

Statement of policy: section 15(4) of the Act

A notice issued by the Board under section 50 of the Legal Services Act 2007 to invite representations on a draft statement of policy under section 49 of the Act.

Representations are invited to be made by 5pm on Wednesday 18 November 2015.

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Introduction

1. In February 2015, Legal Services Board (LSB) published a discussion paper¹ in which we presented our initial analysis of how the current practising rules for in-house lawyers² align with the minimum restrictions set out in section 15 of the Legal Services Act 2007 (the Act). In July 2015, we published a summary of the responses we received to our discussion paper and our analysis of the themes that had emerged from responses to the discussion paper.³
2. Section 15 of the Act sets out the circumstances in which an employee of a non-authorized body will be taken to be carrying on reserved legal activities. Our work has highlighted the regulatory arrangements of the three regulators which have specific rules in place for the practice of in-house lawyers, which, in our view, go beyond the requirements of section 15(4)⁴ of the Act in particular: Bar Standards Board (BSB), Intellectual Property Regulation Board (IPReg) and Solicitors Regulation Authority (SRA).
3. In our discussion paper, we proposed that responses we received to the paper, along with reflections on the extent to which work planned by regulators has progressed, would inform our final recommendations for this area of work.
4. On the basis of our work to date, we consider that a statement of policy, issued under section 49 of the Act, is an appropriate use of our powers to act in relation to in-house lawyers and a proportionate response to address the issues which we have identified in this area. A draft statement of policy can be found at **Annex A** to this document.
5. Under section 50 of the Act, before publishing a statement of policy, LSB is required to invite representations on a draft of the statement. This paper therefore constitutes a notice under section 50 of the Act in relation to a proposed statement of policy about the regulation of in-house lawyers. Representations about the draft statement of policy at **Annex A** may be made to LSB by 5pm on Wednesday 18 November 2015.

¹ *Are regulatory restrictions in practising rules for in-house lawyers justified? A discussion paper*, February 2015, is available at: www.legalservicesboard.org.uk.

² By in-house lawyers we mean those authorised persons who work for employers that do not provide reserved legal services to the public (ie. non-authorized employers).

³ *Are regulatory restrictions in practising rules for in-house lawyers justified? Summary of responses received to a discussion paper and the LSB's response to them*, July 2015, is available at: www.legalservicesboard.org.uk.

⁴ Section 15(4) of the Act states that P (an employee of a person) does not carry on an activity ("the relevant activity") which is a reserved legal activity by virtue of E (a person carrying on a reserved activity) carrying it on in E's capacity as an employee of P, unless the provision of relevant services to the public or a section of the public (with or without a view to profit) is part of P's business.

6. The draft statement of policy sets out the high level principles LSB is likely to consider alongside its regulatory rules, should it be required to exercise its statutory functions. This is most likely to be when a legal services regulator wishes to amend or introduce regulatory arrangements that pertain to section 15(4) of the Act. These principles reflect the themes we identified in our summary of responses to the discussion paper. They are also in line with our expectation that alterations to regulatory arrangements – including the introduction or removal of rules – must be evidence based. This will be particularly important where proposed alterations to regulatory arrangements go beyond the statutory minimum required to achieve the outcome sought.
7. Responses to our discussion paper from SRA and BSB set out plans to review their practising rules for in-house lawyers. Therefore, we consider this statement of policy a timely contribution to their work in this area. However, other legal services regulators, particularly those currently benefiting from transitional arrangements under the Act, may find this statement of policy useful when they come to consider rules in this area.

Background

8. In-house lawyers are employed in a variety of organisations. Section 15(4) effectively splits lawyers' employers into two groups by virtue of whether or not they are providing a service which constitutes a reserved legal activity to the public as part of their business. Our work in this area has looked at the impact this distinction has on regulatory arrangements that might apply to authorised individuals in these circumstances.
9. In our discussion paper, we examined each regulator's arrangements and identified that:
 - The Costs Lawyer Standards Board and the Master of the Faculties did not need to have any such arrangements due to transitional protections in the Act.
 - Three regulators did not make specific provisions for those working in-house: Council for Licensed Conveyancers, CILEx Regulation and the Institute for Chartered Accountants in England and Wales.
 - Three regulators had specific rules in place: BSB, IPReg and SRA. While there are similarities between the arrangements established by these three regulators, there are also some differences.
10. Our analysis showed that where specific rules were in place, those rules did not appear to align with the provisions of section 15(4) of the Act.

Our role

11. Under the Act, LSB has a duty to promote the regulatory objectives and must also have regard to “the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed”.⁵ One of the reasons for the introduction of the Act was a desire to open up the legal services market to meet consumers’ needs more effectively.

12. We also have a number of functions under the Act. These include a responsibility to:

- approve proposed alterations to regulatory arrangements, under Part 3 of Schedule 4 to the Act
- make a recommendation that a body be designated as an approved regulator, under Part 2 of Schedule 4 to the Act
- make a recommendation that a body be designated as a licensing authority, under Part 1 of Schedule 10 to the Act.

13. These approval processes are a key part of LSB’s oversight role: through them we encourage regulators to be more outcomes-focused and to keep regulatory burdens on their regulated sector to a minimum, removing any that are unjustified. This is in line with our regulatory standards framework, which sets out the criteria for our expectations for how regulators should perform.⁶

14. In assessing new regulatory arrangements, or alterations to existing ones, we will always consider the extent to which arrangements can be justified in light of the LSB’s duties under the Act. This will particularly be the case if those rules go beyond the requirements of the Act. We will also consider whether regulatory approaches reflect expectations set out in our regulatory standards framework.

Use of a policy statement under section 49 of the Act

15. In its oversight role, LSB has at its disposal a range of regulatory tools, one of which is to issue a statement of policy under section 49 of the Act. Our powers to issue a policy statement are broad – under section 49(2) LSB may prepare and issue a statement of policy with regard to anything.

16. Both SRA and BSB have outlined their intentions to review their regulatory arrangements for in-house lawyers in an effort to ensure that they better

⁵ Section 3 of the Act.

⁶ See www.legalservicesboard.org.uk for further information about our regulatory standards work.

reflect section 15(4) of the Act.⁷ Given this work, we consider that a statement of policy is the most useful and appropriate action to take at this stage.

17. Our work on reviewing regulatory arrangements for in-house lawyers, and responses to our discussion paper about the arrangements has led us to identify a number of principles. We consider that these principles are of particular relevance to how in-house lawyers are regulated.
18. The draft statement of policy sets out the principles that we will be mindful of when we exercise our statutory functions. It is likely to be particularly relevant when we consider proposed changes to regulatory arrangements that pertain to section 15(4) of the Act against our rules. A statement of policy also provides a basis for LSB to maintain a watching brief on in-house practising rules and to build upon our evidence base in this area if required in the future.
19. The principles we have identified are set out in the draft statement of policy at **Annex A**.
20. **We would welcome representations about the proposals set out in the proposed statement at Annex A by 5pm on Wednesday 18 November 2015.**

Next steps

21. Once we have considered representations on the draft statement of policy at **Annex A**, we will publish a final version of the statement. If the statement differs from the draft in a material way, we will publish details of the differences.
22. We will then consider the final version of the statement of policy in the exercise of our statutory functions, most likely to be when we consider proposed changes to regulatory arrangements, when they relate to section 15(4) of the Act.
23. Under section 49(6) of the Act, LSB may at any time alter or replace any statement issued under section 49.

How to respond

24. **Any representations should be made to the Board by 5pm on Wednesday 18 November 2015.**
25. We would prefer to receive responses electronically (in MS Word format), but hard copy response by post or fax are also welcome.

⁷ See *Are regulatory restrictions in practising rules for in-house lawyers justified? Summary of responses received to a discussion paper and the LSB's response to them*, July 2015, available at www.legalservicesboard.org.uk.

26. Responses should be sent to:

Email: consultations@legalservicesboard.org.uk

Post: Legal Services Board, One Kemble Street, London, WC2B 4AN

Fax: 020 7271 0051

27. We intend to publish all responses on our website unless a respondent explicitly requests that a response (or a specific part of it) should be kept confidential. We will record the identity of the respondent and the fact that they have submitted a confidential response in our summary of responses.

28. If you wish to discuss any aspect of this paper, or need advice on how to respond to the consultation, please contact the LSB by telephone (020 7271 0050) or by one of the methods described above.

29. Any complaints or queries about this process should be directed to the Consultation Co-ordinator, Jenny Hart, at the following address:

Jenny Hart
Consultation Co-ordinator
Legal Services Board
One Kemble Street
London WC2B 4AN

Email: consultations@legalservicesboard.org.uk

Annex A

Draft statement of policy to be issued under section 49 of the Legal Services Act 2007 (the Act), regarding section 15 (4) of the Act

Provision

1. This statement of policy is issued under Section 49(2) of the Act, which provides for Legal Services Board (LSB) to prepare and issue a statement of policy about any matter. In preparing this statement, LSB has had regard to the principle that its principal role is the oversight of approved regulators, as required by section 49(3).
2. LSB must have regard to any relevant policy statement published under section 49 in exercising or deciding whether to exercise any of its functions. For the purposes of this policy statement, LSB's statutory decision making functions, set out in Schedule 4 and Schedule 10 to the Act, are likely to be the most relevant.
3. In accordance with section 49(6) of the Act the LSB may at any time alter or replace a policy statement.

Purpose of this document

4. This statement of policy will be considered by LSB in exercising or deciding to exercise any of its functions. In so far as any provision relates to section 15(4) of the Act, LSB functions which are likely to be the most relevant include:
 - those in relation to an approval of proposed alterations to regulatory arrangements under Part 3 of Schedule 4 to the Act
 - a recommendation that a body be designated as an approved regulator under Part 2 of Schedule 4 to the Act
 - a recommendation that a body be designated as a licensing authority under Part 1 of Schedule 10 to the Act.

Background

5. LSB has reviewed the regulatory arrangements of approved regulators as they relate specifically to section 15(4) of the Act. Section 15(4) states that an employer who employs an employee who is carrying on a reserved legal activity, does not itself carry on a reserved legal activity unless part of its business is to provide that reserved legal activity to the public, or a section of the public.

6. We considered that in some cases the regulatory arrangements of approved regulators and the provisions of section 15(4) did not align and in some cases were more restrictive than anticipated by section 15(4). In addition, the existence, or not, of regulatory arrangements in relation to section 15(4) of the Act did not appear to be evidence based.
7. Informed by LSB's February 2015 discussion paper about the regulatory restrictions for in-house lawyers⁸ and the responses received to that discussion paper⁹, LSB has developed a set of principles that it will consider when asked to approve (alterations to) regulatory arrangements that pertain to section 15(4) of the Act.
8. While it is most likely that the principles will be relevant in relation to LSB's statutory decision making functions, LSB may consider these principles when exercising any of its statutory functions.

LSB principles for assessing regulatory arrangements that pertain to section 15(4) of the Act

9. Where LSB is asked to approve regulatory arrangements (or an alteration to existing regulatory arrangements) that pertain to section 15(4) of the Act, in addition to considering proposed alterations against any relevant rules made by LSB under the Act, LSB will also consider the principles set out below:

The approach taken to rules pertaining to section 15(4) is evidence based

10. We will expect an approved regulator which chooses to apply regulatory restrictions that are additional to those required by the Act, to justify its approach with a sound evidence base. Equally, when regulators opt not to apply regulatory restrictions, this should be an active decision taken in light of an appropriate assessment of any need for such action.
11. For rules which pertain to section 15(4) of the Act, it will be particularly important for LSB to understand any evidence that informs a decision by an approved regulator to place regulatory restrictions on in-house lawyers providing unreserved legal services to consumers unconnected to the employer's business.

⁸Are regulatory restrictions in practising rules for in-house lawyers justified? A discussion paper, February 2015, is available at: www.legalservicesboard.org.uk.

⁹Are regulatory restrictions in practising rules for in-house lawyers justified? Summary of responses received to a discussion paper and the LSB's response to them, July 2015, available at www.legalservicesboard.org.uk.

Rules that pertain to section 15(4) have been considered in light of wider regulatory arrangements

12. Our guidance on Schedule 4, Part 3 applications suggests that approved regulators should confirm in their applications to alter regulatory arrangements that any consequential effects of their proposed changes have been considered in light of wider regulatory arrangements.
13. Our work suggests that the approach approved regulators take to regulating in-house lawyers impacts more widely than can be addressed with a simple, isolated change to a definition or rule. LSB will consider the extent to which a review by regulators of regulatory arrangements that relate specifically to section 15(4) has been far reaching and considered in light of any wider regulatory arrangements.

The impact on consumers of any rules that pertain to section 15(4) of the Act has been assessed

14. Any alterations to regulatory arrangements must, in accordance with LSB rules, assess the impact on consumers,¹⁰ as part of a wider assessment of the impact of alterations against the regulatory objectives. This will involve, for example, assessing the extent to which regulators have balanced access to justice with mitigating risks around potential consumer detriment.
15. Where new or revised regulatory arrangements pertain to section 15(4), LSB would further consider how regulators communicate and keep consumers informed about the benefits and consequences of different regulatory approaches for in-house lawyers.

Consistency in approach to regulating in-house lawyers has been considered

16. In accordance with the Act and LSB rules, any alterations to regulatory arrangements should have regard to the principle of consistency. Consistency in approach is also a key means of ensuring consumer understanding about recourse and may influence consumers' choice in accessing legal services.
17. When proposed changes to regulatory arrangements relate to section 15(4), LSB will consider the extent to which there is consistency in the approach to regulation taken across the different regulators and across those lawyers, regulated by the same regulator, who work in-house and those who do not.

¹⁰ Under rule nine of the LSB's rules for rule change applications (available at www.legalservicesboard.org.uk), an application must include a statement explaining how and why an alteration will either help to promote, be neutral towards or be detrimental to each of the regulatory objectives, one of which is to protect and promote the interests of consumers.