

Legal Services Commission Response to a Consultation Paper from the Legal Services Board on Compliance and Enforcement Statement of Policy
12 October 2009

Introduction

1. The Legal Services Commission (LSC) is a non-departmental public body sponsored by the Ministry of Justice (MoJ). The LSC is the biggest single purchaser of legal services in England and Wales with an annual spend of £2.1 billion; we are responsible for the delivery of civil and criminal legal aid and the development of community legal services.
2. The LSC welcomes the opportunity to respond to the Legal Services Board's (LSB) policy paper on compliance and enforcement. We have a strong interest in the performance of legal service regulators through our responsibility to legal aid clients. We strongly believe that improved regulatory performance will lead to better access and outcomes for consumers.
3. The LSC agrees in principle with the approach to enforcement and compliance set out by the LSB, in particular the focus on outcomes for consumers. Our comments on the policy are outlined below. Our response focuses on the key themes raised by the paper rather than dealing with individual questions.

Statement of Policy

4. We recognise the LSB's rationale for enforcing principles rather than specific rules. This will allow greater flexibility for rules to develop over time and prevent the LSB from interfering to an inappropriate degree with the day to day running of Approved Regulators. However a principles-based approach has associated risks. It is possible that the LSB will be made more open to challenge as part of the process of discovering the boundaries of the principles, particularly since the sector the LSB regulates excels in such testing of the limits. It will also be more difficult to ensure the consistency of decision-making than would be the case if clear rules and guidance were produced.
5. We therefore recommend that the LSB carry out a full risk assessment relating to potential challenges to decision making, and produce clear and robust guidance to underline the principles. This will enable the LSB to defend its decisions and ensure that it can secure good regulatory performance in the interests of consumers.
6. We agree with the strategic aims set out in the policy and would suggest that, in addition to protecting the consumer and embedding quality assurance, the regulatory structure encourages innovation, new entrants and diversity.

Approach to Compliance and Enforcement

7. The policy sets out a comprehensive list of the matters that the LSB will take into account when reviewing Approved Regulators' compliance.
8. In general it would be helpful to have more detail about the different information strands. For example what weighting will be given to the information from different sources? What criteria will be used to assess the information? How will information be collected?

9. In particular we would like to see more detail around the ongoing monitoring of Approved Regulators and their compliance. How does the LSB view this working in practice, as effective monitoring will be fundamental to ensuring good regulatory performance in the interest of consumers and those who are regulated? For example, how frequently will performance be assessed? Will Approved Regulators have general performance targets? How will the LSB obtain the data? How will any data be used? Will information be made publicly available?
10. We are aware that some of this work may be underway and we would welcome the opportunity to feed in our comments on the proposals once they are available.
11. It is the LSC's view that ongoing performance monitoring is vital to ensure that poor performance is identified at the earliest opportunity, and also to demonstrate the individual and/or collective strengths of Approved Regulators. This will support the LSB and Approved Regulators in being seen as world leaders in the full range of their activities.
12. We believe that information on regulatory performance should be made available to:
 - Consumers
 - Those who are regulated by LSB Approved Regulators to enable them to make informed decisions about their choice of regulator
 - Procurers of legal services, such as ourselves.
13. When developing their performance monitoring strategy the LSB may want to consider the approach taken by regulators in other sectors. For example, Ofwat compile and publish annual comparative reports of the performance of water companies. They use these comparisons to encourage each company to meet the standards of the best performers in the market. Similarly, the Council for Healthcare Regulatory Excellence (CHRE), which operates in a similar role to the LSB as an oversight regulator for healthcare professional regulators, conducts and publishes performance reviews of their Approved Regulators annually.
14. It is not clear from the LSB's policy whether in their view the regulatory objectives all hold equal weighting in a compliance and enforcement context. Would non-compliance in one area be seen as more serious than another and thereby bring about a different level of LSB intervention? If this were the case we would expect that the protection and promotion of the interests of consumers and an independent, strong, diverse and effective legal profession would carry the highest weightings.

Judging breaches of compliance

15. The LSB must set clear criteria to assess whether a breach has occurred. Without clear criteria it will be extremely difficult to ensure consistency and fairness and may leave enforcement decisions open to challenge.
16. When determining whether an Approved Regulator's acts or omissions have been unreasonable the LSB should assess:
 - Whether there are sufficient grounds to suspect a breach of regulatory objectives has or will occur
 - The seriousness of the breach - the impact on:
 - Consumers
 - Competition
 - Other market participants

- The regulatory regime
- Others e.g. legal service procurers
- The persistence of the breach - is this a pattern of behaviour?
- Whether steps have been taken by the Approved Regulator to remedy the issue.

Enforcement Mechanisms

17. We are encouraged that the LSB has a number of enforcement mechanisms at their disposal (from informal resolution through to cancellation of designation) and are not solely relying on financial penalties.
18. A variety of mechanisms allow the LSB to: respond flexibly; determine the most appropriate course of action in order to bring about a positive change; and ultimately protect the best interests of consumers. For example, depending on the nature of the breach, the use of directions may be more effective than financial penalties in securing a long-term change in behaviour. However this approach may require more intervention from the LSB.
19. We agree that there will be circumstances where, due to the type of non-compliance, one or other mechanism is not appropriate, for example a very serious breach will not be suitable for informal resolution. Examples of such circumstances should be clearly set out. As with the process for assessing if a breach has occurred there must be clear criteria in place to govern which is the most appropriate enforcement action to take.
20. Of the enforcement tools available to the LSB we believe that censure should be reserved for the most serious situations where directions have not been acted upon, or where directions alone are not sufficient to rectify the issue. The focus of enforcement should primarily be on bringing about a change in behaviour, and we believe that the other enforcement tools may be more effective at doing this.
21. We recognise the importance of financial penalties to any enforcement regime. We believe that it sends a clear message about the seriousness of a breach and also may act as a powerful disincentive for poor performance in the future. We would like to see more detail on how the LSB views the risks associated with financial sanctions.
22. In principle we agree that members of Approved Regulators should have to pay some contribution for the failure of their Approved Regulator to comply. However we would advise the LSB to proceed cautiously in this area and to look in more detail at the potential impact this may have on different groups; for example practitioners who conduct publicly funded work, BAME practitioners and sole practitioners. This assessment should inform the development of the rules around increases to the practice fees as a consequence of financial penalties for Approved Regulators. We cover this in more detail in the Impact section below.
23. We do not believe that at this early stage of reform the regulatory market is sufficiently competitive to allow members to move easily between regulators if they are unhappy with performance or behaviour. In the absence of strong competition practitioners may not have the influence the LSB suggests over their regulators.

Impact of the compliance and enforcement policy

24. We agree that the regulations have the potential to improve the provision of legal services and secure better outcomes for diverse clients. However before we are able to form a more substantial judgement on the impact of the proposals we would like to

see a more comprehensive equalities impact assessment. The focus of the initial assessment is on the impact on consumers and does not appear to take account of the equality and diversity issues for member organisations. There may be impacts that the LSB should consider when finalising the detail of their policy.

25. For example, we have concerns that if applied the proposal for financial penalties, may have consequential impact on practising fees (point 3.38). Our evidence shows that many publicly funded BAME, female and disabled practitioners are sole practitioners or are employed in very small firms. Our experience of engaging with diversity representative bodies indicates that increasing costs will create a disproportionate financial burden on small firms. We would suggest that one way of responding to such an impact would be to ensure that performance targets for Approved Regulators include greater accountability to members.
26. We believe there should be more work undertaken to engage and involve organisations owned or managed by members of diversity groups with the consultation and decision making process.

We hope that you will find this response useful. If you have any queries about its content, please do not hesitate to contact Jennifer Will, Quality Manager Strategic Development, at jennifer.will@legalservices.gov.uk.

Yours sincerely

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Legal Services Commission