

Legal Services Board response to BERR consultation on Extending the Scope of Application of the Regulators' Compliance Code and the Principles of Good Regulation

The Legal Services Board (LSB) welcomes the opportunity to respond to this consultation paper. Our comments relate to Chapter 5 of the consultation paper, which includes the proposal to amend the Listing Order to include the regulatory functions of the LSB, thereby making us subject to the Regulators' Compliance Code and the Principles of Good Regulation.

Legal Services Board

The LSB is the new, independent body responsible for overseeing the regulation of lawyers in England and Wales. Our goal is to reform and modernise the legal services market place by putting the interests of consumers at the heart of the system, reflecting the objectives of the statute that created us, the Legal Services Act (LSA) 2007.

We share our regulatory objectives with the nine 'approved regulators' of the legal profession, each of which have direct responsibility for the day-to-day regulation of the different types of lawyers. These objectives are:

- protecting and promoting the public interest
- supporting the constitutional principle of the rule of law
- improving access to justice
- protecting and promoting the interests of consumers
- promoting competition in the provision of services in the legal sector
- encouraging an independent, strong, diverse and effective legal profession
- increasing public understanding of citizens' legal rights and duties
- promoting and maintaining adherence to the professional principles

Application of Principles and Code to LSB

In summary, the LSB supports the proposal that it should be subject to the Better Regulation principles. We also agree that our direct regulatory functions should be subject to the Regulators' Compliance Code. However, we seek clarity about the application of the Code to our distinctive role as an oversight regulator of the approved regulators of the legal services sector.

The Board is already statutorily required to have regard to the Better Regulation principles – section 3(3)(a) of the LSA 2007 states our regulatory activities should be

transparent, accountable, proportionate, consistent and targeted only at cases where action is needed. In addition, the approved regulators which we oversee are subject to the same requirements (section 28(3)(a)). Under the Act, the Board is also subject to other important better regulatory disciplines, including requirements to consult when making rules.

The Act is also clear in setting out a proportionate approach to the use of enforcement powers, consistent with the purpose of the Code. For example, the Board can only issue intervention directions to approved regulators if a breach cannot be adequately addressed by the use of less intrusive powers. Furthermore, the Board is firmly committed to embedding good regulatory practices within our organisation, as set out in our recently published Draft Business Plan for 2009/10.

The Board has considered the content of the Code and concluded it is broadly content with the potential requirement to have regard to it when exercising its regulatory functions. To take two examples:

- Under the LSA 2007 (section 49), the Board must prepare and issue policy statements with respect to the exercise of key regulatory functions, including financial penalties, intervention directions, and cancellation of the designation of approved regulators. If the LSB is subject to the Code, we understand we will be required to have regard to it when issuing these policy statements. We see the risk-based approach of the Code as complementary to the LSA 2007 and it matches with our preferred approach.
- We also support the Hampton principle, embedded in the Code, that regulators should recognise their key role in allowing, or even encouraging, economic progress. A core responsibility for the LSB, as we take on our full powers, will be to work with the approved regulators in opening up legal services markets to external investment and ownership ('Alternative Business Structures'). We see this as offering significant potential benefits to consumers, and commercial opportunities to firms, both within and outside the sector.

We plan to establish internal processes to ensure that new regulatory proposals are consistent with the Code, and where they are not, we will properly reason any departure from its provisions.

Oversight regulatory functions

However, we wish to highlight the distinctive role of the LSB as an oversight regulator for the legal services sector. We have some backstop direct regulatory and licensing powers over individual firms. However, for the most part, we will not be regulating legal firms directly. Instead, our principal role is to oversee the day-to-day regulation of different types of lawyers by a range of legal regulators. So, if the Government decides to include the LSB within the Listing Order, it should give due consideration to how the Code impacts upon the LSB, approved regulators, and consumers and providers of legal services within our particular regulatory framework. In particular, clarity is needed about the definition of 'regulated entities' and whether the approved regulators are considered to be regulated entities when the LSB exercises its oversight regulatory functions.

For example, the requirement in the Code to provide targeted and practical advice to 'regulated entities' on meeting their regulatory obligations may not be appropriate to the LSB's oversight regulatory relationship with approved regulators. It is more relevant to the direct regulation of firms by other regulators to which the Code applies. We therefore suggest that the Code might be more appropriately applied to the direct regulatory functions of the LSB only, rather than our unusual oversight regulatory functions. We note that the Council for Healthcare Regulatory Excellence, which has oversight regulatory powers over the health professions regulators, has not been included within the scope of the Code.

We would, of course, expect to be transparent and accountable in our dealings with approved regulators, and the overall spirit of the Code is certainly applicable to our relationship with the approved regulators. It will be important for the LSB to take a proportionate approach to the use of our regulatory oversight functions in relation to the approved regulators (not least because our oversight of approved regulators has an indirect impact upon legal services firms).

At the same time, we need to ensure the approved regulators are pursuing the regulatory objectives in a manner which is consistent with the Better Regulation principles and the Code. We see our role as promoting, influencing and shaping good regulatory practice by each of the approved regulators we oversee, in addition to pursuing our own direct powers in a proportionate way. It would be helpful for the Government to indicate this is a reasonable interpretation of the consequence of including the LSB within the scope of the Code.

We are keen to discuss with BERR the implications of applying the Code to the LSB before final decisions are made.