

Statement of policy on section 15(4) of the Legal Services Act 2007: regulatory arrangements for in-house lawyers

Summary of representations received, LSB's response and
decision document

February 2016

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Introduction

1. In September 2015, the Legal Services Board, under section 50 of the Legal Services Act (“the Act”) invited representations on a draft statement of policy regarding arrangements for the regulation of in-house lawyers.¹ The statement was drafted following the LSB’s thematic review of regulatory restrictions on in-house lawyers.
2. This paper summarises the representations received on the draft, sets out the Board’s the final decision and the LSB’s statement of policy (see Annex A).

Background

3. In-house lawyers are employed in a variety of organisations. Section 15 of the Act sets out the circumstances in which an employee of a non-authorised body (an in-house lawyer) will be taken to be carrying on reserved legal activities.
4. LSB’s thematic review focused on section 15(4) of the Act. This 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 thematic review looked at the impact this distinction has on regulatory arrangements that might apply to authorised individuals in these circumstances.
5. Our discussion paper, published in February 2015², analysed how the current practising rules for in-house lawyers align with the minimum restrictions set out in section 15 of the Act. This analysis 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, do not appropriately reflect the requirements of section 15(4)³ of the Act in particular: Bar Standards Board (BSB), Intellectual Property Regulation Board (IPReg) and Solicitors Regulation Authority (SRA).
6. 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 these responses.⁴ In their responses, both SRA and BSB outlined their intentions to

¹ By in-house lawyers we mean those authorised persons who work for employers* that do not provide reserved legal activities to the public (ie. non-authorised employers)

² *Are regulatory restrictions in practising rules for in-house lawyers justified? A discussion paper*, February 2015, is available at: www.legalservicesboard.org.uk.

³ 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.

⁴ *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.

review their regulatory arrangements for in-house lawyers in an effort to ensure that they better reflect section 15(4) of the Act.⁵

7. Our thematic review led us to identify a number of principles that we consider are of particular relevance to how in-house lawyers are regulated. In the light of this, and given the work planned by SRA and BSB, we considered that a statement of policy, issued under section 49 of the Act, would be an appropriate use of LSB's powers and a proportionate response. Other legal services regulators, particularly those currently benefitting from transitional arrangements⁶ under the Act, may find this statement of policy useful when they come to consider rules in this area.

Use of a statement of policy

8. 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 within our statutory remit.
9. This statement of policy sets out the principles to which we will have regard when we exercise our statutory functions. It is likely to be particularly relevant when we consider applications from regulators proposing changes to regulatory arrangements that pertain to section 15(4) of the Act; details of the relevant LSB statutory functions are listed in the introduction to the statement.
10. This 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.

Representations

11. On 23 September 2015, we issued a notice under section 50 of the Act inviting representations on a draft statement of policy. We provided eight weeks for stakeholders to make representations. The LSB received seven responses. These are summarised below. Responses can be read on the LSB website.⁷
 - a. **Bar Council (BC):** BC stated that it agreed with the principles in the draft statement and it did not have any fundamental objections to the principles outlined. It expressed a desire to see consistency across regulators that regulate lawyers providing the same services. It also suggested that the evidence requirements to support regulatory change should not be too

⁵ *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.

⁶ Under transitional protections in Schedule 5 of the Act, the Costs Lawyer Standards Board and the Master of the Faculties do not need to have any such arrangements at present.

⁷ Available from http://www.legalservicesboard.org.uk/what_we_do/consultations/closed/index.htm

onerous for regulators and that the rule change approval process should be as efficient as possible.

- b. **Bar Standards Board (BSB):** BSB stated that it “generally supports the approach the Legal Services Board has taken in its draft policy statement” and agreed with the four principles. In further comments, BSB remarked that while rules pertaining to in-house practice should be seen in the context of wider regulatory arrangements, this should not slow the adoption of simple changes that did not have consequential effects. It restated its commitment to undertake a full review of its rules in this area.
- c. **Chartered Institute of Legal Executives (CILEx):** CILEx stated it had no objections to the draft statement of policy. In further comments it stated that it considered the current CILEx Regulation approach to regulating in-house lawyers works well and that it had identified “no risks through our disciplinary or monitoring processes”.
- d. **CILEx Regulation:** CILEx Regulation responded that it believed that the draft statement of policy “is appropriate”. CILEx Regulation has no additional regulatory arrangements for its in-house lawyers, and it stated that its current evidence does not suggest that further restrictions are required. It added “we will continue to keep the approach under review as new research and evidence becomes available.”
- e. **GC100:** GC100 supported the proposal to adopt a statement of policy. It commented: “This is a proportionate and transparent approach which informs both regulators and those who are regulated as well as other interested parties.”

It commented that alongside interests of consumers (principle 3), there are other interests in regulation and other regulatory objectives that should be considered, such as promoting access to justice and protecting and promoting the public interest. It also commented that a focus on the principle of consistency may lead to a “one size fits all” approach. It expressed a preference for the Statement of Policy to refer to a proportionate and targeted approach rather than “consistent”.

GC100’s response concluded with a discussion of the impact that current legislative and regulatory restrictions have on the provision of pro bono by in-house lawyers. GC100 expressed its hope that the Statement of Policy would encourage the SRA to reconsider its regulatory arrangements in this area. GC100 would also support a review of section 15 of the Act in the interests of what it sees as supporting greater provision of pro bono activities.

- f. **Lawyers in Charities (LinC):** LinC’s response expressed concern that the draft statement of policy would allow the provision of legal services to the public by unregulated providers without clients being aware of the absence of consumer protection. It welcomed the focus on consistency and the need for an evidence base. It also requested further details of how evidence will be collected and monitored, and a “stronger statement” about the LSB’s involvement in consistency. Further, LinC asked the LSB to oversee the creation of a “new, modern, and fit for purpose set of regulated activities” as it views current arrangements as “out of date and no longer fit for purpose”. It also argued that this statement of policy should be used to “create a single, joined up, regulatory framework for all legal entities.”
- g. **The Law Society (TLS):** TLS stated it was “broadly content with the thrust” of the draft statement of policy, adding that it “usefully sets the tone for the regulators’ own imminent review of these arrangements.” It added that under the current regulatory framework, the option for an employer to be authorised as an Alternative Business Structure would allow consistency between lawyers in private practice and those in-house to be achieved.

Our response

12. We are grateful to these organisations for their responses. We welcome their support for the four principles in the draft statement of policy and the timeliness and manner of the LSB’s approach to issues in this area.
13. We have reviewed the specific comments on the principles provided by GC100 and LinC against the range of evidence and analysis collected during our thematic review. Our review has not indicated that material changes are necessary to the four principles in the draft statement of policy. In particular, GC100’s view that the principle focused on consistency should be replaced by one focused on regulation that is proportionate and targeted has been assessed against the considerable strength of comments we received in favour of consistent approaches to regulation of in-house lawyers across legal services regulators.
14. We have considered the comments from the Bar Council on the evidence burden for regulators. We have also taken in to account those from GC100 about regard for other regulatory interests and objectives and the need for arrangements to be proportionate and targeted and LinC’s request to add further detail on the LSB’s role assessing evidence and regarding consistency. These comments indicate to us that we need to provide additional clarity on the role of this Statement of Policy in our statutory decision-making processes. This can be found at paragraph 5 in Annex A.

15. LSB must have regard to any relevant policy statement published under section 49 in exercising or deciding whether to exercise any of its statutory functions and the rules and processes established by LSB to make decisions will continue to apply. For example, regulators will continue to be required to explain the impact of an alteration on each of the regulatory objectives. They will also need to state how the regulator is complying with its obligations under section 28 of the Act to have regard to the Better Regulation Principles. This includes the need to be proportionate and targeted.
16. GC100 made further comments on the issue that some in-house lawyers experience when seeking to offer pro bono legal services. The legislative review it seeks is beyond the scope of this statement of policy. However, we consider that there is value in recognising in the preamble to the statement of policy that specific regulatory arrangements may apply to pro bono activity. This can be found at paragraph 9 in Annex A.
17. LinC's concerns reflect the strong responses about ensuring adequate consumer protection and understanding that we received in response to the initial discussion paper. It was this feedback that led the LSB to highlight this issue as one of the principles in the statement of policy. LinC's interest in reform of the legislative framework mirrors work the LSB has undertaken in this area and we will discuss separately with LinC its remarks in this area. Finally, we do not agree that the scope of this statement of policy, focused on regulatory arrangements for in-house lawyers, should be extended to capture LinC's proposal to encourage harmonised regulatory approaches to all legal entities. This is because authorised bodies are not subject to section 15 of the Act and do not employ in-house lawyers.

The Board's decision

18. Having had regard to these representations, the Board considers that, aside from some minor changes to the introductory text noted above, the final statement of policy does not differ materially from the draft published on 18 September 2015.
19. The final statement of policy is at Annex A.
20. Before issuing this decision document the Board has re-considered whether the Statement of Policy is consistent with our role as an oversight regulator. It concluded that it is.
21. On 21 January 2016 the Board decided to issue the Statement of Policy.
22. Under section 49(6) of the Act, the LSB may at any time alter or replace any statement under section 49.

Annex A: Statement of policy on section 15(4) of the Legal Services Act 2007: regulatory arrangements for in-house lawyers

Issued under section 49 of the Legal Services Act 2007

February 2016

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.
5. The statement of policy, below, does not prejudice the prevailing rules, processes and tests established by LSB to deliver the statutory functions listed above. This includes having regard to the Act's regulatory objectives, the principles of better regulation, and best regulatory practice. Rather, the principles in the statement of policy provide additional focus on those areas identified through our thematic review as important in improving regulatory arrangements for in-house lawyers.

Background

6. 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.
7. 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.
8. 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 regulatory arrangements (or an alteration to existing regulatory arrangements) that pertain to section 15(4) of the Act.
9. In keeping with the provisions of section 15(4) of the Act, the statement of policy applies regardless of whether legal services are carried on with a view to profit. In principle, the LSB supports the provision of pro bono services and nothing in the statement of policy should be seen to specifically restrict or deter the provision of pro bono services by in-house lawyers within the current legislative framework.
10. 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.

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.

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

11. 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:

1. The approach taken to regulatory arrangements pertaining to section 15(4) is evidence based

12. 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.
13. For regulatory arrangements 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.

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

14. 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.
15. 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, including those approved under a designation process (Schedule 4, Part 2 and Schedule 10, Part 1).

3. The impact on consumers of any regulatory arrangements that pertain to section 15(4) of the Act has been assessed

16. 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,

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.

assessing the extent to which regulators have balanced access to justice with mitigating risks around potential consumer detriment.

17. 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.

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

18. 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.
19. 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.