

Statement of policy for enforcement

Prepared under section 49(1) of the Legal Services Act 2007

Version 3, April 2018

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Introduction

1. This statement of policy sets out the way in which the Legal Services Board (LSB) will exercise the enforcement functions given to it by the Legal Services Act 2007 (the Act). It also explains the approach the LSB is likely to take to enforcement and how it will conduct its investigations, including how the LSB will gather evidence and information in order to inform its decisions.
2. The LSB's enforcement functions are:
 - section 31 (performance targets and monitoring)
 - section 32 (directions)
 - section 35 (public censure)
 - section 37 (financial penalties)
 - section 41 (intervention directions)
 - section 45 (cancellation of designation as approved regulator)
 - section 76 (cancellation of designation as licensing authority by order).
3. As an oversight regulator the LSB may exercise the above enforcement functions against the approved regulators. The LSB may also issue directions under section 32 of the Act to the Solicitors Disciplinary Tribunal (the Tribunal).¹ For the purpose of sections 32-34 of the Act only, the Tribunal is treated in this policy as if it were an approved regulator, and this policy should be read accordingly.
4. This statement of policy also applies to the way in which the LSB will exercise its enforcement powers against approved regulators in their capacity as licensing authorities for alternative business structures.
5. The Office for Legal Complaints (OLC) is not an approved regulator and therefore this enforcement policy does not apply to the OLC
6. The LSB has made certain rules about aspects of its enforcement functions. These are listed at Annex A.
7. This is a revised statement of policy, replacing *Statement of Policy – Compliance and Enforcement (Version 2: November 2010)* and *Statement of Policy – Cancellation of designation as a Licensing Authority*, issued in 2011.

¹ Section 179 applies sections 32-34 and Schedule 7 of the Act to the Tribunal with modifications. Section 179(b) amends section 32(4)(b) to grant power to the LSB to issue a direction to the Tribunal for it to take steps to modify any rules made by the Tribunal under section 46(9)(b) of the Solicitors Act 1974.

Background

8. The Act provides the LSB with a range of enforcement tools that it can use when it identifies that:
 - an act or omission by an approved regulator (or a series of such acts or omissions) has had, or is likely to have, an adverse impact on one or more of the regulatory objectives
 - an approved regulator has failed to comply with any requirement imposed on it by or under the Act (including a direction by the LSB) or any other enactment
 - an approved regulator has failed to ensure that the exercise of its regulatory functions is not prejudiced by any of its representative functions
 - an approved regulator has failed to ensure that decisions relating to the exercise of its regulatory functions are, so far as reasonably practicable, taken independently from decisions relating to the exercise of its representative functions
 - an approved regulator has failed to comply with requirements imposed on it by section 51 of the Act (control of practising fees charged by approved regulators), or by rules under that section
 - an approved regulator has failed to comply with the LSB's internal governance rules
 - the Solicitors Disciplinary Tribunal fails to perform any of its functions to an adequate standard, or at all.
9. The Act says that the LSB must make a statement of policy about the exercise of its enforcement powers.
10. In preparing this statement of policy, the LSB has:
 - had regard to the fact that its principal role is the oversight regulator of the approved regulators
 - taken into account the desirability of resolving informally matters which arise between the LSB and an approved regulator
 - specified how it will comply with the requirement to be proportionate, consistent, targeted only at cases where action is needed, etc and
 - had regard to the principle that it should only exercise its enforcement powers if the act or omission of an approved regulator was unreasonable.

The LSB's approach to enforcement action

11. The LSB will seek to achieve an appropriate balance between informal and formal action, based on best practice. The LSB considers that this will enable it to improve regulatory performance by the approved regulators.
12. In deciding whether it is appropriate to exercise its formal enforcement powers, the LSB must have regard to the principle that it should only use them if the act or omission of the approved regulator was unreasonable.
13. The LSB will therefore consider all the circumstances of the case, including all relevant evidence from the approved regulator and/or others in order to reach a conclusion as to whether the act or omission was unreasonable.
14. The LSB will seek to be transparent and open in the use of its enforcement powers. The LSB anticipates reports of investigations and communications regarding enforcement action will be published, save for exceptional circumstances.

The enforcement process

15. The LSB will, in the first instance, use its judgement to decide if one or more of the conditions specified in the Act (see paragraph 8 above) is satisfied. In doing so the LSB will take account of the evidence available to it which is likely to come from many different sources including approved regulators, other stakeholders, market research and regulatory performance reviews. As explained further below (at paragraphs 23-33) it will then decide whether to seek to resolve the issues informally in the first instance.
16. If informal resolution fails or is inappropriate in the circumstances, the LSB may consider exercising one or more of its formal enforcement powers. This option will be open to the LSB where (i) one or more of the conditions specified in the Act (see paragraph 8 above) is satisfied, and (ii) it is appropriate in the circumstances to exercise formal enforcement power(s). As noted in paragraph 12 above, this will include consideration of whether the act or omission of the approved regulator was unreasonable. In addition, the LSB will also consider whether it would be proportionate and consistent to exercise one or more of the enforcement powers.

Gathering information and deciding to proceed

17. The LSB expects to gather information about approved regulators from a number of different sources proactively and reactively, including as part of its day to day work. The LSB will normally consider if data gathered for one purpose (such as practising fee approval or rule change applications) may also be relevant to another purpose (such as assessing compliance with the regulatory objectives or another requirement under the Act). A non-exhaustive list of examples of the sources include:

- admission of non-compliance by act or omission by the approved regulator
- information from third parties including:
 - other approved regulators
 - the Office for Legal Complaints
 - the Legal Services Consumer Panel
- outcomes from the performance reviews of the approved regulators
- issues that arise in discussions with approved regulators
- performance of the Tribunal against its key performance indicators.

18. The LSB will assess the information available and come to a decision about whether to proceed with informal or formal action. If it needs more information it may use its formal information gathering powers under section 55 of the Act to obtain it. Alternatively, if it is appropriate to do so, it will continue to gather information on an informal basis.

19. The LSB will always take into account relevant information and evidence that it receives during its consideration of whether or not to pursue an issue, and if it does, the type of action that is appropriate.

20. In assessing information in the context of compliance and enforcement action the LSB will always take into account the following:

- this statement of policy
- its position as an oversight regulator and its duties under the Act
- best regulatory practice including the requirement that its activities must be proportionate, consistent, transparent, accountable and targeted only at cases in which action is needed

21. The LSB will also take into account some or all of the following as relevant:

- the actual or potential adverse impact on one or more of the regulatory objectives (which include the professional principles in s1(3) of the Act)
- whether it considers that the approved regulator's act or omission has been unreasonable (see paragraph 12)
- the seriousness of the act or omission and the impact (or likely impact) of it on consumers and those being regulated
- the desired outcome for consumers of taking action and whether that outcome is likely to be significantly beneficial compared to the impact of not taking action
- the likely impact on those being regulated by the approved regulator and the likely impact on the wider provision of legal services
- whether the resource requirements needed are proportionate to achieving the desired results

- whether it has previously taken informal or formal action over the same or similar issues, and
- any other matters that appear appropriate to take into account.

22. If the LSB decides that the matter should be pursued it may:

- seek to resolve the matter informally with the approved regulator or the Tribunal, or
- pursue one or more of the other enforcement powers.

Informal resolution

23. The LSB must, in preparing this statement of policy, take into account the desirability of resolving informally matters that arise between the LSB and the approved regulators. This section sets out how the LSB is likely to approach that requirement.

When is informal resolution appropriate?

24. The LSB will always consider whether it is appropriate, in the circumstances of the case, to resolve matters informally, and this may take place prior to any consideration of more formal intervention. The LSB's approach to informal resolution will always be proportionate to the circumstances of the particular case.

25. For the avoidance of doubt, the Act does not require the LSB to:

- seek an informal resolution before commencing a formal enforcement process, or
- come to a view on whether an approved regulator's act or omission is unreasonable before deciding to pursue informal resolution. That requirement only applies when the LSB is considering whether to use one of the formal powers.

26. An informal approach may not be appropriate in all cases. This may occur in circumstances where the impact of the issue is immediate, serious and/or widespread, or where the LSB considers that, in certain cases, informal resolution is not compatible with the regulatory objectives.

27. An informal approach is also unlikely to be considered appropriate where an approved regulator's previous failure to fulfil commitments to resolve informally is indicative that formal powers would be more effective in the circumstances.

28. However, if the LSB decides that it is appropriate to take formal enforcement action it will always be open to the approved regulator to propose a way to achieve compliance or to present fresh evidence that could not reasonably have

been made available earlier to demonstrate that a breach had not occurred. Making such a proposal does not fetter the LSB's discretion to continue with enforcement action but the approved regulator's actions are likely to be taken into account by the LSB in deciding whether, and if so what, further action is needed.

Agreed steps

29. As part of the informal resolution process, the LSB may consider inviting the approved regulator to agree to take steps in order to resolve an issue informally. The approved regulator would be given the opportunity to comment on the proposed steps. The agreed steps would be proportionate to the circumstances and would have regard to the resources of the approved regulator as well as those of the LSB.

30. Failure to take to the agreed steps could result in formal action being taken. The LSB is not prevented from taking further formal or informal action by negotiating such steps, should it be appropriate in the circumstances to do so.

Publication

31. When proceeding with the informal resolution route, the LSB anticipates that all communications will be made public except in exceptional circumstances. This will assist in ensuring that the LSB is accountable for its actions and that consumers and others understand the reasons for its approach in each particular case.

Timescale

32. The timescale for resolving matters informally in general will be determined by the LSB on a case-by-case basis and notified to the approved regulator in a timely manner. The LSB will accordingly ensure that such timescales are fully transparent, proportionate to the circumstances in question and, in particular, are sufficient so as to mitigate any detriment persons affected by the issue may suffer.

If informal resolution is unsuccessful?

33. If the first attempt at informal resolution does not achieve an outcome that, in the LSB's judgement, is appropriate, then the LSB will consider what further action it should take. Default by the approved regulators of the informal resolution may result in formal action being taken. The approach adopted will depend on the circumstances of the individual case.

Performance targets and monitoring (section 31 of the Act)

34. The LSB is likely to use performance targets and monitoring when an investigation by the LSB has identified the need for action to improve performance and raise standards. They are likely to be used when an approved

regulator is failing or is likely to fail in a specific area with a clear impact (or likely impact) on the regulatory objectives and where performance appears to be reasonably readily quantifiable and measurable.

35. Any performance target will need to be transparent, which means that its intention is clearly understood. The cost of its measurement and reporting should also be proportionate. The target will need to be consistent with any other performance targets the LSB has imposed to the extent that the cases are comparable.
36. The LSB will always consider the facts of the case as to whether it is appropriate to combine this form of enforcement with other enforcement powers for the purposes of achieving a more effective route to compliance. For example, a section 32 direction may be used to underpin and drive delivery of a section 31 performance target. The LSB may also decide to proceed (if appropriate) to more severe forms of enforcement, such as intervention following a failure to deliver a performance target.

Directions (section 32 of the Act)

37. The LSB is likely to use directions when it wants to ensure that specific actions are carried out by an approved regulator in order to rectify an identified act or omission (including a failure to comply with the Act or with the law generally). The LSB may also direct the Tribunal to modify its rules where it has failed to perform any of its functions to an adequate standard, or at all. Directions may be combined with other enforcement tools and may precede other forms of enforcement action. For example, where an approved regulator does not deliver the requirements of the direction, it will be open to the LSB to pursue imposing a financial penalty where it is appropriate to do so.
38. In seeking to direct an approved regulator to take a particular set of actions (or when seeking to direct the Tribunal to modify any rules it makes) the LSB will ensure that it has acted proportionately. The LSB will endeavour to ensure that any direction it sets is clearly understood by the approved regulator and achieves its aim. In setting a direction the LSB will have regard, where it is relevant to do so, to the experiences of setting directions during other enforcement action. The LSB's use of directions will be based on evidence of regulatory failure and the LSB will publish its reasons for its actions.

Public censure (section 35 of the Act)

39. Public censure is likely to be used (either on its own or in combination with other forms of enforcement) to draw public attention to the act or omission by the approved regulator.

40. The aim of the censure statement is to change the behaviour of the approved regulator. In general, organisations value their reputation and the public censure will identify failures of performance. The LSB believes that, when used appropriately, public censure can be enough to act as a catalyst for a change in behaviour that leads to improved performance of an approved regulator.

Financial penalties (section 37 of the Act)

41. The Act allows the LSB to impose a financial penalty when an approved regulator fails to comply with internal governance rules, a direction by the LSB under section 32, the requirements under section 51 of the Act (control of practising fees charged by approved regulators) or by rules made under that section.

42. Financial penalties are likely to be used when, in the LSB's judgement, it is appropriate to impose one to seek to change the unreasonable behaviour of the approved regulator by penalising the specific act or omission that has been identified. A further aim is to deter future non-compliance by the approved regulator on which the penalty is imposed and other approved regulators. A financial penalty will only be imposed in serious circumstances and the aim will be to set the level such that it is likely to give consumers and those being regulated confidence that issues which cause them detriment will be dealt with by the regulatory regime.

43. The LSB may consider that it is appropriate to impose a financial penalty in combination with other enforcement powers.

Maximum financial penalty

44. The LSB considers that, to act as a credible deterrent, the maximum penalty must be capable of having a significant impact on the approved regulator. A high maximum level gives a regulator the flexibility to exercise its discretion and judgement in setting a penalty in a way that enables it to take into account the likely wide variation in the outcomes of investigations that it will encounter. Under the *Legal Services Act 2007 (Maximum Penalty for Approved Regulators) Rules 2009*, the maximum financial penalty which may be imposed on an approved regulator is an amount equal to 5 per cent of all income which the regulator derived from its regulatory functions in respect of its most recent accounting period.

45. It is not the objective of the LSB to impose penalties which have the effect of making it impossible for an approved regulator to fulfil its regulatory functions. The LSB would therefore regard any attempt by an approved regulator to pay a penalty in a way which had such an impact as, of itself, raising issues in relation to compliance with LSB's internal governance rules.

46. If the LSB is investigating a number of breaches by an approved regulator as separate investigations (for example one investigation into a breach of directions concerning internal governance rules and a separate investigation into a breach of rules controlling practising fees), it may be appropriate for each investigation to impose a separate penalty, and in each case up to the maximum amount.

Process for setting a penalty

47. The LSB will be guided by the principles of better regulation and best regulatory practice when it uses its reasonable discretion and judgement in setting the level of a financial penalty. However, the LSB does not consider that it is appropriate to set out in advance the exact mechanism by which it will decide on the appropriate level of a penalty. This is likely to vary on a case by case basis and it is unlikely that a prescriptive approach can be applied in all cases.

48. The LSB will consider whether there are any aggravating factors when it sets the level of the penalty. Aggravating factors it may consider could include (but not be limited to):

- the seriousness of the failure
- the extent to which it was deliberate or reckless
- the impact on consumers and whether the actions have resulted in an actual or potential loss to anyone (for example by preventing them from participating in certain types of business opportunities)
- the duration of the act or omission, and
- whether there was a lack of co-operation by the approved regulator with the LSB's investigation.

49. The LSB will also consider whether any mitigating factors should reduce the level of penalty. These could include (but not be limited to):

- whether the failure was accidental in nature or the result of a genuine misunderstanding
- the presence of good controls or procedures
- the extent of any impact on the regulatory objectives, the professional principles and consumers
- co-operation by the approved regulator with the investigation
- whether directions have been issued that require the approved regulator to spend money on a particular issue, and
- whether there were any genuine proposals by the approved regulator to resolve the matter during the course of the investigation.

50. Finally, the LSB will consider whether, in all the circumstances, the amount of the proposed penalty is reasonable, again guided by the principles of better regulation. In doing this, it will take into account the resources of the approved

regulator. The LSB will also ensure that the proposed penalty does not exceed the maximum amount.

Intervention directions (section 41 of the Act)

51. The LSB regards the use of intervention directions (with the related powers to enter premises under warrant and take possession of any documents under section 42(3) of the Act) as an extreme measure. It will only be used in serious circumstances relating to the approved regulator's regulatory functions, where none of the other enforcement measures are adequate to address the matter.
52. These circumstances are likely to be where there has been a serious and persistent act or omission by the approved regulator that has had or is likely to have an adverse impact on one or more of the regulatory objectives. It is also likely that the act or omission would have (or be likely to have) a demonstrable harmful impact on consumers and/or those regulated by the approved regulator.
53. Intervention directions may also be used if, for whatever reason, the approved regulator faces a risk to its organisational viability, which puts in jeopardy the continuing effective discharge of its regulatory functions. It may also be appropriate to use this power if an approved regulator became insolvent.
54. The aim of using intervention directions would be, where necessary, to stop the approved regulator from behaving in the harmful manner that has been identified. The LSB will use an intervention direction to enable it, or a person nominated by it, to take over one or more of the regulatory functions of the approved regulator and ensure that the approved regulator complies with any related instructions.
55. Before issuing an intervention direction the LSB will have carefully assessed that this is a proportionate response. It will have considered all the circumstances of the case and ensured it had the necessary evidence to demonstrate that issuing an intervention direction was a reasonable response. In issuing an intervention direction the LSB will have regard, where it is relevant to do so, to the experiences of using intervention directions during other enforcement action it has taken.
56. An intervention direction can be revoked by the LSB under section 44 of the Act (whether on the application of the approved regulator or otherwise). In considering whether to revoke the intervention direction the LSB will take into account all the relevant information and evidence that it has, including the views of those it must consult.
57. See Annex A for links to rules the LSB has made on:

- intervention directions, including rules relating to who may be appointed to enter premises under warrant and seize documents under s42(3) of the Act
- revocation of an intervention direction, and
- making oral and written representations in relation to both of the above.

58. Under section 42(3) of the Act, a specified person² or a person appointed by the specified person to act on its behalf, may seek a warrant to enter the premises of an approved regulator and seize documents. However, in accordance with section 42(5) of the Act the warrant will not be issued unless the power of search and entry is deemed necessary or desirable to enable the specified person or the person it appoints to exercise one or more of the approved regulator's regulatory functions.

Cancellation of designation as an approved regulator (section 45 of the Act) and as a licensing authority by order (section 76 of the Act)

59. An approved regulator's designation can be cancelled in relation to one or more of the reserved legal activities that it regulates. The cancellation can be effected either following a request by the approved regulator³, or as a result of enforcement action by the LSB.⁴

60. As with intervention directions, the LSB regards any decision it takes to use its enforcement powers to recommend cancellation of an approved regulator's and/or a licensing authority's designation as extremely serious. These powers will only be used in exceptional circumstances when the LSB is satisfied that none of its other enforcement powers would adequately address the issues. In using its powers, the LSB's aim would be to try to ensure as smooth a transition as possible to a new body taking over regulation of the former approved regulator's and/or licensing authority's members. The LSB would also try to ensure appropriate provision of information to the public in order to reassure consumers about those providing legal advice to them.

61. See Annex A for rules the LSB has made on:

- the process of cancellation following a request by an approved regulator
- who may be appointed to enter premises under warrant and seize documents in the event of a cancellation of designation
- the making of written and oral representations where cancellation of designation is the result of enforcement action by the LSB.

² Section 42(9), a "specified person" means the Board or, where a person is nominated by it, that person.

³ Section 45(3) of the Act

⁴ Section 45(5) of the Act

62. Under section 48(3) of the Act the LSB may seek a warrant authorising a person appointed by the Board to enter and search premises and take possession of records (written and electronic) found on the premises. However, in accordance with section 48(5) of the Act the warrant will not be issued unless the power of search and entry is deemed necessary or desirable for the purpose of continuing regulation.

63. Similar to the processes for cancelling the designation of approved regulators, a licensing authority's designation can be cancelled in relation to one or more of the reserved legal activities that it regulates. The cancellation can also be effected either following a request by the licensing authority⁵, or as a result of enforcement action by the LSB.⁶

64. Cancellation may also take place where designation of the body as an approved regulator is wholly or partially cancelled, and accordingly gives rise to an equivalent cancellation as a licensing authority.⁷ The converse of this is not true and the LSB recognises that there may be instances where it may recommend that a body's designation as a licensing authority is cancelled but not recommend that its designation as an approved regulator is cancelled.

65. See Annex A for rules the LSB has made on:

- the process of cancellation following a request by a licensing authority
- who may be appointed to enter premises under warrant and seize documents in the event of a cancellation of designation
- the making of written and oral representations where cancellation of designation as a licensing authority is the result of enforcement action by the LSB.

66. Under section 79(3) of the Act the LSB may seek a warrant authorising a person appointed by the Board to enter and search premises and take possession of records (written and electronic) found on the premises. However, in accordance with section 79(5) of the Act the warrant will not be issued unless the power of search and entry is deemed necessary or desirable for the purpose of continuing regulation.

⁵ Section 76(3) of the Act

⁶ Section 76(5) of the Act

⁷ Section 75 of the Act

Annex A: LSB Enforcement and Cancellation Rules and Regulations

Enforcement rules

- ***Legal Services Act 2007 (Maximum Penalty for Approved Regulators) Rules 2009 (2009 No 3249)***

These rules set out the method to be used in determining the maximum amount of the penalty which the LSB may impose under section 37(3) of the Act on an approved regulator.

- ***Intervention directions: section 41(5) and 42(10) rules***

These rules apply if the Board wishes to nominate a person to exercise the regulatory function of an approved regulator in accordance with an intervention direction. These rules also provide for who may be appointed to enter and search the premises of an approved regulator as a result of an intervention direction.

- ***Intervention directions: rules for applications to revoke***

These rules apply if an approved regulator wishes to apply to the LSB to revoke an intervention direction.

Cancellation of designation rules

- ***Rules for applications to cancel designation as an approved regulator***

These rules apply if an approved regulator wishes to apply to have its designation as an approved regulator cancelled.

- ***Rules on powers of entry following cancellation of designation***

These rules provide for who may be appointed to enter and search the premises of a former approved regulator or licensing authority if their designation is cancelled.

- ***Rules for applications to cancel designation as a licensing authority***

These rules apply if a Licensing Authority wishes to apply to have its designation as a Licensing Authority cancelled.

Multi-procedural rules

- ***Rules for making oral and written representations and giving oral and written evidence***

These rules apply if a person wishes to make oral or written representations to the LSB in relation to a number of the LSB's powers, and these include the exercise of directions, intervention directions and their revocation, and cancellation of

designation of both approved regulators and licensing authorities following enforcement action by the LSB.

Regulations

- ***The Legal Services Act 2007 (Warrant) (Approved Regulator) Regulations 2015 (2015 No 935)***

These regulations apply in relation to the issuing of warrants under sections 42(3), and 48(3) of the Act to enter the premises of a former approved regulator and seize documents.

- ***The Legal Services Act 2007 (Warrant) (Licensing Authority) Regulations 2015 (2015 No 938)***

These regulations apply in relation to the issuing of warrants under section 79(3) of the Act to enter the premises of a former licensing authority and seize documents.