive or active role.
2. We are in no doubt about the active nature of oversight placed on us by the Act. This paper explains our position on that point so that all with an interest in legal services regulation can understand why we act as we do. In preparing this, we looked back to the Parliamentary passage of the Act to confirm that we were clear about legislative intent and considered carefully the nature of the responsibilities and duties required of us by the Act.
3. Whilst we start with the Act, we note the Government's 2005 White Paper on legal services market reform. This recommended creating an LSB to "*provide consistent oversight of front-line professional bodies*". At the time, government envisaged those bodies (now referred to as approved regulators) would have to be authorised by the LSB, but only where we were satisfied that they were "*fit for purpose*". In the event, this provision did not remain in the Act and so the regulatory arrangements of the approved regulators were effectively 'passported in' and treated as having been approved. We assume this was done to aid transition and regulatory certainty, rather than being intended as some form of perpetual blanket approval.
4. The Explanatory Notes to the Act make clear that it provides for our establishment as a single oversight body to sit at the head of the new regulatory framework and ensure that the approved regulators carry out their regulatory functions to the required standards. They note that the Act confers powers onto the LSB and that it sets out how intervention can happen when there is a problem. As noted in the White Paper, the expectation is that we will work alongside regulators to help them improve.
5. This is helpful context for us in informing our approach. Our position at the head of the regulatory regime, our statutory responsibilities and the strong powers we are given in Part 4 of the Act ("*regulation of approved regulators*") to secure the regulatory objectives, gives a clear steer that, providing we are proportionate, we must take an active, and indeed proactive, approach to our duties.

Using our powers to promote the regulatory objectives and better regulation principles

6. The Act gives us a range of duties, functions and powers so that we can oversee regulation and ensure that it leads to delivery of the regulatory objectives. These include:
 - a. making statutory decisions including: approving practising certificate fees; approving changes to regulatory arrangements; and recommending designation of new approved regulators and licensing authorities
 - b. giving guidance for the purpose of meeting the regulatory objectives or about any matter relating to our functions
 - c. assisting in the maintenance and setting of standards of regulation, education and training and
 - d. a general power, so that we may do anything we judge necessary to facilitate the carrying out of our functions.
7. We deliver these duties, functions and powers in accordance with the Act and, in particular, the better regulation principles. They allow us, for instance to provide feedback to approved regulators on their assessments of their own performance in relation to the regulatory objectives; and to investigate actual (or likely) detriment to the regulatory objectives to identify ways in which approved regulators can improve their performance.
8. Where we are satisfied that an approved regulator has acted in a way that has had or is likely to have an adverse impact on one or more of the regulatory objectives and we fail to achieve a change in approach through persuasion and influence, we have powers to remedy the situation. These include setting performance targets; giving directions; public censure; and imposing a financial penalty. Ultimately, we can recommend to the Lord Chancellor that he strip an approved regulator of its authority to regulate reserved legal activities.
9. Powers to act in anticipation of a detrimental impact on the regulatory objectives make it beyond doubt that we would be remiss to be passive monitors or interveners of last resort. We must be proactive if we are to be in a position to discharge our responsibilities properly and proportionately.
10. We therefore cannot and will not wait for detriment to consumers or the regulatory objectives to occur before considering an issue. We will use our powers to request information from approved regulators so that we can better understand issues and to inform investigations into whether an approved regulator's acts or omissions have the potential to have an adverse impact on the

regulatory objectives. This may include calling for sight of original documents - an approach that reduces the need for new work to be commissioned by the regulator in question and which makes sure that we are informed by solid evidence.

Conclusion

11. So, whilst approved regulators and the LSB share a similar responsibility to act in line with the regulatory objectives and better regulation principles, there is a clear hierarchy. Whilst there is no doubt that the Act demands approved regulators consider how best to deliver their objectives this must be seen in the context of the LSB being statutorily required to oversee what they do.
12. The scope of our oversight is wide. Our judgements are not limited to considering simply whether a decision of an approved regulator is “Wednesbury” reasonable. It can be open to the LSB to impose a different solution, if we reasonably form a judgement that the regulator’s decision is harmful when considered in the broader context of our oversight of the entire sector, or that a more proportionate, effective means of implementation is possible.
13. We understand that approved regulators would prefer a hands off approach from us. But the legal constraints on our ability to be proactive are light. Our role at the apex of regulation, arrived at with legislative intent, means we are able and indeed bound to take positive, but proportionate, action to deliver the regulatory objectives. Choosing not to act is not an option for us.
14. To do otherwise would be to ignore the single most important rationale for the regulatory model – that without oversight, the self-governing nature of regulators may mean that best regulatory practice could be ignored, that barriers to entry could be maintained and that self-interest would drive regulation to the exclusion of the interests of the public and all who need to use legal services.